



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 1, 2011

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

OR2011-09377

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# 422950 (DSHS File No. 18862/2011).

The Texas Department of State Health Services (the "department") received a request for information pertaining to specified dialysis facility, including 1) correspondence between the facility and the department concerning a specified corrective action plan ("CAP"); 2) official correspondence between the facility and the department concerning any previous CAPs; 3) a specified epidemiology report by the CDC; and 4) any CMS-2567 surveys and complaint investigations for the facility filed since March 1, 2009. You indicate the department will redact personal e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ You state the department has released some of the requested 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). The information at issue is

¹Open Records Decision No. 684 is a previous determination to all governmental bodies which authorizes the withholding of ten categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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. *See id.* § 552.302; *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). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third-party interests are at stake. Open Records Decision No. 150 at 2 (1977). Because section 552.101 can provide a compelling reason for non-disclosure under section 552.302, we will consider your arguments under that exception.

We next note that the submitted information contains Centers for Medicare and Medicaid Services (“CMS”) 2567 federal deficiency forms. 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; *see also* Open Records Decision No. 673 at 7-8 (2001) (listing elements of second type of previous determination under section 552.301(a)). You have marked some information in the federal form to be withheld pursuant to section 552.101 of the Government Code in conjunction with federal law in accordance with this previous determination. The department must withhold this marked information.

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, such as chapter 251 of the Health and Safety Code, which relates to end stage renal disease facilities. Section 251.015 provides:

- (a) A medical review board shall advise the [Texas Board of Health] 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 the 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.

Health & Safety Code § 251.015. Section 251.061 of the Health and Safety Code provides, in relevant 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.

Health & Safety Code § 251.061(g). You have marked information that you assert is confidential pursuant to section 251.015(c) of the Health and Safety Code. You represent that this information consists of quality of care information compiled by the department or the medical review board, or constitutes recommendations of the medical review board. As you note, the information at issue also contains a corrective action plan, which is not confidential under section 251.061(g). However, you state that the information marked in the corrective action plan 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, 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. We have marked additional information that must be withheld under this section.

In summary, the department must withhold the information marked by you in the federal CMS-2567 form under section 552.101 of the Government Code in conjunction with federal law in accordance with Open Records Letter No. 2005-04917. The department must also withhold the information marked under section 552.101 in conjunction with section 251.015(c) of the Health and Safety 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 "Laura Ream Lemus".

Laura Ream Lemus
Assistant Attorney General
Open Records Division

LRL/em

Ref: ID# 422950

Enc. Submitted documents

c: Requestor
(w/o enclosures)