



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 9, 2012

Dr. Bill Nemeth  
Medical Director  
Texas Physician Health Program  
333 Guadalupe, Tower 2, Suite 520  
Austin, Texas 78701

OR2012-05056

Dear Dr. Nemeth:

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# 449943.

The Texas Physician Health Program (the "program") received a request for the monitoring agreement between the program and a named individual, and the quarterly reports for the named individual provided by his attending physician. You claim the submitted information is excepted from disclosure under sections 552.101, 552.111, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

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 section 167.010 of the Occupations Code, which is part of the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code §§ 151.001-168.202. Section 167.010 of the Occupations Code governs the confidentiality of records held by the program and provides:

- (a) Each referral, proceeding, report, investigative file, record, or other information received, gathered, created, or maintained by the program or its

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<sup>1</sup>We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than those submitted to this office.

employees, consultants, work site monitors, or agents relating to a physician or physician assistant is privileged and confidential and is not subject to disclosure under Chapter 552, Government Code, or to discovery, subpoena, or other means of legal compulsion for release to any person except as provided by this chapter.

(b) Notwithstanding Subsection (a), the program may report to the [Texas Medical Board (the “board”)] or the physician assistant board, as appropriate, the name and pertinent information relating to impairment of a physician or physician assistant.

(c) Notwithstanding Subsection (a), the program shall make a report to the board or the physician assistant board, as appropriate, regarding a physician or physician assistant if the medical director or the governing board determines that the physician or physician assistant poses a continuing threat to the public welfare. If requested by the board or the physician assistant board, a report under this subsection must include all information in the possession or control of the program.

*Id.* § 167.010; *see also id.* § 151.002(a)(12) (physician defined as person licensed to practice medicine in Texas). You state the submitted information consists of records maintained by the program relating to a physician. Further, you state none of the exceptions apply to this information. Based on your representations and our review, we find the submitted information is confidential under section 167.010 of the Occupations Code.

We note the submitted information includes mental health records governed by chapter 611 of the Health and Safety Code. Section 552.101 also encompasses section 611.002, which provides in part:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health and Safety Code § 611.002(a)-(b); *see also id.* § 611.001 (defining “patient” and “professional”). Sections 611.004 and 611.0045 of the Health and Safety Code provide for access to information that section 611.002 makes confidential only by certain individuals. *See id.* §§ 611.004, .0045; Open Records Decision No. 565 (1990). The mental health records we have marked are confidential under section 611.002 of the Health and Safety Code. You have submitted an authorization for release form signed by the named individual. Accordingly, the marked mental health records may generally be released if the program determines the requestor is authorized to obtain the records under sections 611.004 and 611.0045 of the Health and Safety Code. *See* Health and Safety Code § 611.004(a)(4)

(professional may disclose confidential information to person who has patient's written consent).

Although the submitted information is generally confidential under section 167.010, sections 611.004 and 611.0045 may provide the requestor with a right of access to the marked mental health records. Therefore, there is a conflict between the confidentiality provided by section 167.010 and the release provided by sections 611.004 and 611.0045. Where general and specific statutes are in irreconcilable conflict, the specific provision typically prevails as an exception to the general provision unless the general provision was enacted later and there is clear evidence that the legislature intended the general provision to prevail. *See id.* § 311.026(b); *City of Lake Dallas v. Lake Cities Mun. Util. Auth.*, 555 S.W.2d 163, 168 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.). In this instance, although section 167.010 generally makes each referral, proceeding, report, investigative file, record or other information received, gathered, created, or maintained by the program confidential, sections 611.004 and 611.0045 specifically permit the release of mental health records to certain parties and under certain circumstances. Therefore, we find sections 611.004 and 611.0045 prevail over section 167.010. Additionally, although you also seek to withhold the marked mental health records under section 552.111 of the Government Code, we note a specific statutory right of access provision prevails over general exceptions to disclosure under the Act. *See* Open Records Decision Nos. 613 at 4 (1993) (exceptions in Act cannot impinge on statutory right of access to information), 451 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under the Act). Therefore, we conclude the program must release the marked mental health records to the requestor if the program receives the required authorization for the release of those records under sections 611.004 and 611.0045 of the Health and Safety Code. If the program does not receive the required authorization for the release of those records, the submitted information must be withheld under section 552.101 in conjunction with section 167.010 of the Occupations Code.

You ask whether section 552.023 of the Government Code applies to the information withheld under section 167.010. Section 552.023 of the Government Code gives a person or a person's authorized representative a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from required public disclosure by laws intended to protect that person's privacy interests. *See* Gov't Code § 552.023. However, section 552.023 does not apply where interests other than the person's privacy are being protected. *See, e.g.*, ORD 565 (provisions of Medical Practices Act making medical records confidential intended to protect more than just privacy interests of patient). You state section 167.010 furthers the regulatory function of the board as well as protects the privacy of participants in the program. *See* Occ. Code § 167.005(a) (stating purpose of program is to promote physician wellness and treatment of health conditions that can compromise ability to practice medicine with skill and safety). Upon review, we agree section 167.010 does not only protect privacy interests. Accordingly, we find section 552.023 does not provide the requestor with a right of access to this information in this case. *See, e.g.*, Open Records Decision Nos. 603 at 2-3 (1992) (no section 552.023 right of access to information encompassed by Health and Safety Code section 142.009, which protects integrity of investigatory process as well as individual's

privacy interests), 587 at 3-4 (1991) (finding predecessor to Family Code section 261.201 pertaining to child abuse investigations protects law enforcement, as well as privacy interests).

In summary, if the program determines the requestor is authorized to obtain the marked mental health records under sections 611.004 and 611.0045 of the Health and Safety Code, then the information we have marked must be released to the requestor. The remaining information must be withheld under section 552.101 in conjunction with 167.010 of the Occupations Code. However, if the program determines the requestor is not authorized to obtain the marked mental health records under sections 611.004 and 611.0045, the submitted information must be withheld under section 552.101 in conjunction with section 167.010 of the Occupations Code in its entirety.<sup>2</sup>

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,



Michelle R. Garza  
Assistant Attorney General  
Open Records Division

MRG/em

Ref: ID# 449943

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>2</sup>Because this requestor may have a special right of access to some of the information being released, if the program receives another request for this information from an individual other than this requestor, the program must again seek a decision from this office.