



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 10, 1997

Ms. Patti J. Patterson, M.D., M.P.H.
Interim Commissioner
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

Letter Opinion No. 97-035

Re: Whether the Texas Department of Health may conduct or commission study of market need and feasibility, which the United States Department of Housing and Urban Development requires before it will issue mortgage insurance on hospitals and long-term care facilities (ID# 39239)

Dear Commissioner Patterson:

The United States Department of Housing and Urban Development (the "HUD") will not issue mortgage insurance on a new or rehabilitated long-term care facility or hospital unless a state agency in the state where the health-care facility is located has "conducted or commissioned and paid [to prepare] an independent study" assessing the "market need and feasibility" of the proposed new or rehabilitated health-care facility. You ask whether the department is authorized to conduct or commission the study that is required before the HUD may issue mortgage insurance. We have examined the department's statutory authority, and we conclude that the department may conduct the study. We also conclude that the department may contract with another state agency or, in certain circumstances, an independent consultant to perform the study.

Federal law authorizes the Secretary of the HUD to issue mortgage insurance for the development of nursing homes,¹ intermediate care facilities,² assisted living facilities,³ and hospitals.⁴ As you state, the HUD mortgage insurance benefits "those entities seeking . . . an economical source

¹For purposes of federal law, a "nursing home" is a licensed facility that accommodates convalescents or other persons who are not acutely ill and who do not need hospital care, but who need skilled nursing care and related medical services. See 12 U.S.C. § 1715w(b)(1).

²Federal law defines "intermediate care facility" as a licensed facility that accommodates persons who, "because of incapacitating infirmities," require minimal, continuous care, but who do not need continuous medical or nursing services. See *id.* § 1715w(b)(2).

³An "assisted living facility" is a licensed facility that avails its residents of "supportive services" to assist them in carrying out activities of daily living, that may avail its residents of home health-care services, and that "provides separate dwelling units for residents, . . . , which includes common rooms and other facilities appropriate" to provide supportive services to residents. See *id.* § 1715w(b)(6).

⁴See *id.* §§ 1715w, 1715z-7. A "hospital," for purposes of 12 U.S.C. § 1715z-7, is a licensed facility that "provides community service [to] inpatient medical care of the sick or injured . . . ; [and] not more than 50 per centum of the total patient days of which during any year are customarily assignable to the categories of chronic convalescent and rest, drug and alcoholic, epileptic, mentally deficient, mental, nervous and mental, and tuberculosis." See *id.* § 1715z-7(b)(1).

of funding” to construct or rehabilitate long-term care facilities or hospitals. The HUD secretary may not issue mortgage insurance unless he or she has received either a certificate of need for the facility from the designated agency or, if no state agency has been designated to issue certificates of need, a “study of market need and feasibility that . . . assesses, on a marketwide basis, the impact of the proposed [facility] on, and its relationship to, other health care facilities and services”⁵ You ask whether the department may conduct or commission and pay for the requisite study. You apparently assume that no state agency has been designated to provide the HUD secretary with a certificate of need, and we do not here examine your assumption.

You cite Attorney General Opinion JM-754 as relevant to your inquiry. In that opinion, this office considered whether the governor may provide the Secretary of the HUD with the requisite certificates of need.⁶ Under federal law as it existed at that time, the secretary could issue mortgage insurance for health-care facilities only if the secretary had received a certificate of need from the state agency designated in accordance with federal law to provide the certification.⁷ Because the governor had not been appropriately designated, he was unauthorized to provide the HUD secretary with the necessary certificates of need.⁸ In 1988, after this office issued Attorney General Opinion JM-754 the federal government amended 12 U.S.C. §§ 1715w(d)(4)(A) and 1715z-7(d)(4) to permit the Secretary of the HUD to issue mortgage insurance not only upon receipt of a certificate of need from the designated state agency but also, in a state where no state agency has been designated, if the state has prepared or commissioned a study assessing market need and feasibility of the health-care facility.⁹ Hence, you ask whether the department may prepare or commission the necessary study under the post-1987 version of the statute, and Attorney General Opinion JM-754 is irrelevant to your question.

