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August 22, 1990

Mr. George E. Chapman
Executive Director
Workers' Compensation Commission
1st Floor, 200 East Riverside
Austin, Texas 78704-1287

OR90-371

Dear Mr. Chapman:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 9053.

The Workers' Compensation Commission (the commission) received an open records request for what constitutes the "base chagemaster" for six Houston area hospitals. The chagemasters consist of lists of all goods and services provided by the hospitals and the prices for those goods and services. You contend that this information comes under the protection of sections 3(a)(1), 3(a)(4), and 3(a)(10) of the Open Records Act.

Section 3(a)(4) of the Open Records Act protects from required public disclosure "information which, if released, would give advantage to competitors or bidders." Section 3(a)(4) is generally invoked to except information submitted to a governmental body as part of a bid or similar proposal. See, e.g., Open Records Decision No. 463 (1987). Section 3(a)(4) was not, however, intended to protect business entities that are in competition in the private sector. See Open Records Decision No. 541 (1990). The primary purpose of section 3(a)(4) is to protect the government's purchasing interests by preventing a competitor or bidder from gaining an unfair advantage over other competitors or bidders. You have demonstrated no ongoing competitive situation to which the information at issue relates. Consequently, section 3(a)(4) does not apply to the requested information.

Both section 3(a)(1) and section 3(a)(10) protect information deemed confidential by law. Section 3(a)(10) of

the Open Records Act excepts from required public disclosure:

trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

This section protects two categories of information: 1) trade secrets and 2) commercial or financial information. Although the concept of trade secrets often encompasses information pertaining to business sales, statistics, inventories, and customer lists, see, e.g. Open Records Decision Nos. 255 (1980); 107 (1975), pricing information is generally not considered a trade secret. See, e.g. Open Records Decision No. 306 (1982).

As noted above, however, section 3(a)(10) also protects "commercial or financial information obtained from a person." The requested material is clearly commercial information. To fall within section 3(a)(10), however, it must also be "privileged or confidential by statute or judicial decision."

Section 3(a)(10) is patterned after section 552(b)(4) of the federal Freedom of Information Act, 5 U.S.C. section 552 et. seq. Open Records Decision Nos. 309 (1982); 107 (1975). The test for determining whether commercial or financial information is confidential within the meaning of section 552(b)(4) is as follows:

a commercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: 1) to impair the Government's ability to obtain necessary information in the future; or 2) to cause substantial harm to the competitive position of the person from whom the information was obtained. (Emphasis added.)

National Parks and Conservation Association v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). The same test is employed under section 3(a)(10). See Open Records Decision No. 541 (1990).

Although you assert that disclosure of the chagemasters to the public will impair the commission's ability to obtain similar information in the future, you inform us that the chagemaster is submitted pursuant to a

state regulation that requires hospitals to submit specified information to the commission. See 28 T.A.C. § 42.110(g). Consequently, the first test is not applicable in this instance. If the second test is satisfied, the information may be withheld. The courts have held that

in order to show the likelihood of substantial competitive harm, it is not necessary to show actual competitive harm. Actual competition and the likelihood of substantial competitive injury is [sic] all that need be shown. (Emphasis added.)

Gulf & Western Industries v. United States, 615 F.2d 527, 530 D.C. Cir. 1979); see also National Parks and Conservation Association v. Kleppe, 547 F.2d 673, 679 (D.C. Cir. 1976). "Conclusory and generalized allegations" of competitive harm have, however, been held insufficient to satisfy the requirements for non-disclosure. See National Parks and Conservation Association v. Kleppe, 547 F.2d at 680.

Your letter does not specify the nature of the competition between hospitals, the relevance of price to such competition, or how release of the chagemasters to the public would cause "substantial competitive injury" to hospitals that submit information to the commission. It is also unclear for whom price becomes a consideration when seeking health care services and whether price influences the decision to engage the services of a particular hospital.

One factor to consider when determining whether information may be protected from disclosure as commercial or financial information is whether the information is customarily released to the public by the person from whom it was obtained. See National Parks and Conservation Association v. Morton, 498 F.2d 765, 767, 770 (D.C. Cir. 1974). A letter from the Texas Hospital Association states that chagemaster information is used in contract negotiations with insurance providers. This claim, as well as the claim that chagemasters are trade secrets, implies that the pricing information contained in the chagemasters is not disclosed to the public by the hospitals. But it is not clear from your letter or the letter of the hospital association whether this is indeed the case or how chagemaster information differs from pricing information generally available to the public.

In light of these ambiguities, we are unable to determine whether any of the hospitals from whom the

requested information was obtained will suffer substantial competitive injury from the public disclosure of the chagemasters. And in consideration of the property interest the hospitals may have in the requested information, we will defer rendering our decision until your office and the hospitals have had an opportunity to address the issues just described. We ask that you supply us with information addressing these issues within twenty (20) days from the receipt of this letter. We are allowing this time so that your office may solicit the input of the hospitals that supply the chagemasters to the commission. If we have not received the additional information at the end of the thirty days, the chagemasters will be presumed to be public. Thank you for your assistance in this matter.

If you have any questions regarding this letter, please refer to OR90-371.

Yours very truly,



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Opinion Committee

SA/RWP/le

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ID# 9497

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