



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

July 5, 1996

Ms. Christine T. Rodriguez  
Staff Attorney  
Legal and Compliance, MC 110-1A  
Texas Department of Insurance  
P.O. Box 149104  
Austin, Texas 78714-9104

OR96-1077

Dear Ms. Rodriguez:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 39994.

The Texas Department of Insurance (the "department") received a request for information relating to complaints against several health maintenance organizations and one life insurance company. The department has provided some of this information to the requestor. You contend that the remaining information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. You also note that some of the requested information may implicate the proprietary interests of NYLCare Health Plans of the Gulf Coast, Inc. (formerly Sanus Health Plan, Inc.) and NYLCare Health Plans of the Southwest, Inc. (formerly Sanus Texas Health Plan, Inc.) (collectively "NYLCare"). You have submitted representative samples of the requested information to this office for review.<sup>1</sup>

Pursuant to section 552.305 of the Government Code, we notified NYLCare of the request for information and of its opportunity to claim that information in which it has proprietary interests is excepted from disclosure. NYLCare responded by claiming that

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<sup>1</sup>We assume that 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 that those records contain substantially different types of information than that submitted to this office.

the NYLCare documents that the department has identified as being subject to the request are not in fact responsive to the request. In the alternative, NYLCare claims NYLCare documents are exempted from disclosure under sections 552.101 and 552.110 of the Government Code.

First, we address NYLCare's claim that the NYLCare documents submitted to us for review by the department are not in fact responsive to the request for information. We note that the request for information is broad in scope. Employees of the department, in good faith,<sup>2</sup> identified the NYLCare documents as responsive to the request. Whether the documents fall within the scope of the request is a disputed question of fact. Fact issues are not resolvable in the open records process, and therefore, we must rely on the representation of the governmental body requesting our opinion. See Open Records Decision Nos. 554 (1990), 552 (1990). In this case, we rely on the department's determination that the documents are responsive to the request for information.

The department claims that much of the information submitted to us for review is exempted from disclosure under section 552.103 of the Government Code. To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 551 (1990). A contested case under the Administrative Procedure Act is litigation for purposes of section 552.103(a). Open Records Decision No. 588 (1991). Litigation cannot be regarded as "reasonably anticipated" unless there is more than a "mere chance" of it--unless, in other words, we have concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision Nos. 452 (1986), 331 (1982), 328 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision Nos. 452 (1986), 350 (1982).

You state that some of the information at issue relates to the department's ongoing investigation of two entities for alleged violations of state insurance laws. You further state that the department anticipates that "this investigation will culminate in an administrative contested case" against the entities being investigated. Under these circumstances, we conclude that the department reasonably anticipates litigation, and some of the information at issue relates to the anticipated litigation. Pursuant to section 552.103, the department may withhold from disclosure all information for which it has claimed section 552.103.<sup>3</sup>

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<sup>2</sup>The Open Records Act requires the department to make a good faith effort to relate a request to information which it holds. Open Records Decision No. 561 (1990) at 8.

<sup>3</sup>We note that once all parties to litigation have gained access to the information at issue, through discovery or otherwise, section 552.103(a) is no longer applicable. Open Records Decisions Nos. 551 (1990), 454 (1986). Further, once the litigation has concluded, section 552.103(a) is no longer applicable. Open Records Decision No. 350 (1982).

The department also contends that one intraagency memorandum dated January 25, 1996 and its attachments are excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) excepts from disclosure information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 (1990) at 5. Client communications to the attorney regarding the subject matter of the representation are privileged. *Id.* at 3. The memorandum at issue, sent from a non-legal division of the department to the department's legal division, consists of a client's confidential communications to its attorney regarding the subject matter of representation. Therefore, the department may withhold the memorandum dated January 25, 1996 and its attachments from disclosure under section 552.107(1).<sup>4</sup>

Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Both the department and NYLCare contend that the consumer medical information contained in the requested documents is excepted from disclosure under section 552.101 either as information made confidential by the Medical Practice Act (the "MPA"), article 4495b, V.T.C.S., or by the doctrine of common-law privacy. Section 5.08(b) of the MPA provides as follows:

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are *created or maintained by a physician* are confidential and privileged and may not be disclosed except as provided in this section. [Emphasis added.]