The department’s authority to prepare or commission and pay for the study of market need and feasibility depends not upon federal law but upon state law. Your question thus requires us to consider whether state law authorizes the department to conduct or commission the study. In short, we believe that state law authorizes the department to conduct the study itself, to contract with another state agency to perform the study, or, in certain circumstances, to contract with an independent consultant to perform the study.

The department is generally authorized “to better protect and promote the health of the people of this state.”¹⁰ Additionally, the department may spend money it has received from the state, the

⁵See *id.* §§ 1715w(d)(4)(A), 1715z-7(d)(4).

⁶Attorney General Opinion JM-754 (1987) at 1.

⁷See *id.* at 2-3 (quoting 12 U.S.C. § 1715w(d)(4)(A), *amended* 1988), 4-5.

⁸*Id.* at 5.

⁹See 12 U.S.C. § 1715w historical and statutory notes; *id.* § 1715z-7 historical and statutory notes.

¹⁰Health & Safety Code § 11.002.

federal government, or any other public source.¹¹ Health and Safety Code chapter 104 pertains more specifically to the issue you raise.

Health and Safety Code chapter 104 creates the Statewide Health Coordinating Council¹² (the “coordinating council”) and provides for the preparation and approval of a state health plan.¹³ Under Health and Safety Code section 104.021(a), the department must prepare a proposed state health plan every six years and must review and update the plan every two years. The department must premise the state health plan on information representing local, regional, and statewide perspectives¹⁴ and must develop the plan in accordance with coordinating council directives.¹⁵ Ultimately, the plan must identify health concerns and health-service needs and suggest strategies for remedying perceived shortfalls:

(e) The state health plan shall be developed and used in accordance with applicable state and federal law. The plan must identify:

(1) major statewide health concerns;

(2) the availability and use of current health resources of the state, including resources associated with state-supported institutions of higher education; and

(3) future health service and facility needs of the state.

(f) The state health plan must:

(1) propose strategies for the correction of major deficiencies in the service delivery system;

(2) propose strategies for involving state-supported institutions of higher education in providing health services and for coordinating those efforts with health and human services agencies in order to close gaps in services; and

¹¹See *id.* § 12.011(a).

¹²See *id.* § 104.011.

¹³See *id.* § 104.021.

¹⁴*Id.* § 104.022(a).

¹⁵See *id.* § 104.022(b).

(3) provide direction for the state's legislative and executive decision-making processes to implement the strategies proposed by the plan.¹⁶

Thus, the department collects and compiles on a regular basis a large amount of information about the state's health-care resources and must draw conclusions about health-care needs. Presumably, some of this information would be helpful in compiling the market-need and feasibility study that the HUD requires. Moreover, the department's involvement with the state health plan does not end with the governor's adoption of the plan. Rather, the department is "the state health planning and development agency,"¹⁷ although the department may contract with an appropriate state agency to perform specific state health planning and development functions.¹⁸ In particular, the department may collect and disseminate data from health-care facilities to aid in the development of health-care resources and to accomplish state health-plan goals:

(a) The [Board of Health] by rule shall establish reasonable procedures for the collection of data from health care facilities and for the distribution of data necessary to facilitate and expedite proper and effective health planning and resource development.

(b) The board by rule shall specify the type of data required, the entities required to submit the data, and the period during which the data must be submitted.

(c) The department, in accordance with rules adopted by the statewide health coordinating council, shall collect and distribute data necessary to support specific state health plan goals.

(d) The department shall file, index, and periodically publish in a coherent manner summaries or analyses of the data collected.¹⁹

In our opinion, this section sufficiently authorizes the department to conduct a study of market need and feasibility of a proposed health-care facility for purposes of the HUD, so long as the department collects and distributes the data consistently with the applicable rules.²⁰ Market-need and

¹⁶*Id.* § 104.022(e), (f). The Health and Human Services Commission must be permitted to review the state health plan before the coordinating council may approve it and submit it to the governor for adoption. *See id.* §§ 104.023, .024. We are unaware of any statute, nor did you cite any, that would authorize the Health and Human Services Commission to conduct or commission the market-need and feasibility study about which you ask.

