



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 15, 2006

Mr. Alex J. Fuller, Jr.  
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P.O. Box 1588  
Austin, Texas 78767

OR2006-02597

Dear Mr. Fuller:

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# 243245.

Sabine County Hospital (the "hospital"), which you represent, received a request for "all citations, notifications of violations, documents verifying that the violations have been corrected, complaints, statements of deficiencies and/or warning notices issued to the Sabine County Hospital District, the [hospital] or any division thereof" from 2001 through 2005. You state that you have released some of the requested information. You claim that the portions of the remaining requested 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 hospital has failed to comply with the deadlines prescribed by 552.301 of the Government Code in seeking an open records decision from this office. *See* Gov't Code § 552.301. 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 requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *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 section 552.302); Open Records Decision

No. 319 (1982). Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Because your claim under section 552.101 of the Government Code can provide a compelling reason to withhold information, we will address your arguments.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information made confidential by other statutes. You claim that some of the submitted information is not subject to release pursuant to the Privacy Rule adopted by the United States Department of Health and Human Services, Office for Civil Rights, to implement the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”). At the direction of Congress, the Secretary of Health and Human Services (“HHS”) promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* HIPAA, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 (“Privacy Rule”); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

This office has addressed the interplay of the Privacy Rule and the Act. Open Records Decision No. 681 (2004). In that decision, we noted that section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted that the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” *See* Open Records Decision No. 681 at 8 (2004); *see also* Gov’t Code §§ 552.002, .003, .021. We therefore held that the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. Open Records Decision No. 681 at 9 (2004); *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the hospital may withhold protected health information from the public only if the information is confidential under other law or an exception in subchapter C of the Act applies.

You also claim that some of the submitted information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 241.051 of the Health and Safety Code. Chapter 241 of the Health and Safety Code governs the licensing of

hospitals. Section 241.051 authorizes the Texas Department of Health (the “department”)<sup>1</sup> 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:

- (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:

- (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.

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<sup>1</sup>We note that the Texas Department of Health became part of the Texas Department of State Health Services on September 1, 2004. See [http:// www.tdh.state.tx.us](http://www.tdh.state.tx.us); see also Acts 2003, 78th Leg., R.S., ch. 198, eff. Sept. 1, 2003.

Health & Safety Code § 241.051(d), (e). You indicate, and our review confirms, that the department obtained and compiled some of the submitted documents in connection with the investigation of eight complaints concerning the hospital. Accordingly, the hospital must withhold these documents, which we have marked, under section 552.101 in conjunction with section 241.051(d) of the Health and Safety Code. We find, however, that none of the remaining information at issue is confidential under section 241.051(d), and therefore none of this information is excepted from disclosure under section 552.101 on that basis.

We now address your arguments for the information you seek to withhold in the submitted Centers for Medicare and Medicaid Services (“CMS”) and Health Care Financing Administration (“HCFA”) 2567 forms (Statement of Deficiencies and Plan of Correction).<sup>2</sup> Section 552.101 of the Government Code also encompasses the Medical Practice Act (“MPA”), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides in relevant part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). Medical records must be released upon the patient’s signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). The remaining documents include information that you state has

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<sup>2</sup>We note that federal law requires that, once the provider has had a reasonable opportunity to review the CMS or HCFA 2567 forms evaluating its performance, the department must release such forms with the identifying information of individual patients, physicians, and other medical practitioners, or other individuals redacted. 42 U.S.C. § 1306(e), (f); 42 C.F.R. § 401.126, .133. However, federal law does not similarly compel the provider to release these forms to the public. *See* electronic mail transmission from Patricia Mantoan, attorney, United States Department of Health and Human Services, to Caroline E. Cho, Assistant Attorney General, Open Records Division (March 10, 2006) (on file with the Open Records Division).

been directly obtained from medical records that were created by treating physicians. *See* Occ. Code §§ 159.002, .004; Open Records Decision Nos. 598 (1991), 546 (1990) (because hospital treatment is routinely conducted under supervision of physicians, documents relating to diagnosis and treatment during hospital stay would constitute protected MPA records). Accordingly, we have marked the information that may be released only in accordance with the MPA.

