



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 9, 1997

Ms. Mary Keller
Senior Associate Commissioner
Legal and Compliance, MC110-1A
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR97-2007

Dear Ms. Keller:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 108277.

The Texas Department of Insurance (the "department") received a request for the following information:

- (1) All non-privileged documents and materials relating to, pertaining to, and/or referring to the "Draft Report" of March 3, 1997 regarding Kaiser Foundation Health Plan of Texas, Inc., including, without limitation, any and all documents created or obtained during the Texas Department of Insurance's investigation and review of Kaiser Foundation Health Plan of Texas, Inc.
- (2) All non-privileged documents and materials relating to, pertaining to, and or referring to the suit filed by Kaiser Foundation Health Plan of Texas, Inc. against Texas Department of Insurance, including, without limitation, any and all documents, materials and deposition transcripts created or obtained during or subsequent to the judicial proceedings.

You state that the department does not interpret the first item requested as including information created or obtained by the department after the date of the April 18 Consent Order in the case of *Kaiser Foundation Health Plan of Texas and Permanente Medical Association of Texas v. Texas Department of Insurance*, No. 9702481 (200th Dist. Ct., Travis County Tex., April 21, 1997) (the "*Kaiser case*" or "*Kaiser litigation*"). You also state that

the department does not interpret the second item requested as including information created or obtained by the department after the April 21, 1997, Agreed Order of Dismissal with Prejudice in the same case. You further state that the department will release some of the requested information to the requestor. However, you assert that portions of the requested information are excepted from required public disclosure based on Government Code sections 552.101, 552.107, 552.111 and 552.112. You also request that we determine the applicability of several confidentiality directives of the court in the *Kaiser* litigation to the requested information. In addition, the department raises section 552.305 of the Government Code, which relieves a governmental body of its duty to state which exceptions apply to requested information in situations in which a third party's privacy or proprietary interests are implicated by the release of the requested information. *See* Open Records Decision No. 542 (1990). The department has submitted representative samples of the requested information.¹

Both the department and this office notified Kaiser Foundation Health Plan of Texas and Permanente Medical Association of Texas ("Kaiser") of this request. Kaiser asserts that the requested information is excepted from required public disclosure based on Government Code section 552.101 in conjunction with several confidentiality statutes, the common-law right to privacy, the constitutional right to privacy and the informer's privilege. Kaiser also raises sections 552.110 and 552.111 of the Government Code.

Kaiser argues that the report to the Commissioner of Insurance involving Kaiser contains confidential information. This office has concluded that the report contains no confidential information and that the department must release the report in its entirety. *See* Open Records Letter No. 97-0907 (1997).

The department requests a determination regarding the status of the applicability of the confidentiality directives issued by the court in the *Kaiser* case to the requested documents. Section 552.107(2) of the Government Code excepts from required public disclosure information if "a court by order has prohibited disclosure of the information." The department submitted to this office copies of these directives, but does not explain their applicability to the requested documents. In its correspondence to this office concerning this open records request, Kaiser does not assert that the directives apply to the requested information.² If a governmental body does not establish how and why an exception applies

¹In reaching our conclusion here, 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) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). 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.

²We note that counsel for Kaiser has stated in correspondence to a representative of the Financial Litigation Division of this office that all deposition transcripts and exhibits in the *Kaiser* litigation in the possession of this office are subject to the Order on Plaintiffs' Motion for Protective Order, signed March 12, 1997. *See* Letter of Ms. Mary Schaerdel Dietz of Fulbright & Jaworski, L.L.P., to Mr. David C. Mattax,

to the requested information, the attorney general has no basis on which to pronounce it protected. *See* Open Records Decision No. 363 (1983). As the department has not met its burden under Government Code section 552.107(2), and considering the fact that Kaiser has not raised section 552.107(2) or asserted the validity or applicability of the *Kaiser* court's confidentiality directives, we will therefore consider the other exceptions the department and Kaiser raise.