¹⁷*Id.* § 104.041(a).

¹⁸*Id.* § 104.041(b).

¹⁹*Id.* § 104.042(a) - (d).

²⁰We express no opinion as to whether the department, in compiling, assembling, and disseminating the market-need and feasibility information the HUD requires, must comply with Board of Health rules or coordinating council rules.

feasibility data may be necessary "to facilitate . . . resource development."²¹ Moreover, market-need and feasibility data may be necessary "to support specific state health plan goals,"²² particularly where a new or rehabilitated health-care facility will correct a deficiency in the service-delivery system, as identified in the state health plan.²³

We believe the legislative history of Health and Safety Code section 104.042(a) - (d), quoted above, supports our interpretation. The legislature added the substance of this section in 1985 following sunset review of the department and the Texas Health Facilities Commission, which issued certificates of need for long-term health-care facilities and hospitals as the HUD required at that time.²⁴ The Sunset Commission indicated in its report to the legislature that the department and the Health Facilities Commission debated how specific the data collected for purposes of the state health plan must be.²⁵ Evidently, the health-plan data was not specific enough for certificate-of-need purposes.²⁶ The Sunset Commission therefore recommended that the statute require the department to collect and disseminate data "necessary to support state health plan goals which can be implemented through the certificate of need process."²⁷ As supporters of the bill contended, by requiring the department to "collect data that would assist the Health Facilities Commission in its certificate-of-need process," the amendment implementing the Sunset Commission's recommendation would "ensure that health facilities and resources are developed in an orderly and economical fashion."²⁸

²¹See *id.* § 104.042(a).

²²See *id.* § 104.042(c).

²³See *id.* § 104.022(f)(1).

²⁴See *supra* text accompanying notes 6-9 (discussing federal law as it existed when this office issued Attorney General Opinion JM-754 (1987)).

²⁵TEX. SUNSET ADVISORY COMM'N, FINAL REPORT TO THE GOV. OF TEX. AND MEMBERS OF THE 69TH LEG. 127 (Jan. 1985).

²⁶See *id.*

²⁷*Id.*

²⁸HOUSE STUDY GROUP, BILL ANALYSIS, C.S.H.B. 2091, 69th Leg., R.S. (1985).

The legislature let the statute establishing the Health Facilities Commission and the certificate-of-need program expire in 1985.²⁹ Additionally, as we have already stated, the federal government amended 12 U.S.C. §§ 17152(d)(4)(A) and 1715z-7(d)(4) in 1988 to permit the Secretary of the HUD to issue mortgage insurance not only upon receiving a certificate of need but, in the alternative, if the state has prepared or commissioned a market-need and feasibility study.³⁰ Because the data the department collects under Health and Safety Code section 104.042(a) - (d) is used for the same purpose as the certificate of need, we believe that section authorizes the department to collect the data required for the market-need and feasibility study.³¹

We note that the fiscal note to the 1985 bill that added Health and Safety Code section 104.042(a) - (d) stated that House Bill 1843 of that legislative session provided the funds to support the department's collection of hospital financial, utilization, and patient-discharge data.³² House Bill 1843 did not pass, and we do not find a similar provision in the appropriations act that passed that year.³³ We do not consider whether the appropriations act for the current biennium provides the department with funds to support the department's collection of data required by section 104.042(a) - (d).³⁴ The legislature may wish to clarify this issue during the current session.

Finally, the department may commission the study.³⁵ Health and Safety Code section 104.041(b) authorizes the department to contract with another, appropriate state agency to conduct

²⁹See Act of May 28, 1977, 65th Leg., R.S., ch. 735, art. 2, § 2.114, 1977 Tex. Gen. Laws 1826, 1848.

³⁰See *supra* text accompanying note 9.

