RQ-825

Texas Department of Health

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May 16, 1995

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Opinion Committee

FILE # ML-33707-95
I.D. # 33707

The Honorable Dan Morales
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

Re: Applicability of Texas Open Records Act and 42 U.S.C. 1306

Dear General Morales:

I am writing to request an Attorney General's Opinion under authority of the Texas Government Code, §402.042(b)(2).

FACTS:

The Texas Department of Health (TDH) licenses and regulates hospitals pursuant to Health & Safety Code chapters 241 and 577. TDH also has a written contract with the Health Care Financing Administration (HCFA), under which TDH employees perform investigations as the state survey agency for certifying hospital facility compliance with the Medicare Conditions of Participation, established under subchapter XIX of the Social Security Act and the implementing federal regulations published at 42 Code of Federal Regulations (CFR) 482. Verifying facility compliance with the Medicare Conditions of Participation, and compliance with the state statutory facility licensing laws, is accomplished primarily through complaint investigations. When a complaint investigation is conducted, TDH employees always review facility compliance with both TDH health facility licensure statutes and implementing administrative rules, as well as with applicable federal law, if the facility is certified for participation in the Medicare program.

TDH employees are thus conducting official state business at the same time that they are fulfilling a contractual responsibility, and all of the documentation made or collected by TDH employees pursuant to the investigation is used for both purposes. TDH is required to investigate complaints made against the health facilities that TDH licenses and regulates, as a matter of state law. TDH employees are required, under the contract with HCFA, to complete a HCFA form number 2567,

Statement of Deficiencies (HCFA 2567) and to follow HCFA guidelines in reporting facility noncompliance to HCFA.

According to HCFA, disclosure of the HCFA 2567 is governed by 42 U.S.C. 1306, and the implementing federal rules at 42 CFR 401. 42 U.S.C. 1306 is entitled "...Disclosure of information in possession of Department of Health and Human Services..."

42 U.S.C. 1306(a) states that "...no disclosure of ... any file, record, report, or other paper, or any information, obtained at any time by the Secretary or by any officer or employee of the Department of Health and Human Services in the course of discharging the duties of the Secretary under this Act, and no disclosure of any such file, record, report, or other paper, or information, obtained at any time by any person from the Secretary or from any officer or employee of the Department of Health and Human Services shall be made, except as the Secretary may by regulations prescribe and except as otherwise provided by Federal law..."

42 U.S.C. 1306(e) further states that "...no report described in subsection (d) of this section shall be made public by the Secretary or the State subchapter XIX agency until the contractor or provider of services whose performance is being evaluated has had a reasonable opportunity (not exceeding 60 days) to review such report and to offer comments pertinent parts of which may be incorporated in the public report..."

42 CFR 401.101(a)(1) states that "...the rules apply to information obtained by intermediaries or carries in the course of carrying out agreements under...the Social Security Act...and any other information subject to ...[42 U.S.C. 1306(a)]..."

42 CFR 401.133(a)(2) states that "...state agency survey reports...the statement of deficiencies or report and any pertinent written statements furnished by the institution or facility on the statement of deficiencies shall be disclosed within 90 days following the completion of the survey by the State agency, but not to exceed 30 days following the receipt of the report by HCFA..."

HCFA's Position

HCFA takes the position that only the federal law, under 42 U.S.C. 1306, governs release of the HCFA 2567 as well as the notes made and documents collected pursuant to a facility investigation. HCFA contends that, in accordance with the supremacy clause, federal law governs if it conflicts with state law. HCFA states that "...field notes are not releasable because they are pre-decisional..." HCFA further states that the contracting facility itself is entitled to a copy of the HCFA 2567 "...as soon as the ink on it is dry..." HCFA states, however, that TDH is in violation of federal law if the department discloses the HCFA 2567 in accordance with the Texas Open Records Act, rather than in compliance with 42 U.S.C. 1306 and the implementing regulations.

TDH's Position

Article IV of the U.S. Constitution states, in part, that "...all laws made in pursuance of the Constitution...shall be the 'supreme law of the land' and shall enjoy legal superiority over any conflicting provision of a State constitution or law..." TDH contends that the supremacy clause is not triggered, absent a conflict between state and federal law. The substantive provisions of both state and federal law make the records at issue public records, subject to deletion of personal identifiers. The federal law is inapplicable to the portion of the investigation performed pursuant to the applicable state health facility licensing law. The state employees performing the investigations make notes and collect documentation which is ultimately used for reporting noncompliance with the state licensing law, as a state regulatory function and also used to report facility noncompliance with Medicare standards to HCFA. Thus, rather than presenting a conflict, the laws at issue must be read together.

While both state and federal law make the investigational report public, subject to deletion of personal identifiers, the time period within which disclosure of a requested report must be made, differs. Under state law a record is deemed public after ten days following receipt of a request for disclosure, unless an exception applies. Under federal law, the HCFA 2567 is disclosable after ninety days, in order to afford the contractor an opportunity to respond to the cited deficiencies. Although there appears to be a procedural, rather than a substantive, conflict between the state and federal law, reconciliation of this apparent conflict must be made in recognition of the fact that state employees are conducting official business pursuant to both state and federal law when conducting a compliance investigation. TDH maintains that the field notes, survey reports and all information ultimately transferred to the HCFA 2567 must be disclosed in accordance with the Texas Open Records Act, because these notes are made and documents are collected by state employees, who are conducting official state business at the same time that they are fulfilling TDH's contract with HCFA. Furthermore, there is no applicable confidentiality provision, or other exception to the required disclosure, upon which TDH could rely in refusing the requested disclosure.

The basic premise of the Texas Open Records Act is that information in the possession of a governmental body is generally available to the public, unless the information falls under one of the specific exceptions enumerated in §§552.101-552.123. The Texas Open Records Act §552.021(a)(1) states that "...information is public information if, under law or ordinance or in connection with the transaction of official business, it is collected, assembled, or maintained by a governmental body..." §552.022(1) states that "...without limiting the meaning of other sections of this chapter, a completed report, audit, evaluation, or investigation made of, for, or by a governmental body are public information..." The field notes, survey reports and the information which is later transferred to the HCFA 2567 is collected, assembled, and maintained by the state government employees, who are simultaneously performing the state statutory function

of investigating and regulating health facilities licensed by TDH.

The Texas Open Records Act §552.101 states that "...that information is excepted from requirements of §522.021 if it is information considered to be confidential by law either constitutional, statutory, or by judicial decision..." Statutory provisions at 42 U.S.C. 1306 and 42 CFR 401.133 do not state that the HCFA 2567 is confidential, but rather those provisions specifically make the form disclosable after a 90 day time period, subject to removal of personal identifiers. Excepted disclosure does not fall within any of the other exceptions enumerated in §§552.102-552.123. Disclosure of the report, and the records made and collected during the investigation, is not excepted from the required disclosure under the Texas Open Records Act and must be released within ten days after receipt of a request for disclosure, whether the report is complete or not.

Issues

1. Is disclosure of the HCFA 2567, and the documentation made and collected by TDH employees pursuant to a health facility complaint investigation, governed by the Texas Open Records Act or by 42 U.S.C. 1306 and the implementing regulations, with regard to the time period within which disclosure is required?

2. If such disclosure is governed by 42 U.S.C. 1306, can TDH assert that provision in refusing to disclose records requested in accordance with the Texas Open Records Act, until after 90 days following completion of the survey?

Your consideration of this request will be greatly appreciated. If you need additional information or have questions, please contact Sharon Alexander, Attorney, Office of General Counsel at (512) 458-7236.

Sincerely,

David R. Smith, M.D.
Commissioner of Health