OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

May 2, 2003

Mr. Marc Allen Connelly
Assistant General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR2003-2968

Dear Mr. Connelly:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 180356.

The Texas Department of Health (the "department") received a request for information regarding complaint number 02-40205. You state that some responsive information will be released to the requestor. You claim, however, that portions of the responsive information are excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note, and you acknowledge, that the department has not sought a decision from this office within the ten business day time period mandated by section 552.301 of the Government Code. When a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling interest to withhold the information to overcome this presumption. *See id.* Normally, a compelling interest exists when some other source of law makes the information confidential or when third party interests are at stake. Open Records Decision No. 150 at 2 (1977). As the presumption of openness can be overcome by a showing that information is confidential by law, we will consider your arguments under section 552.101.

We begin by noting that you have submitted several documents pertaining to the department's investigation of complaint number 02-40245. These documents are not

responsive to the request for information pertaining to complaint number 02-40205 and need not be released.

Next, section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You contend that a portion of the submitted information is confidential pursuant to section 241.051 of the Health and Safety Code. Chapter 241 of the Health and Safety Code governs licensing of hospitals. Section 241.051 authorizes the department to make any inspection, survey, or investigation that it considers necessary, and provides in pertinent part:

> (d) All information and materials obtained or compiled by the department in connection with a complaint and investigation concerning a hospital are confidential and not subject to disclosure under Section 552.001 et seq., Government Code, and not subject to disclosure, discovery, subpoena, or other means of legal compulsion for their release to anyone other than the department or its employees or agents involved in the enforcement action except that this information may be disclosed to:
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> > (1) persons involved with the department in the enforcement action against the hospital;
> >
> > (2) the hospital that is the subject of the enforcement action, or the hospital's authorized representative;
> >
> > (3) appropriate state or federal agencies that are authorized to inspect, survey, or investigate hospital services;
> >
> > (4) law enforcement agencies; and
> >
> > (5) persons engaged in bona fide research, if all individual-identifying and hospital-identifying information has been deleted.
>
> (e) The following information is subject to disclosure in accordance with Section 552.001 et seq., Government Code:
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> > (1) a notice of alleged violation against the hospital, which notice shall include the provisions of law which the hospital is alleged to have violated, and a general statement of the nature of the alleged violation;
> >
> > (2) the pleadings in the administrative proceeding; and

(3) a final decision or order by the department.

You indicate that the department obtained and compiled a portion of the submitted documents, which you have marked, as a result of a complaint and investigation concerning a hospital. You also state that the submitted information does not contain any information that falls within the exceptions to confidentiality outlined in sections 241.051(d) and (e). Upon review, we agree that the information you have marked is generally subject to section 241.051(d) of the Health and Safety Code.

We note, however, your contention that the documents you have marked under section 241.051 are also confidential pursuant to chapter 48 of the Human Resources Code. Chapter 48 of the Human Resources Code governs investigations and protective services for elderly and disabled persons. Section 48.101 provides in part as follows:

> (a) The following information is confidential and not subject to disclosure under Chapter 552, Government Code:
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> > (1) a report of abuse, neglect, or exploitation made under ... chapter [48 of the Human Resources Code];
> >
> > (2) the identity of the person making the report; and
> >
> > (3) except as provided by this section, all files, reports, records, communications, and working papers used or developed in an investigation made under this chapter or in providing services as a result of an investigation.
>
> (b) Confidential information may be disclosed only for a purpose consistent with this chapter and as provided by department or investigating state agency rule and applicable federal law.

We recognize that section 241.051 of the Health and Safety Code encompasses the submitted documents as records of a complaint and investigation concerning a hospital in general. We note, however, that chapter 48 of the Human Resources Code specifically allows for the public availability of records of an investigation of abuse or neglect of elderly persons. Where information falls within both a general and a specific statutory provision, the specific provision prevails over the general. *See Cuellar v. State*, 521 S.W.2d 277 (Tex.Crim.App.1975) (under well-established rule of statutory construction, specific statutory provisions prevail over general ones); Open Records Decision Nos. 598 (1991), 583 (1990), 451 (1986). Furthermore, chapter 48 of the Human Resources Code was enacted after the enactment of chapter 241 of the Human Resources Code. Where two statutory provisions conflict, the statute latest in date of enactment prevails. *See* Gov't Code § 311.025(a). You inform us that the department has adopted rules for the release of

information otherwise made confidential by section 48.101. *See* 25 T.A.C. § 1.207 (relating to confidentiality of information used or developed in the investigative process under chapter 48 of the Human Resources Code). Accordingly, to the extent section 1.207 of title 25 of the Texas Administrative Code provides for the release of information subject to section 48.101 of the Human Resources Code, the release provision under section 1.207 prevails over section 241.051 of the Health and Safety Code. Upon review of the submitted documents, we agree that the information that you have marked as confidential under section 48.101 of the Human Resources Code must not be released to the public, except for a purpose consistent with chapter 48 of the Human Resources Code, and as provided by a department or investigating state agency rule or federal law. *See id.* § 48.101(b); 25 T.A.C. § 1.207.

The remainder of the submitted documents consist of a Health Care Financing Administration ("HCFA") Form 2567 Statement of Deficiencies and Plan of Correction. You contend that this information is confidential under section 1306(e), title 42 of the United States Code and section 401.133(a)(2), title 42 of the Code of Federal Regulations. Section 1306 of title 42 of the United States Code requires state agencies operating programs under the relevant subchapter to release certain reports and evaluations, but only after the entity whose performance is being evaluated has had a reasonable opportunity, not exceeding sixty days, to review the report and offer comments. 42 U.S.C. 1306(e), (f). Section 401.133(a)(2) of title 42 of the Code of Federal Regulations provides that a statement of deficiencies or report must be made available to the public "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 [the Health Care Finance Administration]." You indicate that the submitted HCFA Form 2567 documents are subject to section 1306(e)(3) and (f) of title 42 of the United States Code and section 401.133(a)(2) of title 42 of the Code of Federal Regulations. Therefore, you must release the submitted HCFA Form 2567 documents as required under those provisions. *See* 42 U.S.C. § 1306(e), (f); 42 C.F.R. § 401.133(a)(2).

In summary, the department must withhold the documents you have marked under section 48.101 of the Human Resources Code unless otherwise authorized to release the documents under that section. The submitted HCFA Form 2567 documents must be released to the extent required by sections 1306(e)(3) and (f) of title 42 of the United States Code and section 401.133(a)(2) of title 42 of the Code of Federal Regulations.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 180356

Enc: Submitted documents

c: Mr. Rick A. Eckerson
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(w/o enclosures)