



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 17, 2012

Ms. Elizabeth Jones  
Assistant General Counsel  
Texas Department of State Health Services  
P.O. Box 149347  
Austin, Texas 78714-9347

OR2012-00759

Dear Ms. Jones:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 443757 (DSHS File No. 19584/2012).

The Texas Department of State Health Services (the "department") received a request for the behavioral health integrated provider system (BHIPS) data generated by two substance abuse treatment centers that are no longer in operation. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note, and you acknowledge, the department failed to meet the statutory deadlines imposed by section 552.301 of the Government Code. *See* Gov't Code § 552.301(b), (e). Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *Id.* § 552.301(b). Additionally, under section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e). You state the department received the request for information on September 12, 2011. Thus, the department's ten-business-day deadline to request a ruling from this office under section 552.301(b) was September 26, 2011 and fifteen-business-day deadline to submit information under section 552.301(e) was October 3, 2011. However, you

did not request a decision from this office or provide the information required under section 552.301(e) until November 18, 2011. Thus, the department failed to comply with the procedural requirements mandated by section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Because section 552.101 of the Government Code can provide a compelling reason to withhold information, we will consider the applicability of this exception.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. This exception encompasses information other statutes make confidential such as section 290dd-2 of title 42 of the United States Code, which provides in part:

(a) Requirement. Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

42 U.S.C. § 290dd-2(a); *see* 42 C.F.R. §§ 2.1 (records of identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with performance of drug abuse prevention function conducted, regulated, or directly or indirectly assisted by any department or agency of United States are generally confidential), 2.12(b) (discussing when an alcohol abuse or drug program is considered to be federally assisted). Section 290dd-2 makes confidential the records of substance abuse patients created and maintained as part of their participation and treatment in a federally assisted substance abuse program. *See* 42 U.S.C. § 290dd-2(a). An exception to the prohibition against disclosure of protected information exists in section 2.12(c)(4) of title 42 of the Code of Federal Regulations for a qualified service organization that has entered into an agreement with the treatment center. *See* 42 C.F.R. § 2.12(c)(4) (providing restrictions on disclosure do not apply to communications between a program and a qualified service organization of information needed by the organization to provide services to the program). A qualified service organization is an

organization that provides services, such as data processing, to a program; acknowledges it is bound by part 2 of title 42 of the Code of Federal Regulations; and will resist any effort to obtain access to patient records except as permitted by part 2 of title 42 of the Code of Federal Regulations. *See id.* § 2.11.

You state the named treatment centers provided substance abuse services to clients and were funded through the department with federal grants, and the department acted as a qualified service organization to provide data storage services to the treatment centers. You state BHIPS is a comprehensive tool used by the treatment centers for conducting client screenings and assessments, formulating treatment plans, tracking services and client progress, and collecting discharge and follow-up information. In essence, BHIPS contains client data. Finally, you state while the data in BHIPS is held by the department it remains the property of the client treatment center. We note federal law allows for the release of a patient's substance abuse records upon proper written consent. *See id.* §§ 2.15, .31, .33; 42 U.S.C. § 290dd-2(b)(1). Based upon your representations and our review, we find a portion of the submitted information, which we have marked, constitutes records of the identity, diagnosis, prognosis, or treatment of substance abuse patients created and maintained as part of the patients' participation and treatment in a federally assisted substance abuse program. Accordingly, the department must withhold the client data we have marked under section 552.101 of the Government Code in conjunction with section 290dd-2(a) of title 42 of the United States Code unless the department receives proper written consent for release of the records. The remaining information consists of a listing of the data fields into which client data can be entered. Such information is not client data for purposes of section 290dd-2(a) of title 42 of the United States Code and may not be withheld under section 552.101 of the Government Code on that basis.

You also raise section 552.101 in conjunction with the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d–1320d-9. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. pts. 160, 164 ("Privacy Rule"); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

This office addressed the interplay of the Privacy Rule and the Act in Open Records Decision No. 681 (2004). In that decision, we noted section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent such use or disclosure is required by law and the use or disclosure complies with, and is limited to, the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted the Act "is a mandate in Texas law that compels Texas governmental

bodies to disclose information to the public.” *See* ORD 681 at 8; *see also* Gov’t Code §§ 552.002, .003, .021. We, therefore, held that the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See Abbott v. Tex. Dep’t of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9; *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make information that is subject to disclosure under the Act confidential, the department may not withhold any of the remaining information on this basis.

In summary, the department must withhold the substance abuse treatment records we have marked under section 552.101 of the Government Code in conjunction with section 290dd-2(a) of title 42 of the United States Code unless the department receives proper written consent for release of the records. The remaining information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Jessica Marsh  
Assistant Attorney General  
Open Records Division

JM/em

Ref: ID# 443757

Enc. Submitted documents

c: Requestor  
(w/o enclosures)