



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 6, 2022

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

OR2022-13048

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# 946063 (HHSC Ref. No. A02032022.0450007).

The Texas Health and Human Services Commission (the "commission") received a request for information pertaining to a specified investigation. The commission claims the submitted information is excepted from disclosure under section 552.101 of the Government Code.¹ We have considered the claimed exception and reviewed the submitted information.

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. Section 552.101 encompasses sections 401.126 and 401.133 of title 42 of the Code of Federal Regulations. The information at issue consists of a CMS-2567 federal deficiency form. The commission claims this information is confidential under sections 401.126 and 401.133. These federal regulations require the commission to release the CMS-2567 form 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, .133; Open Records Decision No. 487 (1988). The CMS-2567 form does not contain the signature of the

¹ We note, and the commission acknowledges, 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), (e). Nonetheless, because the exception the commission claims 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.

hospital's representative or any comments provided by the hospital. The commission does not inform us that the commission sent this form to the hospital for review and comments, that the investigated hospital 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 the commission must withhold the information it marked 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.

Section 552.101 also 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 the information at issue was obtained or compiled by the commission as a result of a complaint or investigation concerning a mental health hospital licensed under chapter 577 that was made under section 577.013 of the Health and Safety Code. The commission informs us the program area that possessed the information at issue was formerly part of the department but has been transferred to the commission. The commission states the documents at issue do not contain any information that falls within the exceptions listed in subsections (d)(1) through (5) or (e)(1) through (3). Upon review,

we find the commission must withhold the information it marked under section 552.101 of the Government Code in conjunction with section 577.013(d) of the Health and Safety Code.

In summary, the commission must withhold the information it marked 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 it marked under section 552.101 of the Government Code in conjunction with section 577.013(d) of the Health and Safety Code.

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,

Katie Stallcup
Assistant Attorney General
Open Records Division

AKS/be

Ref: ID# 946063

Enc. Submitted documents

c: Requestor
(w/o enclosures)