Some of the documents submitted to this office are medical records that were created or are being maintained by consumers' physicians. These documents are confidential and may be released only in accordance with the MPA. Open Records Decision No. 598 (1991). *See* § 5.08(c), (j). Some of the documents submitted to this office contain medical information but are not covered by the MPA, because they were not created by nor are they being maintained by a physician. We must consider whether this medical information is protected by common-law privacy.

Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. *See*

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<sup>4</sup>We have concluded that you may withhold all documents for which you claimed section 552.111 under either section 552.103 or section 552.107. Therefore, we need not address your section 552.111 claim.

*Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). While common-law privacy may protect an individual's medical history, it does not protect all medically-related information. See Open Records Decision No. 478 (1987). Individual determinations are required. See Open Records Decision No. 370 (1983). This office has determined that common-law privacy protects the following information: the kinds of prescription drugs a person is taking, Open Records Decision No. 455 (1987); the results of mandatory urine testing, *id.*; illnesses, operations, and physical handicaps of applicants, *id.*; the fact that a person attempted suicide, Open Records Decision No. 422 (1984); the names of parents of victims of sudden infant death syndrome, Attorney General Opinion JM-81 (1983); and information regarding drug overdoses, acute alcohol intoxication, obstetrical/gynecological illnesses, convulsions/seizures, or emotional/mental distress, Open Records Decision No. 343 (1982). Some of the medical information that is not covered by the MPA is protected by common-law privacy. The department must withhold this information under section 552.101. We have marked this medical information accordingly.

NYLCare states that "all the 'representative sample' [NYLCare] documents submitted to the Attorney General by the Department were obtained by the Department through subpoena." NYLCare contends that two provisions of the Insurance Code render these NYLCare documents confidential. We disagree. Section 5(a), article 1.10D of the Insurance Code provides in part:

Any information or material acquired by the department that is relevant to an inquiry by the insurance fraud unit is not a public record for as long as the commissioner considers reasonably necessary to complete the investigation, protect the person under investigation from unwarranted injury, or serve the public interest.

Section 1(d), article 1.19-1 of the Insurance Code provides in part:

Any information or material acquired under this article under a subpoena is not a public record for as long as the board or commissioner considers reasonably necessary to complete the investigation, protect the person being investigated from unwarranted injury, or serve the public interest.

These provisions grant the Commissioner of Insurance (the "commissioner") the discretion to keep such information confidential. See Open Records Decision Nos. 608 (1992) at 2, 609 (1992) at 3. Here, the commissioner has not elected to hold the NYLCare information at issue confidential pursuant to either of these provisions. Accordingly, these provisions do not except the NYLCare information at issue from required public disclosure in conjunction with section 552.101 of the Government Code.

Finally, NYLCare contends that its information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the property interests of private persons by excepting from required public disclosure two types of information:

(1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763m 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

any formula, pattern, device, or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, . . . [but] a process or device for continuous use in the operation of the business . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939).

In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>5</sup> This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a prima

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<sup>5</sup>The Restatement lists the following six factors to be considered in determining whether particular information constitutes a trade secret:

- 1) the extent to which the information is known outside of [the company's] business;
- 2) the extent to which it is known by employees and others involved in [the company's] business;
- 3) the extent of measures taken by [the company] to guard the secrecy of the information;
- 4) the value of the information to [the company] and to [its] competitors;
- 5) the amount of effort or money expended by [the company] in developing this information;
- 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939).

facie case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5-6. NYLCare argues that the customer information contained in the documents at issue constitutes a customer list that is a trade secret of NYLCare. We agree. Pursuant to the trade secret prong of section 552.110, the department must withhold from disclosure the names, addresses and telephone numbers of NYLCare customers.

NYLCare contends that the remainder of its information is commercial or financial information. Commercial or financial information is excepted from disclosure under the second prong of section 552.110. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770.

"To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted). NYLCare has made this showing, but it has not successfully demonstrated that section 552.110 applies to all of the remaining information. We have marked the information that appears on its face to be commercial or financial information, which, if released, would harm NYLCare's competitive interests. The department must withhold this information from required public disclosure under the commercial or financial information prong of section 552.110.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



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Open Records Division

KEH/rho

Ref.: ID# 39994

Enclosures: Marked documents

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