



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 29, 2009

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

OR2009-15369

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# 359687.

The Department of State Health Services (the "department") received two requests from the same requestor for corrective action plan letters and monitor status reports regarding two named facilities. You state the department has released some of the information. You claim 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, we note, and you acknowledge, that the department failed to meet the deadlines prescribed by section 552.301 of the Government Code in requesting an open records decision from this office. *See* Gov't Code § 552.301(b), (e). A governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the information is public and must be released. *See id.* § 552.302. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.*; *see also 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). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. *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 withhold information, we will consider whether any of the information at issue must be withheld under these exceptions.¹

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. Chapter 251 of the Health and Safety Code relates to end stage renal disease facilities. Section 552.101 encompasses section 251.015 of the Health and Safety Code, which provides as follows:

(a) A medical review board shall advise the department on minimum standards and rules to be adopted under this chapter.

(b) The medical review board shall review the information on quality of care provided in the annual report filed under Section 251.013(f) and other appropriate information provided to or compiled by the department with respect to an end stage renal disease facility. Based on the review, the medical review board may advise the department about the quality of care provided by a facility and recommend an appropriate corrective action plan under Section 251.061 or other enforcement proceedings against the facility.

(c) Information concerning quality of care provided to or compiled by the department or medical review board and a recommendation of the medical review board are confidential. The information or recommendation may not be made available for public inspection, is not subject to disclosure under Chapter 552, Government Code, and is not subject to discovery, subpoena, or other compulsory legal process.

(d) The department, in its discretion, may release to a facility information relating to that facility that is made confidential under Subsection (c). Release of information to a facility under this subsection does not waive the confidentiality of that information or the privilege from compulsory legal process.

¹The Office of the Attorney General will raise a mandatory exception like section 552.137 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Health & Safety Code § 251.015. Section 251.061 of the Health and Safety Code provides in part:

(g) A corrective action plan is not confidential. Information contained in the plan may be excepted from required disclosure under [the Act], in accordance with that chapter or other applicable law.

Id. § 251.061(g). You have marked the information you assert is subject to section 251.015. You inform this office that the submitted documents contain information pertaining to the quality of care by end stage renal disease facilities. You also indicate that these documents were provided to or compiled by the department or a medical review board. We note the information at issue contains corrective action plans which are not confidential under section 251.061(g). However, you indicate that this information also constitutes confidential quality of care information subject to section 251.015(c). Based on your representations and our review of the information at issue, we agree that the information you have marked is confidential under section 251.015(c) of the Health and Safety Code. Therefore, this information must be withheld from disclosure under section 552.101 of the Government Code.

A portion of the remaining information, which we have marked, is subject to section 552.137 of the Government Code. Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with 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). *See* Gov’t Code § 552.137(a)-(c). The e-mail addresses we have marked do not appear to be type specifically excluded by section 552.137(c). Thus, unless the department receives consent for their release, the marked e-mail addresses must be withheld under section 552.137 of the Government Code. *See id.* § 552.137(b).

In summary, the department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 251.015(c) of the Health and Safety Code. The department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code. The remaining information must be released.

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,

A handwritten signature in cursive script that reads "Pam Wissemann".

Pamela Wissemann
Assistant Attorney General
Open Records Division

PFW/jb

Ref: ID# 359687

Enc. Submitted documents

c: Requestor
(w/o enclosures)