



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

July 6, 2020

Mr. Carey Smith  
Senior Counsel  
Texas Health and Human Services Commission  
P.O. Box 13247  
Austin, Texas 78711-3247

OR2020-16956

Dear Mr. Smith:

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# 834048 (HHSC Reference Nos. 22048, 22054, 22081, 22098, 22152, 22158, 22169, 22174, 22183, 22187, 22193, 22195, 22210, 22212, 22213, 22217, 22218, 22224, 22229, 22272, 22283, 22288, 22295, 22316, 22367, 22397, 22405, 22424, and 22433).

The Texas Health and Human Services Commission (the "commission") received numerous requests for information regarding COVID-19 cases in nursing homes, assisted living facilities, state facilities, and child care operations. You state the commission has released some information. You claim the remaining requested information is either not subject to the Act or excepted from disclosure under section 552.101 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.<sup>1</sup> We also have received and considered comments from two of the requestors and from a representative of two other requestors. *See Gov't Code* § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released).

Initially, we address your argument the remaining requested information does not consist of public information 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

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<sup>1</sup>We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See Open Records Decision* Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

maintained under a law or ordinance or in connection with the transaction of official business[.]” *Id.* § 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 provides, in relevant part:

[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 remaining requested information consists of protected health information. Accordingly, we find the remaining requested 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 242.049 of the Health and Safety Code. Section 242.049 states, in relevant part:

- (a) The [Department of Aging and Disability Services (the "department")]<sup>2</sup> may evaluate data for quality of care in nursing facilities.
- (b) The department may gather data on a form or forms to be provided by the department to improve the quality of care in nursing facilities and may provide information to nursing facilities which will allow them to improve and maintain the quality of care which they provide. Data referred to in this section can include information compiled from documents otherwise available under [the Act] including but not limited to individual survey reports and investigation reports.
- (c) All licensed nursing facilities in the state may be required to submit information designated by the department as necessary to improve the quality of care in nursing facilities.
- (d) The collection, compilation, and analysis of the information and any reports produced from these sources shall be done in a manner that protects the privacy of any individual about whom information is given and is explicitly confidential. The department shall protect and maintain the confidentiality of the information. The information received by the department, any information compiled as a result of review of internal agency documents, and any reports, compilations, and analyses produced from these sources shall not be available for public inspection or disclosure, nor are these sources public records within the meaning of [the Act]. The information and any compilations, reports, or analyses produced from the information shall not be subject to discovery, subpoena, or other means of legal compulsion for release to any person or entity except as provided in this section and shall not be admissible in any civil, administrative, or criminal proceeding. This privilege shall be recognized by Rules 501 and 502 of the Texas Rules of Evidence.

Health & Safety Code § 242.049(a)-(d). Although you assert section 242.049(d), you have failed to demonstrate the remaining requested information consists of quality improvement records made confidential by this statute. According, the commission may not withhold

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<sup>2</sup>The Eighty-Fourth Legislature passed Senate Bill 200, which as of September 1, 2017, transferred the functions of the department to the commission. *See* Gov't Code §§ 531.02001, .0202.



the remaining requested information under section 552.101 of the Government Code on this basis.

Section 552.101 of the Government Code also encompasses 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 remaining requested 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 remaining requested 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].

Health & Safety Code § 260A.008. Although you generally assert section 260A.008, you have failed to demonstrate the remaining requested 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 remaining requested information under section 552.101 of the Government Code on this basis.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code §§ 151.001-168.202. Section 159.002 of the MPA provides in relevant part the following:



(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

*Id.* § 159.002(b). Information subject to the MPA includes both medical records and information obtained from those records. *See id.* §§ 159.002, .004. This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 at 3-4 (1988), 370 at 2 (1983), 343 at 1 (1982). Upon review, we find the commission has failed to demonstrate the remaining requested information consists of medical records or information obtained from medical records for purposes of the MPA. According, the commission may not withhold the remaining requested information under section 552.101 of the Government Code on this basis.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate or embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Upon review, we find the information we marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the commission must withhold the information we marked under section 552.101 of the Government Code in conjunction with common law privacy. The commission must release the remaining requested 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,

Sean Nottingham  
Assistant Attorney General  
Open Records Division

SN/rm