³¹We do not believe Health and Safety Code chapter 225 places the responsibility for the market-need and feasibility study on the governor. Health and Safety Code section 225.004(a) authorizes the governor, by executive order and to prevent the loss of federal funds, to "establish a program . . . to review capital expenditures made by or on behalf of a health care facility." See also Health & Safety Code § 225.005 (describing executive order). A capital expenditure would include the costs of constructing or renovating a health-care facility, *see id.* § 225.001 (defining "capital expenditure" and "health care facility"), but section 225.004(a) appears to contemplate reviewing an expenditure once the expenditure has been made. On the other hand, the market-need and feasibility study about which you ask would occur before the expenditure has been made. Furthermore, the federal laws specifically listed as pertinent to Health and Safety Code chapter 225 do not include any provisions in title 12 U.S.C., which pertains to banks and banking. *See id.* § 225.002. Rather, all of the listed provisions are found in title 42, which pertains to the public health and welfare.

³²Fiscal Note, H.B. 2091, 69th Leg., R.S. (1985).

³³See Act of May 27, 1985, 69th Leg., R.S., ch. 980, at II-12 through II-19, 1985 Tex. Gen. Laws 3349, budget 232 - budget 239.

³⁴*But cf.* Act of May 25, 1995, 74th Leg., R.S., ch. 1063, art. II, at II-27, strategy E.1.2, 1995 Tex. Sess. Laws 5242, 5385 (allotting \$1,866,231 to department to "[c]ollect, analyze and distribute data concerning health . . . status[] and systems as tools for decision-making and policy-setting"). We also do not consider whether the department may charge a fee to conduct the market-need and feasibility study.

³⁵Whether the department may pay for a commissioned study is dependent upon whether the legislature has appropriated funds for the market-need and feasibility studies. *See supra* notes 32-34 and accompanying text.

the necessary study.³⁶ Additionally, Government Code section 2254.026 permits the department³⁷ to contract with a private consultant, but only if the department has a "substantial need for the consulting services" and if the agency "cannot adequately perform the services" using department personnel or cannot obtain the services by contracting with another state agency. Whether the circumstances described in Government Code section 2254.026 exist is a question of fact that we cannot resolve in an opinion.

S U M M A R Y

The Texas Department of Health is authorized to conduct the study of market need and feasibility assessing the impact of proposed long-term health-care facilities or hospitals that is required before the United States Department of Housing and Urban Development will issue mortgage insurance on the facility or hospital.

The Department of Health may contract with an appropriate state agency to conduct the requisite study of market need and feasibility. Alternatively, the department may commission a private consultant to perform the study if the circumstances described in Government Code section 2254.026 exist.

Yours very truly,



Kimberly K. Oltrogge
Assistant Attorney General
Opinion Committee

³⁶We note that Health and Safety Code section 108.008(b)(1) requires the department to contract with the Texas Health Care Information Council to collect data under chapter 108 of that code. But we have examined chapter 108, and we do not believe it applies to data the department collects under Health and Safety Code chapter 104. First, chapter 108 appears to relate primarily to the cost and quality of health-care services. See Health & Safety Code §§ 108.003(g)(1)(A), 2(B), (C), .006(a), .009(j), (k), .010; House Research Org., Bill Analysis, H.B. 1048, 74th Leg., R.S. (1995) (requiring Health Care Information Council to develop statewide system to collect data on health-care charges, utilization, provider quality, and outcome of care); House Comm. on Public Health, Bill Analysis, H.B. 1048, 74th Leg., R.S. (1995) (indicating bill motivated by consumers' existing lack of access to information necessary to evaluate health-care services); Hearings on H.B. 1048 Before the Senate Comm. on Health and Human Services, 74th Leg., R.S. (May 17, 1995) (testimony of Senator Patterson) (tape available from Senate Staff Services Office). Chapter 108 does not appear to relate to data necessary to complete a market-need and feasibility study. Second, the Health Care Information Council is directed not to duplicate any other data collection effort required by state or federal law, see *id.* § 108.006(a)(4), thus leaving the department's data collection effort under Health and Safety Code chapter 104 untouched. Finally, chapter 108 does not apply to information regarding long-term care facilities, see *id.* §§ 108.002(6), (11), .009, which chapter 104 encompasses, see *id.* § 104.002.

³⁷See Gov't Code § 2254.021(4); see also *id.* § 2151.002(2)(A).