



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

October 4, 2022

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

OR2022-30589

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# 976120 (HHSC No. A07272022.0450006).

The Health and Human Services Commission (the "commission") received a request for information pertaining to a specified complaint. You state the commission will release some information. You claim the submitted information is excepted 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 excepts 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 sections 401.126 and 401.133 of title 42 of the Code of Federal Regulations. You state the submitted CMS 2567 federal deficiency form is confidential. Sections 401.126 and 401.133 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 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 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”)]<sup>1</sup> 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) 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 marked information that you assert is confidential pursuant to section 251.015(c) of the Health and Safety Code. You represent this information consists of quality of care information compiled by the commission. We note the information at issue includes a corrective action plan that is not confidential under section 251.061(g).

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

However, you state the information marked in the corrective action plan also constitutes confidential quality of care information subject to section 251.015(c). Based on your representations and our review of the information at issue, we agree this information is confidential under section 251.015(c) of the Health and Safety Code. Therefore, the commission must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 251.015(c) of the Health and Safety Code.<sup>1</sup>

In summary, the commission must withhold the unsigned CMS form you 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 you 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 release the remaining information.

Finally, you ask this office to issue previous determinations permitting the commission to withhold 1) CMS 2567 forms under section 552.101 of the Government Code in conjunction with section 401.133(a)(2) of title 42 of the Code of Federal Regulations, and 2) certain information under section 552.101 of the Government Code in conjunction with section 251.015(c) of the Health and Safety Code, 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 decline to issue such previous determinations 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 <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,

Michelle Garza  
Assistant Attorney General  
Open Records Division

MRG/eb

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<sup>1</sup> As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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Enc. Submitted documents

c: Requestor  
(w/o enclosures)