



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 22, 2013

Mr. C. David Richards
Assistant General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2013-06545

Dear Mr. Richards:

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# 486723 (DSHS File No. 21384).

The Texas Department of State Health Services (the "department") received a request for the most recent survey findings regarding a specified facility. You state the department has provided some of the requested information to the requestor. You claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code.

We note 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, 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, 401.133; *see also* Open Records Decision No. 673 at 7-8 (2001) (listing elements of second type of previous determination under section 552.301(a) of the Government Code). Therefore, the department must withhold the information you have marked in the federal forms under section 552.101 of the Government

Code in conjunction with federal law in accordance with this previous determination.¹ However, we will consider your arguments against disclosure of the submitted information not subject to the previous determination.

Next, you acknowledge, and we agree, the department failed to comply with the procedural requirements of section 552.301 of the Government Code. A governmental body's failure to comply with the procedural 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* Gov't Code § 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); *see also* Open Records Decision No. 630 (1994). The presumption that information is public under section 552.302 can generally be overcome by demonstrating the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Section 552.101 of the Government Code can provide a compelling reason to overcome this presumption. Therefore, we will address your argument under this exception for the remaining 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 chapter 251 of the Health and Safety Code, which relates to end stage renal disease facilities. Section 251.015 provides as follows:

- (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 [the

¹As our ruling is dispositive, we do not address your other argument to withhold this information.

Act], 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(g) of the Health and Safety Code reads as follows:

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.

Id. § 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 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. The information at issue contains a corrective action plan that is not confidential under section 251.061(g). However, you state 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 this information is confidential under section 251.015(c) of the Health and Safety Code. Therefore, the department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 251.015(c) of the Health and Safety Code. The department must release the remaining information to the requestor.

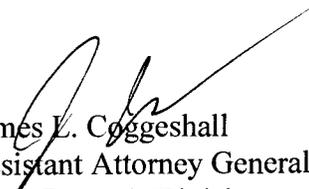
To conclude, the department must withhold the information you have marked in the federal forms under section 552.101 of the Government Code in conjunction with federal law in accordance with Open Records Letter No. 2005-04917. The department must also withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 251.015(c) of the Health and Safety Code. The department must release the remaining information to the requestor.

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/tch

Ref: ID# 486723

Enc. Submitted documents

c: Requestor
(w/o enclosures)