



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 19, 2012

Mr. Monty Waters
Assistant General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78704-9347

OR2012-18660

Dear Mr. Waters:

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# 471504 (DSHS File No. 20765/2012).

The Texas Department of State Health Services (the "department") received a request for certain information pertaining to the Baylor Regional Medical Center- Grapevine for the past five years. You state the department will release some of the requested information. You inform us the department will withhold some of the requested information pursuant to the previous determination issued in Open Records Letter No. 2005-04917 (2005).¹ You further state some of the information requested does not exist.² You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We

¹Open Records Letter No. 2005-04917 is a previous determination issued to the department permitting it to withhold information and materials obtained or compiled by the department in connection with a complaint and investigation concerning a hospital under section 552.101 of the Government Code in conjunction with section 241.051 of the Health and Safety Code, unless the release provisions of section 241.051(d) or section 241.051(e) apply. See Health & Safety Code § 241.051(d), (e); see also ORD 673.

²The Act does not require a governmental body to release information that did not exist when it received a request or to create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990).

have considered the exception you claim and reviewed the submitted representative sample of information.³

Initially, you acknowledge, and we agree, the department failed to request a ruling within the statutory time period prescribed by section 552.301(b) of the Government Code. *See* Gov't Code § 552.301(b). 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 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. *See* Open Records Decision No. 150 at 2 (1977). Section 552.101 of the Government Code can provide a compelling reason for non-disclosure. Accordingly, we will consider the department's assertion of section 552.101 for 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, such as section 98.109 of the Health and Safety Code, which provides in part:

(a) Except as provided by Sections 98.1046, 98.106, and 98.110, all information and materials obtained or compiled or reported by the department under this chapter or compiled or reported by a health care facility under this chapter, and all related information and materials, are confidential and:

(1) are not subject to disclosure under Chapter 552, Government Code, or discovery, subpoena, or other means of legal compulsion for release to any person; and

(2) may not be admitted as evidence or otherwise disclosed in any civil, criminal, or administrative proceeding.

Health & Safety Code § 98.109(a). You state the submitted information was compiled by the department under chapter 98 of the Health and Safety Code and, thus, must be withheld pursuant to section 98.109 of the Health and Safety Code. You further inform us the

³We assume that 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 that those records contain substantially different types of information than that submitted to this office.

statutory exceptions to confidentiality do not apply in this instance. We note, however, that sections 98.103 and 98.1045 of the Health and Safety Code require health care facilities to report only certain health care-associated infections and health care-associated preventable adverse effects involving a facility's patients, to the department. *See id.* §§ 98.103, .1045. Most of the submitted information consists of administrative information, such as that relating to appointments to the Advisory Panel on Health Care-Associated Infections and Preventable Adverse Events, and questions and answers regarding implementation of the reporting system, rather than patient information or information relating to the incidence of infections or preventable adverse effects. Accordingly, we determine the department must withhold the e-mails we have marked in the submitted information, which concern health care-associated infections and health care-associated preventable adverse effects, under section 552.101 of the Government Code in conjunction with section 98.109 of the Health and Safety Code. We find the remaining e-mails are not confidential under section 98.109 of the Health and Safety Code and may not be withheld under section 552.101 of the Government Code on that basis.

We note the remaining information contains e-mail addresses that are subject to section 552.137 of the Government Code. Section 552.137 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). *See Gov't Code* § 552.137(a)-(c). This exception is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, or an e-mail address that a governmental entity maintains for one of its officials or employees. The e-mail addresses we have marked do not appear to be of a type specifically excluded by subsection (c). Accordingly, the department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure.⁴

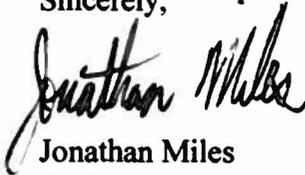
In summary, the department must withhold the e-mails we have marked under section 552.101 of the Government Code in conjunction with section 98.109 of the Health and Safety Code. The department must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless their owners affirmatively consent to disclosure. 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.

⁴This office issued Open Records Decision No. 684 (2009), 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 opinion.

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/bhf

Ref: ID# 471504

Enc. Submitted documents

c: Requestor
(w/o enclosures)