



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 1, 2009

Ms. Dawn Burton
Assistant General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2009-13851

Dear Ms. Burton:

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# 356983 (DSHS File 015649-2009).

The Texas Department of State Health Services (the "department") received a request for information related to the state license and Medicare certification for a specified dialysis center. You state that the department has released some responsive information to the requestor. You claim that portions of the submitted information are excepted from disclosure under sections 552.101 and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

As you acknowledge, the department did not comply with its procedural deadlines under section 552.301 of the Government Code in requesting this decision. *See* Gov't Code §§ 552.301(b), (e)(1). The submitted information is therefore presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information from disclosure. *See id.* § 552.302; *City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.—2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). This statutory presumption of openness can generally be overcome when information is confidential by law or when third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Because sections 552.101

and 552.137 can provide compelling reasons to overcome the presumption of openness, we will consider your arguments under these sections.

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 protected by other statutes, including section 1306(a) of title 42 of the United States Code, which provides:

(1) No disclosure of any return or portion of a return (including information returns and other written statements) filed with the Commissioner of Internal Revenue under Title VIII of the Social Security Act [42 U.S.C.A. § 1001 et seq.] or under subchapter E of chapter 1 or subchapter A of chapter 9 of the Internal Revenue Code [of 1939], or under regulations made under authority thereof, which has been transmitted to the head of the applicable agency by the Commissioner of Internal Revenue, or of any file, record, report, or other paper, or any information, obtained at any time by the head of the applicable agency or by an officer or employee of the applicable agency in the course of discharging the duties of the head of the applicable agency under [chapter 7 of title 42 of the United States Code], and no disclosure of any such file, record, report, or other paper, or information, obtained at any time by any person from the head of the applicable agency or from any officer or employee of the applicable agency shall be made except as the head of the applicable agency may by regulations prescribe and except as otherwise provided by Federal law.

(2) For purposes of this subsection . . . the term "applicable agency" means-

(A) the Social Security Administration, with respect to matter transmitted to or obtained by such Administration or matter disclosed by such Administration; or

(B) the Department of Health and Human Services, with respect to matter transmitted to or obtained by such Department or matter disclosed by such Department.

42 U.S.C. § 1306(a). You cite to subsection 401.101 of title 42 of the Code of Federal Regulations and the Centers for Medicare and Medicaid Services' ("CMS") State Operations Manual for the proposition that section 1306(a)(1) applies to survey agencies. You explain the department is the Medicare state survey agency pursuant to an agreement with the CMS. The information you have marked under section 1306(a)(1) includes a Medicare Enrollment Application. Federal regulations require the department to release official reports that evaluate the performance of a provider of services, 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). You contend that the Medicare Enrollment Application you have marked under section 1306(a)(1) is not the type of report subject to limited disclosure under section 1306(e)(3). Based upon your representations and our review, we agree that the submitted Medicare Enrollment Application form is not an "official report" that falls within the purview of section 1306(e). We also agree that the additional information you have marked under section 1306(a)(1) consists of information obtained by the department as a Medicare intermediary in the course of carrying out its agreement with the CMS. Accordingly, the department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 1306(a)(1) of title 42 of the United States Code.¹

Section 552.101 also encompasses the common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. See *Indus. Found. v. Tex. Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. See *id.* at 681-82. The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. See *id.* at 683. This office has found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, see Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); personal financial information not relating to the financial transaction between an individual and a governmental body, see Open Records Decision Nos. 600 (1992), 545 (1990); and identities of victims of sexual abuse, see Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). Upon review, we agree that the information you have marked under the common-law right of privacy is highly intimate or embarrassing and not of legitimate public concern. Accordingly, the department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with common-law privacy.²

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with

¹As this ruling is dispositive with regard to the information you have marked under section 552.101 in conjunction with section 1306(a)(1), we need not address your remaining arguments against disclosure of this information.

²In light of this conclusion, we need not address your argument under section 552.101 in conjunction with constitutional privacy.

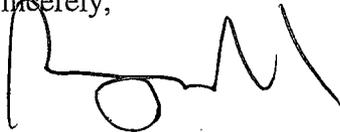
a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov’t Code § 552.137(a)-(c). You do not indicate that the department has received consent to release the e-mail address you have marked, which is not of a type excluded by subsection (c). Thus, the department must withhold the marked e-mail address under section 552.137 of the Government Code.

In summary: (1) the department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 1306(a)(1) of title 42 of the United States Code; (2) the department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (3) the department must withhold the e-mail address you have marked under section 552.137 of the Government Code; and (4) as you raise no further exceptions against disclosure, the department must release the remainder of the submitted information.

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, toll free, at (888) 672-6787.

Sincerely,



Ryan T. Mitchell
Assistant Attorney General
Open Records Division

RTM/rl

Ref: ID# 356983

Enc. Submitted documents

cc: Requestor
(w/o enclosures)