



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 8, 2005

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

OR2005-05012

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# 225587.

The Texas Department of State Health Services (the "department") received a request for "any substantiated complaints regarding the Nursing Services or any Statement of Deficiencies issued to [a certain facility]" licensed by the department. (Emphasis in original). You state that you have or will release some of the requested information but claim that some of the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed 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 Centers for Medicare and Medicaid Services ("CMS") Forms 2567 Statement of Deficiencies and Plan of Correction that are 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.

The submitted CMS 2567 forms 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 state that the remaining submitted information consists of information and materials obtained or compiled by the department in connection with a complaint and investigation concerning a hospital made under section 241.051 of the Health and Safety Code. See Open Records Decision No. 673 at 7 (2001). In Open Records Letter No. 2005-04917 (2005), issued June 6, 2005, we granted the department a previous determination finding, in part, that information and materials obtained or compiled by the department in connection with a complaint and investigation concerning a hospital made under section 241.051 of the Health and Safety Code are excepted from disclosure under section 552.101. The previous determination authorizes the department to withhold such information without the necessity of requesting a decision from the attorney general, provided the pertinent facts and circumstances have not changed since the issuance of the prior ruling. The facts and circumstances at issue continue to support the findings set forth in Open Records Letter No. 2005-04917. We therefore determine that the department must withhold the remaining information pursuant to section 552.101 in conjunction with section 241.051 of the Health and Safety Code in accordance with the previous determination of this office in Open Records Letter No. 2005-04917. See also Open Records Decision No. 673 at 7-8 (2001) (listing elements of second type of previous determination under Gov't Code § 552.301(a)).

In summary, the department must withhold the submitted CMS 2567 forms under section 552.101 in conjunction with federal law. The department must withhold the remaining information you have marked under section 552.101 in conjunction with section 241.051 of the Health and Safety Code in accordance with the previous determination issued in Open Records Letter No. 2005-04917.

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,



L. Joseph James
Assistant Attorney General
Open Records Division

LJJ/seg

Ref: ID# 225587

Enc. Submitted documents

c: Ms. Jennifer Moore
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(w/o enclosures)