



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 24, 2019

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

OR2019-26657

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# 787388 (HHSC No. 18979).

The Health and Human Services Commission (the "commission") received a request for information pertaining to a specified complaint. You claim the submitted information is exempted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed 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. This section encompasses information protected by other statutes, such as chapter 251 of the Health and Safety Code, which relates to end stage renal disease facilities. Section 251.015 provides as follows:

- (a) A medical review board shall advise the executive commissioner and the [Department of State Health Services (the "department")¹] on minimum standards and rules to be adopted by the executive commissioner under this chapter.
- (b) The medical review board shall review the information on quality of care provided in the annual report filed under Section 251.013(f)

¹You inform us the licensing and regulation of end stage renal disease facilities was transferred from the department to the commission.

and other appropriate information provided to or compiled by the department with respect to an end stage renal disease facility. Based on the review, the medical review board may advise the department about the quality of care provided by a facility and recommend an appropriate corrective action plan under Section 251.061 or other enforcement proceedings against the facility.

(c) Information concerning the quality of care provided to or compiled by the department or medical review board and a recommendation of the medical review board are confidential. The information or recommendation may not be made available for public inspection, is not subject to disclosure under [the Act], and is not subject to discovery, subpoena, or other compulsory legal process.

(d) The department, in its discretion, may release to a facility information relating to that facility that is made confidential under Subsection (c). Release of information to a facility under this subsection does not waive the confidentiality of that information or the privilege from compulsory legal process.

Health & Safety Code § 251.015. Section 251.061(g) of the Health and Safety Code reads as follows:

A corrective action plan is not confidential. Information contained in the plan may be excepted from required disclosure under [the Act], in accordance with that chapter or other applicable law.

Id. § 251.061(g). You assert the information you marked is confidential pursuant to section 251.015(c) of the Health and Safety Code. You state this information consists of quality of care information compiled by the commission. Based on your representations and our review of the information at issue, we agree some of the information at issue is confidential under section 251.015(c) of the Health and Safety Code. Therefore, the commission must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 251.015(c) of the Health and Safety Code. However, we find you failed to demonstrate the remaining information at issue constitutes quality of care information compiled by the commission or a recommendation of the medical review board. Accordingly, the commission must release the remaining information at issue to the requestor.

Section 552.101 of the Government Code also encompasses sections 401.126 and 401.133 of title 42 of the Code of Federal Regulations. The remaining information consists of a CMS 2567 federal deficiency form. You state that the remaining information is 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

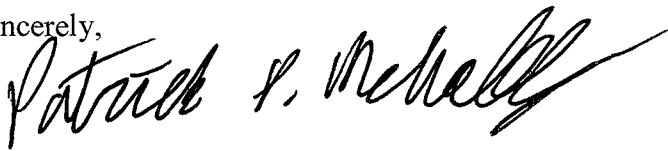
the report and to offer comments. *See* 42 C.F.R. §§ 401.126, 401.133; Open Records Decision No. 487 (1988). Upon review of the information at issue, the CMS 2567 form does not contain the signature of the facility's representative or any comments provided by the facility. You do not inform us that the commission sent this form to the facility for review and comments, that the investigated facility has had a reasonable opportunity to review this federal report, or any evidence that the federal and state conditions that would authorize the commission to publicly release this form have been met. Thus, we conclude that the commission must withhold the unsigned CMS form from the requestor 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. *See* 42 C.F.R. §§ 401.126, .133.

In summary, the commission must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 251.015(c) of the Health and Safety Code. 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 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Patrick P. Mehaffy
Assistant Attorney General
Open Records Division

PPM/jxd

Ref: ID# 787388

Enc. Submitted documents

c: Requestor
(w/o enclosures)