



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 14, 2014

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

OR2014-02905

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# 514149.

The Texas Physician Health Program (the "program") received a request for information related to automated reports and real-time updates and the entire file of a named physician. You claim the submitted information is excepted from disclosure under sections 552.101, 552.111, 552.137, and 552.147 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant request for information because it was created after the program received the request for information. This ruling does not address the public availability of

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<sup>1</sup>Although you also raise sections 552.101 through 552.151 of the Government Code in your brief, you have only submitted arguments in support of sections 552.101, 552.111, 552.137, and 552.147. Therefore, we assume you have withdrawn your claims under the remaining exceptions. *See* Gov't Code §§ 552.301, .302.

<sup>2</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 that submitted to this office.

any information that is not responsive to the request and the program is not required to release such information in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at time request was received).

Next, we understand you to assert the instant request, in part, constitutes a standing request for information. It is implicit in several provisions of the Act that the Act applies only to information already in existence. *See* Gov't Code §§ 552.002, .021, .227, .351. The Act does not require a governmental body to prepare new information in response to a request. *See* Attorney General Opinion H-90 (1973); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 452 at 2-3 (1986), 87 (1975). Consequently, a governmental body is not required to comply with a standing request to supply information prepared in the future. *See* Attorney General Opinion JM-48 at 2 (1983); *see also* Open Records Decision Nos. 476 at 1 (1987), 465 at 1 (1987). Upon review, we agree the instant request, in part, constitutes a standing request for information. The program need not comply with a request to provide information to the requestor on an ongoing basis. However, we understand you to represent the present request for information also encompasses documents the program maintained or had a right of access to as of the date it received the request. Therefore, we will consider your arguments for the responsive information that existed on the date the program received the request.

Next, we note the requestor asks the program to answer a question. The Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2. However, a governmental body must make a good-faith effort to relate a request to any responsive information that is within its possession or control. Open Records Decision Nos. 561 at 8-9 (1990), 555 at 1-2. We assume the program has made a good-faith effort to do so.

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, 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 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. You state the responsive information consists of records maintained by the program relating to a physician. Further, you state none of the exceptions apply to this information. However, 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.*, Open Records Decision No. 565 (1990) (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). Therefore, based on your representations and our review, we find the responsive information is confidential under section 167.010 of the Occupations Code. Accordingly,

the responsive information must be withheld under section 552.101 of the Government Code in conjunction with section 167.010 of the Occupations Code in its entirety.<sup>3</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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Nicholas A. Ybarra  
Assistant Attorney General  
Open Records Division

NAY/ac

Ref: ID# 514149

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure.