



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

OR2005-02206

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# 220280.

The Texas Department of State Health Services (the "department") received a request for information relating to a specified hospital, including any substantiated patient complaints regarding nursing services or any statement of deficiencies issued to the hospital within the past 18 months. You inform us that some of the requested information either has been or will be released. You claim that the remaining information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and have reviewed the information you submitted.

You concede that the department did not comply with section 552.301 of the Government Code in requesting this decision. This section prescribes procedures that must be followed in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires the governmental body to ask for the attorney general's decision and state the exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of the written request for information. *See Gov't Code § 552.301(b)*. Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the request for information; (3) a

signed statement of the date on which the governmental body received the request, or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples if the information is voluminous. *See id.* § 552.301(e)(1)(A)-(D). Section 552.302 provides that if a governmental body does not request an attorney general decision as prescribed by section 552.301, the information requested in writing is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold the information. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

You inform us that the department received the present request for information on November 22, 2004. You requested this decision on January 4, 2005. Thus, you did not request this decision within the ten-business-day period prescribed by section 552.301(b). Likewise, you did not timely comply with section 552.301(e) in requesting this decision. Therefore, the submitted information is presumed to be public under section 552.302 and must be released, unless there is a compelling reason to withhold any of the information. The presumption that information is public under section 552.302 can generally be overcome by a demonstration that the information is confidential by law or that third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). As a claim under section 552.101 of the Government Code can provide a compelling reason for non-disclosure, we will address this exception.

Section 552.101 excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information that is made confidential by statute. You assert that some of the submitted information is confidential under section 241.051 of the Health and Safety Code. Section 241.051 provides in 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 indicate that the department obtained or compiled some of the submitted information as a result of a complaint and investigation concerning a general hospital that is licensed by the department. You also state that none of the information in question falls within the exceptions to confidentiality outlined in section 241.051. Based on your representations and our review of the information, we agree that the investigative information is confidential under section 241.051 of the Health and Safety Code and must be withheld from the requestor under section 552.101 of the Government Code.

The rest of the submitted information consists of a Centers for Medicaid and Medicare Services ("CMS") Statement of Deficiencies and Plan of Correction (Form 2567). The public availability of a CMS Form 2567 is governed by federal law. *See* 42 U.S.C. § 1306; 42 C.F.R. §§ 401.126, .133.¹ These provisions require the department to release a completed CMS Form 2567 containing a statement of deficiencies and plan of correction, provided that (1) no information identifying individual patients, physicians, other medical practitioners, or other individuals shall be disclosed, and (2) the provider whose performance is being evaluated has had a reasonable opportunity to review the report and to offer comments. *See id*; Open Records Decision No. 487 at 5-6 (1988).

¹We note that a federal statute or an administrative regulation enacted pursuant to statutory authority can provide statutory confidentiality for purposes of section 552.101. *See* Open Records Decision No. 476 (1987) (addressing statutory predecessor).

You assert that the Form 2567 has been de-identified in accordance with the federal law. We note that the form is signed by a representative of the provider, and thus the provider appears to have had a reasonable opportunity to review the form and offer comments. Therefore, based on your representations and our review of the information, we agree that the identifying information that you have highlighted must be withheld under section 552.101 of the Government Code. The rest of the information in the Form 2567 must be released.

In summary: (1) the department must withhold the investigative information that is confidential under section 552.101 in conjunction with section 241.051 of the Health and Safety Code; and (2) the department must withhold the identifying information in the CMS Form 2567 under section 552.101 in conjunction with the applicable federal law. The rest of the submitted information must be released.

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 "J.W. Morris, III", with a long horizontal line extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 220280

Enc: Submitted documents

c: Ms. Jennifer Moore
American Nurses Credentialing Center
8515 Georgia Avenue, Suite 400
Silver Spring, Maryland 20910-3492
(w/o enclosures)