The Seventy-Fifth Legislature amended section 17 of the Texas Health Maintenance Organization Act, Chapter 20 of the Insurance Code, to add the following provision to subsection (b):

The Commissioner may examine and use the records of a health maintenance organization, including records of a quality of care assurance program and records of a medical peer review committee as that term is used in Section 1.03, Medical Practice Act (Article 4495b, Vernon's Texas Civil Statutes), as necessary to carry out the purposes of this Act, including an enforcement action under Section 20 of this Act. That information is confidential and privileged and is not subject to the open records law, Chapter 552, Government Code, or to subpoena except as necessary for the commissioner to enforce this Act.

See Act of May 26, 1997, S.B. 385, § 17, 75th Leg., R.S., ch. 1026, (to be codified at Ins. Code art. 20A.17, § 17(b)(4) (effective September 1, 1997)). We believe that this provision provides broad coverage for all records from Kaiser that the department examined or used in carrying out the purposes of the Health Maintenance Organization Act, including Kaiser's records of its quality of care assurance program and its medical peer review committees. The provision permits the release of information when "necessary for the commissioner to enforce" the Health Maintenance Organization Act. Thus, the department must withhold from public disclosure all information covered by this new provision. Gov't Code § 552.101.

The Seventy-Fifth Legislature's amendments to the Texas Health Maintenance Organization Act also include a confidentiality provision that specifically covers enrollees' clinical records:

Enrollees' clinical records shall be available to the commissioner for examination and review to determine compliance. Such records are confidential and privileged, and are not subject to the open records law, Chapter 552, Government Code, or to subpoena, except to the extent necessary to enable the commissioner to enforce this article.

See Act of May 26, 1997, S.B. 385, § 28, 75th Leg., R.S., ch. 1026, (to be codified at Ins. Code art. 20A.37, § 37(f) (effective September 1, 1997)). This provision provides protection for enrollees' clinical records that are not covered by the new provision to be codified at section 17(b)(4) of the Insurance Code, which would include enrollee clinical records the department obtained from the enrollees themselves rather than Kaiser. Thus, based on section 552.101 of the Government Code, the department must not release enrollees' clinical records. See also V.T.C.S. art. 4495b, § 5.08(b) (providing confidentiality for records that physician creates or maintains regarding identity, diagnosis, evaluation, or treatment of patient by physician).³

Portions of the information include complaints that contain confidential medical information not covered by a confidentiality statute, yet protected from required public disclosure based on the common-law right to privacy.⁴ *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). 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 *id.*⁵

³Kaiser also asserts the applicability of federal regulations that prohibit the disclosure of medical records maintained in connection with the performance of any program or activity relating to substance abuse, education, prevention, training, treatment, rehabilitation or research, citing section 2.1 through 2.67 of title 42 of the Code of Federal Regulations. In light of our conclusion under section 5525.101 for enrollees' clinical records, we need not address the applicability of these regulations.

⁴Kaiser also asserts that the informer's privilege aspect of section 552.101 covers the identity of complainants. We believe complainants' identities are otherwise protected from disclosure based on section 552.101 in conjunction with the common-law right to privacy, as discussed above. However, we note that the informer's privilege is the privilege of the governmental body to withhold from disclosure the identity of persons who furnish information of violations of law to officials charge with the duty of enforcing the particular law. See *Roviaro v. United States*, 353 U.S. 53, 59 (1957). Since it exists to protect the governmental body's interest, this privilege may be waived by the governmental body. See Open Records Decision No. 549 (1990) at 6. The department does not assert the informer's privilege. Kaiser lacks standing to raise the privilege.

⁵While 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; and information regarding drug overdoses, acute alcohol intoxication, obstetrical/gynecological illnesses, convulsions/seizures, or emotional/mental distress, Open Records Decision No. 343 (1982). In addition common-law privacy may protect certain financial information, including information about personal financial decisions. See Open Records Decision No. 600 (1992) at 9-12. We believe that, by withholding the name of Kaiser enrollees, their privacy interests will be protected with respect to these types of information.

