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ATTORNEY GENERAL OF TEXAS

July 29, 2015

Mr. Timothy E. Bray
Deputy General Counsel
Office of General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2015-15413

Dear Mr. Bray:

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# 573720 (DSHS File No. 24276/2015).

The Texas Department of State Health Services (the "department") received a request for any investigation documents regarding the requestor's client. You state the department released some responsive information to the requestor, but claim portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code. With regard to the remaining submitted information, you state the department takes no position as to the confidentiality of this information, but you notified the Texas Department of Aging and Disability Services ("DADS") of the request for information and of DADS' right to submit arguments to this office against release of the information. We have received comments from DADS. *See* Gov't Code § 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released). We have considered the submitted comments and reviewed the submitted information.

Initially, we note, and you acknowledge, the department has not complied with the procedural requirements of section 552.301 of the Governmental Code in requesting this ruling. *See id.* § 552.301(b), (e). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in

the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *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, 381-82 (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). This statutory presumption can generally be overcome when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). You seek to withhold some of the responsive information under section 552.101 of the Government Code, which exempts from disclosure information made confidential by law, and we also understand DADS seeks to withhold some of the information under section 552.101 as well. Because section 552.101 can provide a compelling reason for non-disclosure, we will address the applicability of this exception to the submitted information.

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. Section 552.101 encompasses information made confidential by statute, such as the Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code, which governs release of medical records. Section 159.002 of the MPA provides, in relevant 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.

Occ. Code § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004. 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 assert the information you have submitted as Exhibit C constitutes medical records subject to the MPA. You state these

records were created by either a physician or someone under the supervision of a physician, and are maintained by a physician at a nursing facility. Upon review, we agree the information submitted as Exhibit C constitutes medical records subject to the MPA. Accordingly, the department must withhold the information submitted as Exhibit C under section 552.101 of the Government Code in conjunction with the MPA.

Next, we address the records submitted by the department as Exhibit D. You state this information was created or received by DADS as part of DADS' investigation into an incident that occurred at a nursing facility licensed by DADS. You further state DADS provided the information in Exhibit D to the department as part of DADS' complaint against the requestor's client. In its letter to this office, DADS asserts that the information at issue is protected from disclosure pursuant to an earlier ruling of this office, Open Records Letter No. 94-392 (1994). In that ruling addressed to the Texas Department of Human Services, this office concluded certain information was confidential and must be withheld pursuant to section 552.101 of the Government Code in conjunction with section 242.127 of the Health and Safety Code. With regard to the previous ruling, DADS states "the previous determination itself cites the portions of the Health and Safety Code pertaining to the confidentiality of facility investigative files." We note, however, the statute this office construed in Open Records Letter No. 94-392, section 242.127 of the Health and Safety Code, has been repealed and is no longer in effect. *See* Acts 2011, 82nd Leg., 1st C.S., ch. 7, § 1.05(m), 2011 Tex. Gen. Laws 317. Accordingly, Open Records Letter No. 94-392 may not be relied upon as a previous determination of this office. *See* Open Records Decision No. 673 (2001) (listing elements of second type of previous determination under section 552.301(a) of the Government Code).

We note, however, section 260A.008 of the Health and Safety Code now provides the following:

A report, record, or working paper used or developed in an investigation made under [chapter 260A] and the name, address, and phone number of any person making a report under [chapter 260A] are confidential and may be disclosed only for purposes consistent with rules adopted by the executive commissioner [of the Health and Human Services Commission].¹ The report, record, or working paper and the name, address, and phone number of the person making the report shall be disclosed to a law enforcement agency as necessary to permit the law enforcement agency to investigate a report of abuse, neglect, exploitation, or other complaint in accordance with Section 260A.017.

¹We note the Health and Human Services Commission directly oversees DADS.

Health & Safety Code § 260A.008. Chapter 260A pertains to reports of abuse, neglect, and exploitation of residents of certain facilities and investigations resulting from such reports. *See id.* §§ 260A.001-.018; *see also id.* §§ 260A.001(1) (defining “abuse” for purposes of chapter 260A), .001(5)(A) (defining “facility” to include “an institution as that term is defined by section 242.002”), .001(7) (defining “resident” for purposes of chapter 260A), .007 (concerning DADS investigation and report).²

As previously noted, you inform us the information in Exhibit D was created or received by DADS as part of DADS’ investigation into an incident that occurred at a nursing facility licensed by DADS. In addition, DADS indicates the information in Exhibit D consists of records from confidential facility investigative files. Further, DADS does not inform us the information at issue may be disclosed for any purpose consistent with rules adopted by the executive commissioner. Accordingly, upon review, we conclude the information submitted as Exhibit D is confidential pursuant to section 260A.008 of the Health and Safety Code, and the department must withhold it from the requestor pursuant to section 552.101 of the Government Code.

To summarize, the department must withhold the information submitted as Exhibit C under section 552.101 of the Government Code in conjunction with the MPA. The department must withhold the information submitted as Exhibit D under section 552.101 of the Government Code in conjunction with to section 260A.008 of the Health and Safety Code.

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

²Section 242.002(10) of the Health and Safety Code defines institution as an establishment that:

(A) furnishes, in one or more facilities, food and shelter to four or more persons who are unrelated to the proprietor of the establishment; and

(B) provides minor treatment under the direction and supervision of a physician licensed by the Texas Medical Board, or other services that meet some need beyond the basic provision of food, shelter, and laundry.

Id. § 242.002(10).

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/eb

Ref: ID# 573720

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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