



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 17, 2012

Ms. Lisa M. Nieman  
Assistant General Counsel  
Texas Department of State Health Services  
PO Box 149347  
Austin, Texas 78714-9347

OR2012-00812

Dear Ms. Nieman:

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# 442668 (DSHS File 19577/2012).

The Texas Department of State Health Services (the "department") received a request for complaint and discipline information concerning a named individual and a specified company. You state some information has been or will be released to the requestor. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the claimed exception 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 552.302 of the Government Code, a governmental body's failure to comply with the 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, 381-82 (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). A compelling reason exists when third-party interests are at stake or when information is confidential by law. Open Records Decision No. 150 (1977). You

raise section 552.101 of the Government Code, which can provide a compelling reason to withhold information. Thus, we will address its applicability to the submitted information.

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 section encompasses information protected by other statutes, including section 1306(a) of title 42 of the United States Code, which provides:

(1) No disclosure of any return or portion of a return (including information returns and other written statements) filed with the Commissioner of Internal Revenue under Title VIII of the Social Security Act [42 U.S.C.A. § 1001 et seq.] or under subchapter E of chapter 1 or subchapter A of chapter 9 of the Internal Revenue Code [of 1939], or under regulations made under authority thereof, which has been transmitted to the head of the applicable agency by the Commissioner of Internal Revenue, or of any file, record, report, or other paper, or any information, obtained at any time by the head of the applicable agency or by an officer or employee of the applicable agency in the course of discharging the duties of the head of the applicable agency under [chapter 7 of title 42 of the United States Code], and no disclosure of any such file, record, report, or other paper, or information, obtained at any time by any person from the head of the applicable agency or from any officer or employee of the applicable agency shall be made except as the head of the applicable agency may by regulations prescribe and except as otherwise provided by Federal law. . . .

(2) For purposes of this subsection . . . the term “applicable agency” means—

(A) the Social Security Administration, with respect to matter transmitted to or obtained by such Administration or matter disclosed by such Administration; or

(B) the Department of Health and Human Services, with respect to matter transmitted to or obtained by such Department or matter disclosed by such Department.

42 U.S.C. § 1306(a). The department cites to subsection 401.101 of title 42 of the Code of Federal Regulations and the Centers for Medicare and Medicaid Services’ (“CMS”) State Operations Manual for the proposition that section 1306(a)(1) applies to survey agencies. The department explains the department is the Medicare state survey agency pursuant to an agreement with CMS. You state the submitted information was obtained under the Social Security Act, including a CMS-2567 form. Federal regulations require the department to release official reports that evaluate the performance of a provider of services, provided that (1) no information identifying individual patients, physicians, other medical practitioners, or other individuals shall be disclosed, and (2) the provider whose performance

is being evaluated has had a reasonable opportunity to review the report and to offer comments. *See* 42 U.S.C. §§1306(e)-(f); 42 C.F.R. §§ 401.126, .133; Open Records Decision No. 487 at 5 (1988); *see also* Health & Safety Code § 142.009(d)(6). You have marked the information in the CMS-2567 form you assert must be withheld pursuant to federal law. You acknowledge, and we agree, the submitted CMS-2567 form must be released with these redactions in accordance with 42 U.S.C. §§ 1306(e)-(f) and 42 C.F.R. §§ 401.101, .105, .126, and .133. However, we note the remaining submitted information does not contain the type of reports subject to limited disclosure under section 1306(e)(3). Based upon your representations and our review, we agree these documents do not constitute "official reports" that fall within the purview of section 1306(e). Accordingly, with the exception of the information you have marked under section 552.101 of the Government Code in conjunction with federal law, the department must release the submitted CMS-2567 form. The remaining information must be withheld under section 552.101 of the Government Code in conjunction with section 1306(a)(1) of title 42 of the United States Code.

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,



Misty Haberer Barham  
Assistant Attorney General  
Open Records Division

MHB/agn

Ref: ID # 442668

Enc. Submitted documents

c: Requestor  
(w/o enclosures)