



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 21, 2017

Ms. Mary I. Castillo
Public Information Coordinator
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2017-19023

Dear Ms. Castillo:

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# 671759 (DSHS File No. 27213).

The Texas Department of State Health Services (the "department") received a request for all information pertaining to specified entities during a certain time period, including all communications between a named individual and any department employee. You assert the submitted information is excepted from disclosure under section 552.110 of the Government Code. Further, you state release of the submitted information may implicate the proprietary interests of the Center for Medicare and Medicaid Services ("CMS"). Accordingly, you inform us you notified CMS of the request pursuant to section 552.304 of the Government Code.¹ *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have reviewed the submitted representative sample of information.²

¹As of the date of this letter, we have not received any comments from CMS.

²We assume 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.

Although the department argues the submitted information is excepted under section 552.110 of the Government Code, that exception is designed to protect the interests of third parties, not the interests of a governmental body. *See id.* § 552.110 (excepts from disclosure trade secret or commercial or financial information obtained from third party). Thus, we do not address the department argument under section 552.110.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”³ *Id.* § 552.101. This section encompasses information protected by other statutes, including section 1306(e) and (f) of title 42 of the United States Code, which provides:

(e) Public inspection

Notwithstanding any other provision of this section the Secretary [of Health and Human Services] shall make available to each State agency operating a program under subchapter XIX of this chapter and shall, subject to the limitations contained in subsection (f) of this section, make available for public inspection in readily accessible form and fashion, the following official reports (not including, however, references to any internal tolerance rules and practices that may be contained therein, internal working papers or other informal memoranda) dealing with the operation of the health programs established by subchapters XVIII and XIX of this chapter—

- (1) individual contractor performance reviews and other formal evaluations of the performance of carriers, intermediaries, and State agencies, including the reports of follow-up reviews;
- (2) comparative evaluations of the performance of such contractors, including comparisons of either overall performance or of any particular aspect of contractor operation; and
- (3) program validation survey reports and other formal evaluations of the performance of providers of services, including the reports of follow-up reviews, except that such

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

reports shall not identify individual patients, individual health care practitioners, or other individuals.

(f) Opportunity for review

No report described in subsection (e) of this section shall be made public by the Secretary or the State subchapter XIX agency until the contractor or provider of services whose performance is being evaluated has had a reasonable opportunity (not exceeding 60 days) to review such report and to offer comments pertinent parts of which may be incorporated in the public report; nor shall the Secretary be required to include in any such report information with respect to any deficiency (or improper practice or procedures) which is known by the Secretary to have been fully corrected, within 60 days of the date such deficiency was first brought to the attention of such contractor or provider of services, as the case may be.

42 U.S.C. § 1306(e)-(f). We note some of the submitted information consists of CMS Form 2567 Statement of Deficiencies and Plan of Correction. Federal regulations require the department to release completed CMS 2567 forms containing a statement of deficiencies and plan of correction, 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 id.*; 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 the entities at issue have not had a reasonable opportunity to review the CMS 2567 forms. Further, we note the submitted CMS 2567 forms do not contain the signature of the entities' representatives or any comments provided by the entities. Additionally, you do not inform us the federal and state conditions that would authorize the department to publicly release these forms have been met. Thus, we conclude the department must withhold the information we have marked under section 552.101 in conjunction with federal law. *See* 42 U.S.C. § 1306(e), (f); 42 C.F.R. §§ 401.126, .133. As no other exceptions to disclosure have been raised, the department must release the remaining information.

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,

A handwritten signature in black ink that reads "Cole Hutchison". The signature is written in a cursive style with a large, prominent "C" at the beginning.

Cole Hutchison
Assistant Attorney General
Open Records Division

CH/eb

Ref: ID# 671759

Enc. Submitted documents

c: Requestor
(w/o enclosures)