



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 9, 2012

Mr. Marc Allen Connelly
Deputy General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2012-05060

Dear Mr. Connelly:

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# 450160 (DSHS File No. 19445/2012).

The Texas Department of State Health Services (the "department") received a request for all information regarding a specified facility during a specified time period.¹ You state you have released some of the requested information. You claim that 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.

We note that the submitted information contains Centers for Medicare and Medicaid Services ("CMS") 2567 federal deficiency forms. In Open Records Letter No. 2005-04917 (2005), we granted the department a previous determination finding, in part, that the identifying information of patients, physicians, other medical practitioners, or other individuals contained in a CMS-2567 form is confidential when the provider being evaluated has had a reasonable opportunity to review the report and other comments. *See* 42 U.S.C. § 1306(e), (f); 42 C.F.R. §§ 401.126, 133; *see also* Open Records Decision No. 673 at 7-8 (2001) (listing elements of second type of previous determination under section 552.301(a)). You have marked some information in the federal form to be withheld pursuant to

¹We note the department sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if a request for information is unclear, governmental body may ask requestor to clarify request).

section 552.101 of the Government Code in conjunction with federal law in accordance with this previous determination. The department must withhold this marked information.

Next, you inform us some of the remaining information was the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2011-09377 (2011) and 2008-13391 (2008). We have no indication that the law, facts, or circumstances on which the prior rulings were based have changed. Accordingly, to the extent the submitted information is identical to the information previously requested and ruled upon in the prior rulings, the department must continue to rely on those rulings as previous determinations and withhold or release the previously ruled upon information in accordance with Open Records Letter No. 2011-09377 and Open Records Letter No. 2008-13391. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exist where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, to the extent the submitted information is not encompassed by Open Records Letter No. 2011-09377 or 2008-13391, we will consider your arguments against its release.

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, such as chapter 251 of the Health and Safety Code, which relates to end stage renal disease facilities. Section 251.015 provides:

(a) A medical review board shall advise the [Texas Board of Health] on minimum standards and rules to be adopted under this chapter.

(b) The medical review board shall review the information on quality of care provided in the annual report filed under Section 251.013(f) and other appropriate information provided to or compiled by the department with respect to an end stage renal disease facility. Based on the review, the medical review board may advise the department about the quality of care provided by a facility and recommend an appropriate corrective action plan under Section 251.061 or other enforcement proceedings against the facility.

(c) Information concerning the quality of care provided to or compiled by the department or medical review board and a recommendation of the medical review board are confidential. The information or recommendation may not be made available for public inspection, is not subject to disclosure under Chapter 552, Government Code, and is not subject to discovery, subpoena, or other compulsory legal process.

(d) The department, in its discretion, may release to a facility information relating to that facility that is made confidential under Subsection (c).

Release of information to a facility under this subsection does not waive the confidentiality of that information or the privilege from compulsory legal process.

Health & Safety Code § 251.015. Section 251.061 of the Health and Safety Code provides, in relevant part:

(g) A corrective action plan is not confidential. Information contained in the plan may be excepted from required disclosure under [the Act], in accordance with that chapter or other applicable law.

Health & Safety Code § 251.061(g). You have marked information that you assert is confidential pursuant to section 251.015(c) of the Health and Safety Code. You represent that this information consists of quality of care information compiled by the department or the medical review board, or constitutes recommendations of the medical review board. As you note, the information at issue also contains a corrective action plan, which is not confidential under section 251.061(g). However, you state that the information marked in the corrective action plan also constitutes confidential quality of care information subject to section 251.015(c). Based on your representations and our review of the information at issue, we agree that the information you have marked is confidential under section 251.015(c) of the Health and Safety Code. Therefore, the department must withhold the information you have marked, and the additional information we have marked, under section 552.101 of the Government Code in conjunction with section 251.015(c) of the Health and Safety Code.

We note portions of the remaining information are subject to section 552.137 of the Government Code, which excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c).² Gov’t Code § 552.137(a)-(c). The e-mail addresses we have marked are not specifically excluded by section 552.137(c). As such, these e-mail addresses must be withheld under section 552.137 of the Government Code, unless their owners have affirmatively consented to their release.³ *See id.* § 552.137(b).

In summary, to the extent the responsive information is identical to the information previously requested and ruled upon by this office in Open Records Letter No. 2011-09377

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

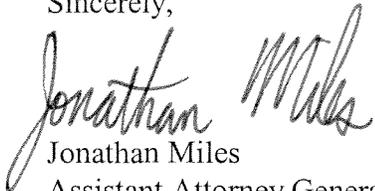
³We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

and Open Records Letter No. 2008-13391, the department must continue to rely on those rulings as previous determinations and withhold or release the previously ruled upon information in accordance with those prior rulings. The department must withhold the information you have marked, and the additional information we have marked, under section 552.101 of the Government Code in conjunction with section 251.015(c) of the Health and Safety Code. The e-mail addresses we have marked must be withheld under section 552.137 of the Government Code, unless their owners have affirmatively consented to their release. The remaining information must be released.

You ask this office to issue a previous determination permitting the department to withhold information under section 552.101 of the Government Code in conjunction with section 251.015(c) of the Health and Safety Code. *See* Gov't Code § 552.301(a) (allowing governmental body to withhold information subject to previous determination); Open Records Decision No. 673 (2001). We decline to issue such a previous determination at this time. Accordingly, 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, 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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/em

Ref: ID# 450160

Enc. Submitted documents

c: Requestor
(w/o enclosures)