



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 8, 2019

Mr. Jonathan Miles
Open Records Attorney
Texas Health and Human Services Commission
P.O. Box 113247
Austin, Texas 78711-3247

OR2019-03804

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# 749585 (Ref. No. 17047).

The Texas Health and Human Services Commission (the "commission") received a request for information pertaining to a specified complaint and a specified report. You state the commission will release some of the requested information. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted representative sample of information.²

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses sections 401.126 and 401.133 of title 42 of the Code of Federal Regulations. Some of submitted information consists of CMS 2567 federal deficiency forms. You state that the information you indicated in the submitted information, which consists of identifying information of representatives of the facility, is

¹We note the commission did not comply with section 552.301 of the Government Code in requesting this decision. *See* Gov't Code § 552.301(b). Nonetheless, because section 552.101 of the Government Code can provide a compelling reason to overcome the presumption of openness, we will consider its applicability to the submitted information. *See id.* §§ 552.007, .302, .352.

²We 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.

confidential under sections 401.126 and 401.133. These federal regulations require the commission to release the Form CMS-2567 provided that (1) no information identifying individual patients, physicians, other 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 C.F.R. §§ 401.126, 401.133; Open Records Decision No. 487 (1988). We note that the signatures of the agency representatives on the Forms CMS-2567 indicate that the providers have had a reasonable opportunity to review the reports and offer comments. Accordingly, we find that the information you have indicated in the forms identifies individual patients, physicians, other medical practitioners or other individuals. Accordingly, we agree that the commission must withhold the information you indicated under section 552.101 in conjunction with sections 401.126 and 401.133 of title 42 of the Code of Federal Regulations.

Section 552.101 of the Government Code also encompasses chapter 241 of the Health and Safety Code, which governs the licensing of hospitals. Section 241.051 authorizes the commission to make any inspection, survey, or investigation that it considers necessary, and provides, in pertinent part:

(d) All information and materials obtained or compiled by the [Department of State Health Services (the “department”)³] in connection with a complaint and investigation concerning a hospital are confidential and not subject to disclosure under [the Act], 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 hospital;
- (2) the hospital that is the subject of the enforcement action, or the hospital’s authorized representative;
- (3) appropriate state or federal agencies that are authorized to inspect, survey, or investigate hospital services;
- (4) law enforcement agencies; and
- (5) persons engaged in bona fide research, if all individual-identifying and hospital-identifying information has been deleted.

(e) The following information is subject to disclosure in accordance with [the Act]:

³The Eighty-Fourth Legislature passed Senate Bill 200, which as of September 1, 2017, transferred the licensing and regulation of hospitals from the department to the commission.

- (1) a notice of alleged violation against the hospital, which notice shall include the provisions of law which the hospital is alleged to have violated, and a general statement of the nature of the alleged violation;
- (2) the pleadings in the administrative proceeding; and
- (3) a final decision or order by the department.

Health & Safety Code § 241.051(d), (e). You state the commission obtained and compiled the information you indicated in connection with the investigation of a complaint concerning a hospital. You also state none of the exceptions to confidentiality found in sections 241.051(d) or (e) apply to the information at issue. Based upon your representations and our review, we conclude the information you indicated is confidential and must be withheld under section 552.101 of the Government Code in conjunction with section 241.051(d) of the Health and Safety Code.

In summary, the commission must withhold the information you indicated 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. The commission must withhold the information you indicated under section 552.101 of the Government Code in conjunction with section 241.051(d) of the Health and Safety Code. The commission must release the remaining information.

Finally, you ask this office to issue a previous determination permitting the commission to withhold CMS-2567 forms 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 from this office. You also seek a previous determination permitting the commission to withhold information obtained in connection with the investigation of a complaint concerning a hospital under section 552.101 of the Government Code in conjunction with section 241.051(d) of the Health and Safety Code without the necessity of seeking a decision from this office. *See* Gov't Code § 552.301(a) (allowing governmental body to withhold information subject to previous determination); Open Records Decision No. 673 (2001). We decline to issue either such previous determination 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, 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 "Emily Kunst". The signature is written in a cursive style with a large, looped "E" and a long, sweeping "t".

Emily Kunst
Assistant Attorney General
Open Records Division

EK/gw

Ref: ID# 749585

Enc. Submitted documents

c: Requestor
(w/o enclosures)