



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

November 10, 2009

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

OR2009-15982

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# 359530.

The Department of State Health Services (the "department") received a request for all information pertaining to a specified laboratory from 2001 to 2006. You state you released some information to the requestor. You claim 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.

You acknowledge, and we agree, the department failed to comply with section 552.301 of the Government Code in seeking an open records decision from this office. Gov't Code § 552.301(b), (e). A governmental body's failure to comply with the procedural requirements of the Act 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; *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, 381-82 (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); *see also* Open Records Decision No. 630 (1994). The presumption that information is public under section 552.302 can be overcome by

demonstrating that the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Section 552.101 can provide a compelling reason to overcome this presumption; therefore, we will consider your arguments under this exception.

Section 552.101 of the Government Code exempts 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. Section 1306(a) of title 42 of the United States Code provides the following:

(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 also cite to subsections 401.101(a)(1), (b), and (c) 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. You seek to withhold most of the submitted information under section 1306(a)(1). 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 represent that the submitted CMS form numbers 1513, 670, 1539, 1557, 209, as well as the CLIA Survey Tracking Sheet and records retrieved from OSCAR and ASPEN federal databases, are not the types of reports subject to limited disclosure under section 1306(e)(3). Based upon your representations and our review, we agree these records are not "official reports" that fall within the purview of section 1306(e). Accordingly, the department must withhold the submitted CMS form numbers 1513, 670, 1539, 1557, 209, as well as the CLIA Survey Tracking Sheet and records retrieved from OSCAR and ASPEN federal databases, in their entirety under section 552.101 of the Government Code in conjunction with section 1306(a) of title 42 of the United States Code. You initially provided this office a memorandum from CMS stating the laboratory director's identity must be redacted from CMS form number 116. However, the memorandum did not cite to any specific statutory authority authorizing such withholding. Consequently, this office requested you provide the legal authority for withholding the laboratory directors' names, along with an explanation of the authority's applicability in this instance. *See* Gov't Code § 552.303(c) (attorney general may give written notice to governmental body that additional information is necessary to render a decision). In response to this request, the department submitted section 5b.9 of the U.S. Department of Health & Human Services' Privacy Act Regulations, which generally pertains to the disclosure of records about a subject individual. *See* 45 C.F.R. § 5b.9. However, you do not submit any arguments explaining the applicability of section 5b.9 to the laboratory directors' names contained in the submitted CMS-116 forms. Accordingly, you failed to demonstrate the laboratory directors' names in the submitted CMS-116 forms are confidential, and those names must be released. Additionally, because you provide no arguments explaining how the remaining information is confidential under section 1306(a)(1), none of the remaining information may be withheld on that basis.

Section 552.101 also encompasses the Medical Practices Act ("MPA"). Medical records are confidential under the MPA, subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the MPA provides in part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(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.

Id. § 159.002(a), (b), (c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). You claim some of the remaining submitted records are medical records subject to the MPA. Upon review, we marked the medical records in the remaining information, which may only be released in accordance with the MPA. However, you have not shown the remaining records you marked under the MPA constitute a communication between a physician and a patient, or contain the identity, diagnosis, evaluation, or treatment of a patient by a physician. Thus, these records do not constitute medical records for purposes of the MPA, and they may not be withheld on that basis.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. 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 demonstrated. *Id.* at 681-82. The remaining information includes patient lists for the specified laboratory that include some personal medical information. This office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision No. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we marked the private medical information in the remaining information. The department must withhold this information under section 552.101 in conjunction with common-law privacy.

In summary, the department must withhold the submitted CMS form numbers 1513, 670, 1539, 1557, 209, as well as the CLIA Survey Tracking Sheet and records retrieved from OSCAR and ASPEN federal databases, in their entirety under section 552.101 of the Government Code in conjunction with section 1306(a) of title 42 of the United States Code. The medical records we marked may only be released in accordance with the MPA. The department must withhold the private medical information we marked under section 552.101 in conjunction with common-law privacy. As you raise no other exceptions to disclosure, the information we marked 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,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/cc

Ref: ID# 359530

Enc. Submitted documents

cc: Requestor
(w/o enclosures)