



The Freedom of Information Foundation of Texas

Protecting the public's right to know for more than 30 years

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April 28, 2020

Phil Wilson
Executive Commissioner
Texas Health and Human Services Commission
4900 N. Lamar Blvd.
Austin, Texas 78751

Dear Mr. Wilson,

I write as the executive director of the Freedom of Information Foundation of Texas (FOIFT), on behalf of our organization and its Board of Directors, to request that HHSC release the names and locations of nursing home facilities where cases and/or deaths from COVID-19 have been confirmed.

We understand that HHSC has received multiple requests from many persons and entities for this information and is refusing to release it on the ground that doing so would be a prohibited release of protected health information (PHI). With respect, FOIFT believes HHSC's position is in error.

HHSC has cited the federal HIPAA statute as grounds for not releasing the requested information. But HIPAA itself does not provide grounds for withholding information requested under the Texas Public Information Act (TPIA). *See, e.g., Abbott v. Texas Dep't of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App. – Austin 2006, no pet.).

The Texas Medical Privacy Act does exempt PHI, as defined by HIPAA, from disclosure under the TPIA. Tex. Health & Safety Code §§ 181.001, 181.006. But the requests at issue do not call for disclosure of PHI.

FOIFT does not dispute that the *actual identity* of a person diagnosed with a particular illness is typically protected PHI. It is equally true that in some very limited circumstances – for instance, for a person who lives alone – there may be a reasonable basis to believe that disclosure of an address may lead to the disclosure of PHI.

However, the requests at issue simply seek information that will enable the public to know what *facilities* have had confirmed COVID-19 cases. These facilities house dozens or hundreds of persons. A facility's address is information "with respect to which there is no reasonable basis to believe that the information can be used to identify an individual," and thus is not PHI. 45 CFR § 164.514(a). *See also* Tex. Atty. Gen. Op. OR2001-2350 (finding that a failure to explain how general information could possibly identify an individual barred a state agency

from relying on a medical privacy statute to withhold information requested under the TPIA); Tex. Atty. Gen. Op. OR2020-05193 (rejecting argument that identification of state psychiatric hospitals at which minors had died would constitute the release of protected information regarding patients' identities).

HHSC has cited several provisions of Chapter 242, subchapter B, of the Health & Safety Code – covering licensing, fees, and inspections of nursing facilities – in explaining the refusal to produce the requested information. These provisions have no relevance to whether the information must be disclosed under the TPIA. Section 242.042 relates to posting requirements. Section 242.043(e)(1) simply provides that photographs taken during an inspection should not reveal residents' identities. Similarly, Section 242.049 provides that quality improvement reports should not identify residents. None of these statutes provides grounds for withholding the requested information.

As discussed above, because HIPAA itself does not operate as an exception to the TPIA, federal regulations promulgated under HIPAA, found in Chapter 45 of the Code of Federal Regulations (CFR), likewise do not constitute TPIA exceptions. Further, the provision cited by HHSC in response to these requests – 45 CFR 164.514(b) – is not relevant. That regulation provides for mechanisms to de-identify information that otherwise would be PHI. Thus, for the regulation to apply, the requested information must first be PHI. As shown above, that is not the case here; no personally identifying information has been requested.

There is no doubt that HHSC is facing an unprecedented situation, but it may not respond by taking a position without legal precedent in withholding what is clearly information that must be released to the public. Aside from the lack of legal authority for HHSC's refusal to release the requested information, HHSC must not pretend that the public cannot be trusted to govern itself when provided with accurate highly relevant information crucially important to the real time protection of the health of Texas citizens and their families and to the real time public oversight of the proper and effective operation of our governmental bodies. Time is of the essence. FOIFT respectfully requests that HHSC fulfill its duties to Texas citizens and release the requested information now.

Sincerely,



Kelley Shannon

Executive Director

Freedom of Information Foundation of Texas

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