



TEXAS
Health and Human
Services

Texas Department of State Health Services

John Hellerstedt, M.D.
Commissioner

December 14, 2020

VIA INTERAGENCY MAIL

Mr. Justin Gordon
Office of the Attorney General
Open Records Division
Price Daniel, Sr., State Office Building
P.O. Box 12548
Austin, TX 78711-2548

Re: DSHS ORR Reference Nos. 10021, 10022

Dear Mr. Gordon:

On November 30, 2020 the Texas Department of State Health Services ("DSHS") received two open records requests seeking information pertaining to 1. critical staffing shortages collected by DSHS from each hospital as part of the COVID19 Hospital Data Points and 2. PPE supplies collected by DSHS as part of the COVID19 Hospital Data Points. Copies of the requests are enclosed as **Exhibit A**.

While DSHS takes no position as to whether the information at issue is excepted from public disclosure under Chapter 552 of the Government Code, we believe that the release of the requested information may implicate the rights of third parties. Accordingly, we have notified the third parties of the requests and of their respective rights to submit comments to the Attorney General. Please use DSHS Reference Nos. 10021 and 10022 when discussing this request for ruling.

Sincerely,

A handwritten signature in black ink that reads "Jonathan Miles".

Jonathan Miles
Open Records Attorney

encl: Exhibit A - Open Records Request
mc: **Requestor (Exhibit A)**

Carla Astudillo
December 14, 2020
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Carla Astudillo
Texas Tribune
VIA EMAIL: castudillo@texastribune.org

Third Parties (Exhibit A)

477 Hospital organizations notified.
Please see spreadsheet



December 14, 2020

Re: Public Information Act notification of request for confidential and/or proprietary information: DSHS ORR Nos. 20201201-10021 and 20201201-10022

Dear Third Parties:

The Department of State Health Services has received two open records seeking 1. critical staffing shortages collected by DSHS from each hospital as part of the COVID19 Hospital Data Points and 2. PPE supplies collected by DSHS as part of the COVID19 Hospital Data Points. We are required to provide notice of the open records request to the supplier of the information to enable the supplier to claim an exception. The following text is a form notification prescribed by the Office of the Attorney General for the State of Texas pursuant to Texas Government Code section 552.305(d):

We have received a formal request to inspect or copy some of our files. These files include information we received from you or from your company. The attorney general's office is reviewing this matter and they will issue a decision on whether Texas law requires us to release your papers. Generally, the law requires that we release all requested information, but there are exceptions. As described below, you have the right to object to the release of your papers, to submit briefing to the attorney general, and to argue that one or more exceptions apply to your papers. If you want to file any objections and briefing, you must do so immediately. If the attorney general's office does not receive your objections and briefing within 10 business days, it could conclude that no exception applies and they may rule that your papers must be released.

The requested information may be excepted from disclosure by sections 552.101, 552.104, 552.110, 552.113, or 552.131 of the Texas Public Information Act (the "Act"), chapter 552 of the Government Code. A copy of the request for information is enclosed **Exhibit A** for your inspection. Pursuant to section 552.301 of the Government Code, we are seeking an attorney general decision to determine whether we must release the requested information. See **Exhibit B**. We are providing the Attorney General with a

copy of the request for information and a copy of the requested information, along with other materials required by the Act.

Under the Act, all information held by governmental bodies is open to public disclosure unless it falls within one of the Act's specific exceptions to disclosure. The Act places on the custodian of records the burden of demonstrating that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). However, in cases such as this one, where a third party's property interest is implicated, the governmental body may rely on the third party to establish that the information should be withheld under applicable exceptions intended to protect those interests. Gov't Code § 552.305; Open Records Decision No. 542 (1990).

If you wish to claim that the requested information is protected proprietary information, you have the right to submit additional information or legal briefing to the attorney general. You are not required to submit briefing to the attorney general, but if you decide not to submit briefing, the Office of the Attorney General will presume that you have no property interest in the requested information. In other words, your failure to take timely action may result in the requested information being released to the public. If you decide to submit briefing, **you must do so not later than the tenth business day after the date you receive this notice**.

If you submit briefing to the attorney general, you must:

- (1) identify the legal exceptions that apply;
- (2) identify the specific parts of each document that are covered by each exception;
and
- (3) explain why each exception applies.

See Tex. Gov't Code § 552.305(d).

A claim that an exception applies without further explanation will not suffice. Attorney General Opinion H-436. You may contact this office to review the information at issue in order to make your arguments. The Act does not require the attorney general to raise and consider exceptions that have not been raised. The attorney general is generally required to issue a decision within 45 working days. **You must send your written comments to the Office of the Attorney General at the following address:**

**Office of the Attorney General
Open Records Division**

**P.O. Box 12548
Austin, Texas 78711-2548**

In addition, you are required to provide the requestor with a copy of your communication to the Office of the Attorney General. Tex. Gov't Code § 552.305(e). You may redact the requestor's copy of your communication to the extent it contains the substance of the requested information. Tex. Gov't Code §552.305(e).

Commonly Raised Exceptions

In order for a governmental body to withhold requested information, specific tests or factors for the applicability of a claimed exception must be met. Failure to meet these tests may result in the release of requested information. We have listed the most commonly-claimed exceptions in the Government Code concerning proprietary information and the leading cases or decisions discussing them. This listing is not intended to limit any exceptions or statutes you may raise.

Section 552.101: Information Made Confidential by Law

Open Records Decision No. 652 (1997).

Section 552.104: Confidentiality of Information Relating to Competition

Boeing Co. v. Paxton, 466 S.W. 3d 831 (Tex. 2015).

Section 552.110: Trade Secrets and Commercial or Financial Information

Trade Secrets:

Hyde Corp. v. Huffines, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958).

Open Records Decision No. 552 (1990).

Commercial or Financial Information:

The commercial or financial information prong of section 552.110 was amended by the Seventy-sixth Texas Legislature. The amendment became effective September 1, 1999. At the time of publication of this form, there were no cases or opinions construing the amended provision.

Birnbaum v. Alliance of Am. Insurers, 994 S.W.2d 766 (Tex. App.--Austin 1999, pet. filed) (construing previous version of section 552.110); *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 639 (1996).

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Section 552.113: Geological or Geophysical Information

Open Records Decision No. 627 (1994).

Section 552.131: Economic Development Negotiation Information

If you have questions about this notice or release of information under the Act, please refer to the Public Information Handbook published by the Office of the Attorney General, or contact the attorney general's Open Government Hotline at (512) 478-OPEN (6736) or toll-free at (877) 673-6839 (877-OPEN TEX). To obtain copies of the Public Information Handbook or Attorney General Opinions, please go to the attorney general's website at www.oag.state.tx.us or call the attorney general's Opinions Library at (512) 936-1730.

Sincerely,



Jonathan Miles
HHSC Open Records Attorney

Enc: Copy of request for information
Request for open records decision

mc: Office of the Attorney General
Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548