



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

February 6, 2019

Mr. Jonathan Miles  
Open Records Attorney  
Texas Health and Human Services Commission  
P.O. Box 13247  
Austin, Texas 78711-3247

OR2019-03471

Dear Mr. Miles:

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# 749354 (Ref. No. 16844).

The Texas Health and Human Services Commission (the "commission") received a request for specified forms and reports pertaining to a named mental health system. You state you will release some information. You claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code.<sup>1</sup> We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>2</sup>

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101.

---

<sup>1</sup>We note the commission failed to comply with section 552.301 of the Government Code in requesting a ruling; however, section 552.101 of the Government Code can provide a compelling reason to withhold information sufficient to overcome the presumption of openness caused by a failure to comply with section 552.301. *See* Gov't Code §§ 552.301, .302. Accordingly, we will consider the commission's argument.

<sup>2</sup>We 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 those records contain substantially different types of information than that submitted to this office.

Section 552.101 encompasses section 577.013(d) of the Health and Safety Code, which provides:

(d) All information and materials obtained or compiled by the [Texas Department of State Health Services (the "department")] in connection with a complaint and investigation concerning a mental hospital licensed under this chapter are confidential and not subject to disclosure, discovery, subpoena or other means of legal compulsion for their release to anyone other than the department or its employees or agents involved in the enforcement action except that this information may be disclosed to:

- (1) persons involved with the department in the enforcement action against the licensed mental hospital;
- (2) the licensed mental hospital that is the subject of the enforcement action, or the licensed mental hospital's authorized representative;
- (3) appropriate state or federal agencies that are authorized to inspect, survey, or investigate licensed mental hospital services;
- (4) law enforcement agencies; and
- (5) persons engaged in bona fide research, if all individual-identifying information and information identifying the licensed mental hospital has been deleted.

Health & Safety Code § 577.013(d). In addition, subsection (e) of section 577.013 provides that notice of the alleged violation against the licensed mental hospital, pleadings in the administrative hearing, and the final decision or order by the department are subject to disclosure under the Act.

The commission states some of the submitted information, which it has marked, was obtained or compiled by the department as a result of complaints or investigations concerning a mental health hospital licensed under chapter 577 that were made under section 577.013 of the Health and Safety Code. You inform us the program area that possessed the information at issue was formerly part of the department, but has been transferred to the commission. You state none of the documents at issue contain information that falls within the exceptions listed in subsections (d)(1) through (5) or subsection (e). Upon review, we find the commission must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 577.013(d) of the Health and Safety Code.

Section 552.101 of the Government Code also encompasses information protected by federal law. The submitted information contains Centers for Medicare and Medicaid Services

("CMS") 2567 federal deficiency forms. Federal regulations require the release of 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* 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). Because the signatures of the agency representatives on the forms indicate that the provider has had a reasonable opportunity to review the report and offer comments, the commission must withhold the information identifying individual patients, physicians, other medical practitioners, or other individuals, which you have marked and we have marked, from the submitted CMS 2567 forms under section 552.101 in conjunction with federal law.


In summary, the commission must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 577.013(d) of the Health and Safety Code. The commission must withhold the information you have marked and we have marked from the submitted CMS 2567 forms under section 552.101 of the Government Code in conjunction with federal law. The remaining information must be released.

Finally, you ask this office to issue previous determinations permitting the commission to withhold 1) certain information under section 552.101 of the Government Code in conjunction with section 577.013(d) of the Health and Safety Code and 2) certain identifying information in Form CMS-2567 under section 552.101 of the Government Code in conjunction with sections 401.126 and 401.133 of title 42 of the Code of Federal Regulations, without the necessity of requesting a decision under section 552.301 of the Government Code. *See* Gov't Code § 552.301(a) (allowing governmental body to withhold information subject to previous determination); 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 a previous determination has been recently issued by this office to the commission with regard to section 577.013(d) of the Health and Safety Code and refer it to Open Records Letter No. 2019-02164 (2019). Additionally, we decline to issue a previous determination with regard to sections 401.126 and 401.133 of title 42 of the Code of Federal Regulations at this time. Accordingly, 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](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, appearing to read "Michelle Garza", with a long horizontal line extending to the right.

Michelle Garza  
Assistant Attorney General  
Open Records Division

MG/mo

Ref: ID# 749354

Enc. Submitted documents

c: Requestor  
(w/o enclosures)