We turn to the examination reports concerning Kaiser. Insurance Code article 1.15, section 9, prohibits the public disclosure of an examination report and “information obtained during the course of an examination” of an insurance carrier. *See* Open Records Decision No. 640 (1996). This provision is expressly made applicable to health maintenance organizations, “except to the extent that the commissioner determines that the nature of the examination of a health maintenance organization renders such clearly inappropriate.” *See* Act of May 26, 1997, S.B. 385, § 17, 75th Leg., R.S., ch. 1026, (to be codified at Ins. Code art. 20A.17, § 17(c) (effective September 1, 1997)). We conclude that the department must withhold from public disclosure based on section 552.101 of the Government Code all examination reports concerning Kaiser and all information obtained during the course of an examination of Kaiser.⁶ *See also* Ins. Code art. 20A.27 (making confidential certain examination reports), Gov’t Code § 552.112 (excepting from public disclosure information contained in or relating to examination, operating, or condition reports prepared by or for certain government agencies).

You raise section 552.107(1) of the Government Code. This exception states that information is excepted from required public disclosure if

it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.

Although section 552.107(1) appears to except information within rule 1.05 of the Texas State Bar Disciplinary Rules of Professional Conduct, the rule cannot be applied as broadly as written to information that is requested under the Open Records Act. Open Records Decision No. 574 (1990) at 5. To prevent governmental bodies from circumventing the Open Records Act by transferring information to their attorneys, section 552.107(1) is limited to material within the attorney-client privilege for confidential communications; “unprivileged information” as defined by rule 1.05 is not excepted under section 552.107(1). Open Records Decision Nos. 574 (1990) at 5, 462 (1987) at 13-14. Thus, section 552.107(1) protects only information that reveals attorney advice and opinion or client confidences. *See* Open Records Decision No. 574 (1990). We agree that section 552.107(1) applies to portions of the requested information.

Section 552.111 of the Government Code excepts from required public disclosure:

An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.

⁶In light of our conclusion under section 552.101, we need not address Kaiser’s assertion that financial information the department obtained during examination of Kaiser’s financial condition is excepted from disclosure based on section 552.110 of the Government Code.

This exception applies to a governmental body's internal communications consisting of advice, recommendations, or opinions reflecting the policymaking process of the governmental body at issue. *See* Open Records Decision No. 615 (1993). This exception does not except from disclosure purely factual information that is severable from the opinion portions of the communication. *See id.* The exception also protects preliminary drafts of a document and any comments or other notations on the drafts because they necessarily represent the advice, opinion, and recommendation of the drafter as to the form and content of the final document. *See* Open Records Decision No. 559 (1990). We agree that portions of the requested information consist of opinion, advice, and recommendation that are excepted from disclosure based on section 552.111.⁷

The department also raises section 552.111 for attorney work product. This office recently stated that if a governmental body wishes to withhold attorney work product under section 552.111, it must first show that the work product was created for trial or in anticipation of litigation under the test articulated in *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993). *See* Open Records Decision No. 647 (1996) at 5. The department has shown that portions of the information were created for trial or in anticipation of litigation under the *National Union* test. Additionally, we believe the requestor is asking for the attorney's entire litigation file in the *Kaiser* case. If a requestor asks for an attorney's entire work file regarding particular litigation, such a request may be denied in its entirety based on the supreme court's holding in *National Union*. *See id.* Accordingly, the department may withhold from disclosure an attorney's entire litigation file in the *Kaiser* case based on section 552.111.

We have marked the submitted documents in accordance with this ruling. We are resolving this matter with this 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 may 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,



Kay Hastings
Assistant Attorney General
Open Records Division

KHG/rho

⁷We note that, as section 552.111 does not protect the interests of a third party such as Kaiser, Kaiser lacks standing to raise this exception.

Ref.: ID# 108277

Enclosures: Marked documents

cc: Mr. David W. Richardson
Hyatt, Crabtree & Moore
1380 Premier Place
5910 North Central Expressway
Dallas, Texas 75206
(w/o enclosures)

Ms. Mary Schaerdel Dietz
Fulbright & Jaworski, L.L.P.
600 Congress Avenue, Suite 2400
Austin, Texas 78701
(w/o enclosures)

