ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 10, 2014

Mr. Brett Norbraten
Open Records Attorney
Texas Department of Aging and Disability Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2014-15967

Dear Mr. Norbraten:

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# 535679 (Department #2014SOLEG0109).

The Texas Department of Aging and Disability Services (the "department") received a request for information in the requestor's file pertaining to a specified complaint and investigation. You claim the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[1]

Initially, we note a portion of the submitted information includes pages from a federal form CMS-2567, Statement of Deficiencies and Plan of Correction. Federal regulations require the release of this form, 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

[1]We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

the report and to offer comments. *See* 42 C.F.R. §§ 401.126, .133; Open Records Decision No. 487 at 5-6 (1988).[2] In this instance, the submitted form reflects that the survey was completed on May 6, 2013 and the submitted information includes the provider's comments to the survey. Furthermore, we note that no portion of the submitted CMS-2567 form identifies any patients, physicians, other medical practitioners, or other individuals. Accordingly, the department must release the submitted CMS-2567 form to the requestor. *See Capital Sr. Mgmt. 1, Inc. v. Tex. Dep't. of Human Services.*, 132 S.W.3d 71, 79 (Tex. App.—Austin 2004, pet. denied) (rejecting argument inspection documents, including CMS- 2567 forms, created by either state or federal government, were based upon reports or proceedings of peer review committee; rather, such documents dealt with reports of abuse or neglect and nursing home's follow-up and were not product of committee's deliberative process). We also note the submitted information includes an "Informal Dispute Resolution" document submitted to the department by the provider in response to the deficiencies cited in the CMS-2567. We find the department must release this document, which constitutes the provider's comments to the survey, pursuant to section 488.325(a)(1) of title 42 of the Code of Federal Regulations. *See* 42 C.F.R. § 488.325(a)(1) (statements of deficiencies and providers' comments must be released to public); 42 U.S.C. § 1396r(g)(5). We note that information that is specifically made public by statute may not be withheld from the public under any of the exceptions to public disclosure under chapter 552 of the Government Code. *See, e.g.*, Open Records Decision Nos. 544 (1990), 378 (1983), 161 (1977), 146 (1976). Furthermore, state statutes are preempted by federal law to the extent they conflict with that federal law. *See English v. General Elec. Co.*, 496 U.S. 72, 79 (1990). Accordingly, the department must release the CMS-2567 form and the "Informal Dispute Resolution" document, which comprise Exhibit B, pursuant to federal law.

Next, we note the remaining information, which is found in Exhibit C, is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

> (a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:
>
> > (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

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[2]Section 401.133 of title 42 of the Code of Federal Regulations provides that "[t]he statement of deficiencies or report and any pertinent written statements furnished by the institution or facility on the statement of deficiencies shall be disclosed within 90 days following the completion of the survey by the State agency, but not to exceed 30 days following the receipt of the report by [the federal Centers for Medicare and Medicaid Services]." 42 C.F.R. § 401.133(a)(2).

Gov't Code § 552.022(a)(1). You inform us the remaining information is from a completed investigation. Accordingly, this information is subject to subsection 552.022(a)(1). The department must release the remaining information pursuant to subsection 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. *See id.* You seek to withhold this information under section 552.103 of the Government Code. However, section 552.103 is a discretionary exception and does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the remaining information may not be withheld under section 552.103 of the Government Code. However, as section 552.101 of the Government Code applies to confidential information, we will consider your argument under section 552.101.

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. Section 552.101 encompasses information made confidential by statute.

Medical records are confidential under the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part:

> (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.

Occ. Code § 159.002(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). Upon review, we find Exhibit C consists of medical records for the purposes of the MPA. Thus, the department must withhold Exhibit C under section 552.101 in conjunction with the MPA.

In summary, the department must release Exhibit B pursuant to federal law. The department must withhold Exhibit C under section 552.101 in conjunction with the MPA.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

Tamara H Holland

Tamara H. Holland
Assistant Attorney General
Open Records Division

THH/bhf

Ref: ID# 535679

Enc. Submitted documents

c: Requestor
(w/o enclosures)