



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 4, 2009

Mr. Marc Allen Connelly
Deputy General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2009-07681

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# 343765.

The Texas Department of State Health Services (the "department") received a request for information pertaining to a specified complaint. You state some of the requested information either has been or will be released. You claim that portions of the submitted 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, the department acknowledges, and we agree, that it failed to comply with the procedural requirements of section 552.301 of the Government Code. *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 id.* § 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). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Because section 552.101 of the Government Code can provide a

compelling reason to overcome the presumption of openness, we will address your arguments under this exception

Next, we note that the submitted information contains a Centers for Medicare and Medicaid Services ("CMS") Form 2567 Statement of Deficiencies and Plan of Correction. Federal regulations require the department to release completed CMS 2567 forms 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* 42 U.S.C. § 1306(e), (f); 42 C.F.R. §§ 401.126, .133; Open Records Decision No. 487 at 5 (1988); *see also* Health & Safety Code § 142.009(d)(6). In Open Records Letter No. 2005-04917 (2005), we granted the department a previous determination finding, in part, that the identifying information of patients, physicians, other medical practitioners, or other individuals contained in a CMS 2567 form is confidential when the provider being evaluated has had a reasonable opportunity to review the report and other comments. *See* 42 U.S.C. § 1306(e), (f); 42 C.F.R. §§ 401.126, .133. You inform us that the department will withhold the identifying information of patients, physicians, other medical practitioners, or other individuals in the submitted CMS 2567 form pursuant to section 552.101 of the Government Code in conjunction with federal law in accordance with this previous determination. *See* Gov't Code § 552.301(a); 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 addition, you claim that the submitted CMS 2567 form should be withheld in its entirety under section 552.101 of the Government Code in conjunction with sections 241.051(d) and 577.013(d) of the Health and Safety Code and withheld in part under section 261.201 of the Family Code.¹ You assert that section 3304 of the CMS State Operations Manual sets guidelines for disclosure of the submitted CMS Form 2567. Section 3304 of the CMS State Operations Manual states that when state confidentiality policies are more stringent than federal law, the department must apply "the most restrictive confidentiality policies of all the programs to which the information relates." However, we note that section 3304 of the CMS State Operations Manual must be read in the context of section 1306(e) of Title 42 of the United States Code and sections 401.126 and 401.133 of title 12 of the Code of Federal Regulations, which expressly require the department to release completed CMS 2567 forms, provided that no information identifying individual patients, physicians, other medical practitioners, or other individuals shall be disclosed. *See* 42 U.S.C. § 1306(e), (f); 42 C.F.R. §§ 401.126, .133. Upon review, we determine that no portion of the submitted CMS 2567 form identifies any patients, physicians, other medical practitioners, or other individuals. Consequently, there is no need to determine whether section 261.201 of the

¹Section 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 exception protects information that other statutes make confidential.

Family Code or sections 241.051(d) and 577.013(d) of the Health and Safety Code are more restrictive in protecting the identifying information of any patients, physicians, other medical practitioners, or other individuals contained in the submitted CMS 2567 form. Thus, the submitted CMS 2567 form must be released in its entirety.

Next, you argue that the information you have highlighted in the submitted Notice of Violation Letter is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 577.013(d) of the Health and Safety Code. Section 552.101 of the Government Code also encompasses section 577.013 of the Health and Safety Code, which provides, in part:

(d) All information and materials obtained or compiled by the department in connection with a complaint and investigation concerning a mental hospital licensed under this chapter are confidential 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 licensed mental hospital;
- (2) the licensed mental hospital that is the subject of the enforcement action, or the licensed mental hospital's authorized representative;
- (3) appropriate state or federal agencies that are authorized to inspect, survey, or investigate licensed mental hospital services;
- (4) law enforcement agencies; and
- (5) persons engaged in bona fide research, if all individual-identifying information and information identifying the licensed mental hospital has been deleted.

(e) The following information is subject to disclosure in accordance with [the Act]:

- (1) a notice of alleged violation against the licensed mental hospital, which notice shall include the provisions of law which the licensed mental hospital is alleged to have violated, and the nature of the alleged violation[.]

Health & Safety Code § 577.013(d), (e). You argue the information you have highlighted in the submitted Notice of Violation Letter is confidential because it consists of information and materials compiled by the department as a result of a complaint and investigation concerning a mental hospital. The information at issue consists of a notice of an alleged

violation against a facility licensed by the department and includes the provisions of law the facility is alleged to have violated and the nature of the alleged violations. Thus, the notice falls under section 577.013(e)(1), and therefore, none of the information you have highlighted in the submitted Notice of Violation Letter is confidential under section 577.013(d), and it may not be withheld on this basis. However, you also argue that the information you have highlighted in the submitted Notice of Violation Letter is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. Thus, in accordance with section 577.013(e), we will address your argument under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.

Section 261.201(a) of the Family Code provides as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). You inform us, and the submitted documents reflect, that the information you have highlighted in the submitted Notice of Violation Letter was taken directly from a report and investigation by the department of a complaint of abuse of a child in a facility licensed by the department. We therefore conclude that the information you have highlighted in the submitted Notice of Violation Letter was used or developed by the department in conducting an investigation under chapter 261 or in providing services as a result of such an investigation. *See id.* § 261.103(a)(3) (requiring that report of suspected abuse or neglect be made to state agency that operates, licenses, certifies, or registers facility in which alleged abuse or neglect occurred). Therefore, the information you have highlighted in the submitted Notice of Violation Letter is confidential under section 261.201 of the Family Code and may be disclosed only for purposes consistent with the Family Code and applicable federal or state law or under rules adopted by the department.

You indicate that the department has adopted section 1.207 of title 25 of the Texas Administrative Code to govern the release of this type of information. You state that section 1.207 references specific statutory exceptions that do not apply to the information you have highlighted in the submitted Notice of Violation Letter. Based on your

representation that the department's rule regarding release of this information does not apply in this instance, the department must withhold the information you have highlighted in the submitted Notice of Violation Letter under section 552.101 of the Government Code as information made confidential by law.

In summary, the submitted CMS 2567 form must be released in its entirety. The department must withhold the information you have highlighted in the submitted Notice of Violation Letter under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. The remaining information must be released to the requestor.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/rl

Ref: ID# 343765

Enc. Submitted documents

cc: Requestor
(w/o enclosures)