



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 11, 2020

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

OR2020-20061

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# 839361 (HHSC Reference# 22417).

The Texas Health and Human Services Commission (the "commission") received a request for a specified list of nursing facilities receiving certain assistance. You claim the submitted information is not subject to the Act pursuant to section 552.002(d) of the Government Code. Alternatively, you claim the submitted information is excepted from disclosure under section 552.101 of the Government Code.¹ We have considered the submitted arguments and reviewed the submitted information.

Initially, we address your argument the submitted information is not subject to the Act pursuant to section 552.002(d) of the Government Code. The Act applies to "public information," which is defined in section 552.002(a) of the Government Code as "information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business[.]" Gov't Code § 552.002(a)(1). However, "protected health information" as defined by section 181.006 of the Health and Safety Code is expressly excluded from the Act's definition of "public information." *See id.* § 552.002(d). Section 181.006 of the Health and Safety Code states:

¹ We note the commission did not comply with section 552.301 of the Government Code in requesting a ruling from this office. *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 which is subject to the Act. *See id.* §§ 552.007, .302, .352.

[F]or a covered entity that is a governmental unit, an individual's protected health information:

(1) includes any information that reflects that an individual received health care from the covered entity[.]

Health & Safety Code § 181.006(1). Section 181.001(b)(2)(A) defines "covered entity," in part, as any person who:

for commercial, financial, or professional gain, monetary fees, or dues, or on a cooperative, nonprofit, or pro bono basis, engages, in whole or in part, and with real or constructive knowledge, in the practice of assembling, collecting, analyzing, using, evaluating, storing, or transmitting protected health information. The term includes a business associate, health care payer, governmental unit, information or computer management entity, school, health researcher, health care facility, clinic, health care provider, or person who maintains an Internet site[.]

Id. § 181.001(b)(2)(A). Section 181.001 states, "[u]nless otherwise defined in this chapter, each term that is used in this chapter has the meaning assigned by the Health Insurance Portability and Accountability Act and Privacy Standards [(“HIPAA”).]” *Id.* § 181.001(a). Accordingly, as chapter 181 does not define “protected health information,” we turn to HIPAA’s definition of the term. HIPAA defines “protected health information” as individually identifiable health information that is transmitted or maintained in electronic media or any other form or medium. *See* 45 C.F.R. § 160.103. HIPAA defines “individually identifiable health information” as information that is a subset of health information, including demographic information collected from an individual, and:

(1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and

(2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and

(i) That identifies the individual; or

(ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

Id. Although you assert the commission is a covered entity, you have failed to demonstrate the submitted information consists of protected health information. Accordingly, we find the submitted information is subject to the Act, and the commission must release it unless it falls within an exception to public disclosure under the Act. *See* Gov’t Code §§ 552.006, .021, .301, .302.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This section encompasses information made confidential by section 247.051 of the Health & Safety Code. Section 247.051 states, in relevant part:

(a) The executive commissioner [of the commission] by rule shall establish an informal dispute resolution process to address disputes between an assisted living facility and the commission concerning a statement of violations prepared by the commission in accordance with this section. . . .

. . .

(d) A statement of violations prepared by the commission following a survey, inspection, investigation, or visit is confidential pending the outcome of the informal dispute resolution process. Information concerning the outcome of a survey, inspection, investigation, or visit may be posted on any website maintained by the commission while the dispute is pending if the posting clearly notes each finding that is in dispute.

Health & Safety Code § 247.051(a), (d). Although you assert section 247.051(d), you have failed to demonstrate the submitted information consists of a statement of violations that is the subject of a pending informal dispute resolution process. Accordingly, the commission may not withhold the submitted information under section 552.101 of the Government Code on this basis.

Section 552.101 of the Government Code also encompasses section 260A.008 of the Health and Safety Code. Section 260A.008 provides, in relevant part:

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 commission].

Id. § 260A.008. Although you generally assert section 260A.008, you have failed to demonstrate the submitted information consists of a report, record, or working paper used or developed in an investigation made under chapter 260A or the name, address, and phone number of any person make a report under chapter 260A. Accordingly, the commission may not withhold the submitted information under section 552.101 of the Government Code on this basis. The commission must release the submitted 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,

Kelly McWethy
Assistant Attorney General
Open Records Division

KM/be

Ref: ID# 839361

Enc. Submitted documents

c: Requestor
(w/o enclosures)