You also claim that references to the discipline of a certain physician for misconduct are excepted from disclosure under section 552.101 of the Government Code in conjunction with sections 160.007 of the Occupations Code and 161.032 of the Health and Safety Code. Section 160.007 of the Occupations Code states that, “[e]xcept as otherwise provided by this subtitle, each proceeding or record of a medical peer review committee is confidential, and any communication made to a medical peer review committee is privileged.” *See* Occ. Code § 160.007. Medical peer review is defined by the MPA to mean “the evaluation of medical and health care services, including evaluation of the qualifications of professional health care practitioners and of patient care rendered by those practitioners.” *Id.* § 151.002(a)(7). A medical peer review committee is “a committee of a health care entity . . . or the medical staff of a health care entity, that operates under written bylaws approved by the policy-making body or the governing board of the health care entity and is authorized to evaluate the quality of medical and health care services[.]” *Id.* § 151.002(a)(8)

Section 161.032 of the Health and Safety Code provides in part:

(a) The records and proceedings of a medical committee are confidential and are not subject to court subpoena.

...

(c) Records, information, or reports of a medical committee . . . and records, information, or reports provided by a medical committee . . . to the governing body of a public hospital . . . are not subject to disclosure under Chapter 552, Government Code.

Health & Safety Code § 161.032(a), (c). Section 161.031(a) defines a “medical committee” as “any committee . . . of (1) a hospital. . . .” *Id.* § 161.031(a)(1). Section 161.031(b) provides that the “term includes a committee appointed ad hoc to conduct a specific investigation or established under state or federal law or rule or under the bylaws or rules of the organization or institution.” *Id.* § 161.031(b). Section 161.0315 provides in relevant part that “[t]he governing body of a hospital [or] medical organization . . . may form a medical peer review committee, as defined by Section 151.002, Occupations Code, or a medical committee, as defined by Section 161.031, to evaluate medical and health care services. . . .” *Id.* § 161.0315(a).

However, neither section 160.007 nor section 161.032 makes confidential “records made or maintained in the regular course of business by a hospital[.]” *Id.* § 161.032(f); see *Memorial Hosp.-the Woodlands v. McCown*, 927 S.W.2d 1, 10 (Tex. 1996) (stating that reference to statutory predecessor to section 160.007 in section 161.032 is clear signal that records should accorded same treatment under both statutes in determining if they were made in regular course of business). The phrase “records made or maintained in the regular course of business” has been construed to mean records that are neither created nor obtained in connection with a medical committee’s deliberative proceedings. See *McCown*, 927 S.W.2d at 9-10 (Tex. 1996) (discussing *Barnes v. Whittington*, 751 S.W.2d 493 (Tex. 1988), and *Jordan v. Court of Appeals for Fourth Supreme Judicial Dist.*, 701 S.W.2d 644 (Tex. 1985)).

You state that the references in the submitted HCFA and CMS 2567 forms regarding disciplinary actions taken against a physician “are gleaned from confidential peer review committee meetings” of the hospital’s board and are therefore confidential under sections 160.007 of the Occupations Code and 161.032 of the Health and Safety Code. We conclude, however, that information contained in these forms, which are completed by the department as part of the Medicare survey process pursuant to federal law, does not qualify as information or records of a medical peer review committee or medical committee for the purpose of evaluating medical and health care services. Cf. *Capital Senior Mgmt. 1, Inc. v. Tex. Dep’t. of Human Servs.*, 132 S.W.3d 71, 79 (Tex.App.—Austin 2004) (rejecting argument that inspection documents, including CMS 2567 forms, created by either the state or federal government, were based upon reports or proceedings of a peer review committee; rather, such documents dealt with reports of abuse or neglect and the nursing home’s follow-up and were not the product of committee’s deliberative process). We therefore find that such information may not be withheld under section 552.101 in conjunction with either section 160.007 of the Occupations Code or section 161.032 of the Health and Safety Code.

In summary, we conclude that a portion of the submitted information, which we have marked, must be withheld under section 552.101 of the Government Code in conjunction with section 241.051(d) of the Health and Safety Code. We have also marked information that may only be released in accordance with the MPA. The remaining information must be released to the requestor.

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); *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 Office of the Attorney General 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. 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,



Caroline E. Cho  
Assistant Attorney General  
Open Records Division

CEC/sdk

Ref: ID# 243245

Enc. Submitted documents

c: Mr. E.M. Farrell  
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(w/o enclosures)