



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 15, 2005

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

OR2005-02199

Dear Mr. Connelly:

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# 220278.

The Texas Department of State Health Services (the "department") received a request for information regarding Texoma Medical Center and Texoma Medical Center Restorative Care Hospital in Denton for a specified time period. You state that some responsive information has been or will be released to the requestor. You claim that portions of the remaining requested information are excepted from disclosure under section 552.101. We have considered the exception you claim and reviewed the submitted information.

Initially, you acknowledge that the department has not sought an open records decision from this office with regard to the submitted information within the ten-day statutory deadline imposed by section 552.301(b) of the Government Code, nor did the department submit the information required by section 552.301(e) to this office within the fifteen-day period. *See Gov't Code* § 552.301(b), (e). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of

openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). This office has held that a compelling reason exists to withhold information when the information is confidential by another source of law or affects third party interests. *See* Open Records Decision No. 150 (1977). Section 552.101 constitutes such a compelling reason. Therefore, we will consider whether this exception applies to the submitted 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," and encompasses information protected by other statutes. A portion of the submitted documents consists of a Centers for Medicare and Medicaid Services ("CMS") Form 2567 Statement of Deficiencies and Plan of Correction that is confidential under section 1306, title 42 of the United States Code and sections 401.126 and 401.133, title 42 of the Code of Federal Regulations. Under federal law, a CMS 2567 form cannot be released to the public until the provider whose performance is being evaluated has had a reasonable opportunity to review that report and to offer comments. 42 U.S.C. § 1306(f); 42 C.F.R. §§ 401.126, .133. Federal law provides that once the provider has had a reasonable opportunity to review the report, the department must release the completed CMS 2567 form with identifying information of individual patients, physicians, other medical practitioners, or other individuals redacted. 42 U.S.C. § 1306(e), (f); 42 C.F.R. §§ 401.126, .133.

Because the signature of the hospital representative on the forms that we have marked indicates that the provider has had a reasonable opportunity to review the reports and offer comments, the department must redact information identifying individual patients, physicians, other medical practitioners, or other individuals from the marked CMS 2567 forms prior to their release under section 552.101 in conjunction with federal law. The remaining CMS 2567 forms, however, do not contain the signature of the hospital's representative or any comments provided by the hospital. You do not inform us that the department sent this form to the hospital for review and comments, that the investigated hospital has had a reasonable opportunity to review this federal report, or any evidence that the federal and state conditions that would authorize the department to publicly release this form have been met. Thus, we conclude that the department must withhold the unsigned CMS forms from the requestor under section 552.101 in conjunction with federal law. *See* 42 U.S.C. § 1306(e), (f); 42 C.F.R. §§ 401.126, .133.

You claim that the remaining submitted information is excepted from public disclosure under section 241.051 of the Health and Safety Code, which 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 [the Act], 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:

- (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 [the Act]:

- (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.

Health & Safety Code § 241.051(d), (e). You state that the department obtained and compiled the remaining information as a result of complaints and investigations concerning a hospital. You also state that these records do not contain any information that falls within the exceptions to confidentiality outlined in section 241.051. Based on your arguments and our review of the remaining submitted information, we agree that this information is confidential under section 241.051 of the Health and Safety Code and must be withheld under section 552.101 of the Government Code.

In summary, (1) the department must redact information identifying individual patients, physicians, other medical practitioners, or other individuals from the marked CMS 2567 forms prior to their release under section 552.101 in conjunction with federal law; (2) the department must withhold the unsigned CMS forms from the requestor under section 552.101 in conjunction with federal law, and (3) the remaining submitted information

is confidential under section 241.051 of the Health and Safety Code and must be withheld under section 552.101.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,

A handwritten signature in black ink, appearing to read "Cindy Nettles". The signature is fluid and cursive, with the first name "Cindy" written in a larger, more prominent script than the last name "Nettles".

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/krl

Ref: ID# 220278

Enc. Submitted documents

c: Ms. Jennifer Steel Walter
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(w/o enclosures)