



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 16, 1997

Ms. Mary Keller
Senior Associate Commissioner
Legal and Compliance
Texas Department of Insurance
P.O. Box 149104
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OR97-2066

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# 107850.

The Texas Department of Insurance (the "department") initially received a request for "complaints relating to HMOs since September 1, 1995," regarding complaints of "medical necessity, denial of claim, and delays (claim handling)." The requestor later amended the request to include the complainant's city or county of residence.¹ You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code. In addition, because you also assert that a third party's privacy or property interest may be implicated by this request, you raise section 552.305 of the Government Code. We have considered the exceptions you claim and have reviewed the sample documents you submitted.²

Pursuant to section 552.305 of the Government Code, this office notified the health maintenance organizations affected by this request which are listed in Attachment "A." See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990)

¹The requestor does not seek the identity of the complainants.

²We 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.

(determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). This office received responses to the notifications from Aetna US Healthcare ("AUSHC"); AmeriHealth HMO of Texas, Inc.; BlueCrossBlueShield of Texas on behalf of Rio Grande HMO, Inc., West Texas Health Plans, L.C., Mid-Con Health Plans, L.C., and Dental Benefits, Inc. ("BlueCross"); Certus HealthCare, L.L.C. ("Certus"); CIGNA HealthCare of Texas, Inc. ("CIGNA"); Community First Health Plans, Inc. ("CFHP"); Great-West on behalf of One Health Plan ("Great-West"); Harris County Attorney's Office on behalf of Community Health Choice Inc., f/k/a Total Community Health Care Plan, Inc. ("CHC"); Harris Methodist Health, Inc. ("Methodist"); HMO Texas, L.C. ("HMO Texas"); Humana Insurance Company and Humana Health Plan of Texas, Inc. ("Humana"); Texas Health Maintenance Organization Association ("THMOA") on behalf of its members; Kaiser Foundation Health Plan of Texas ("Kaiser"); Mercy Health Plans ("MHP"); Methodist Care, Inc.; NYL Care Health Plans of the Gulf Coast, Inc., NYLCare Health Plans of the Southwest, Inc., and NYLCare Dental Plans of the Southwest, Inc. ("NYLCare"); PacifiCare of Texas, Inc. ("PacifiCare"); Parkland Community Health Plan, Inc. ("Parkland"); PCA Health Plans of Texas, Inc. ("PCA"); Principal Health Care of Texas, Inc. ("Principal"); Prudential Health Care Plan, Inc. ("Prudential"); Scott and White Health Plan ("Scott and White"); Seton Health Plan, Inc. ("Seton"); SHA, L.L.C. d/b/a FIRSTCARE ("FIRSTCARE"); Texas Universities Health Plan, Inc. ("TUHP"); UNICARE of Texas Health Plans, Inc. ("UNICARE"); United Dental Care; and United HealthCare of Texas, Inc. ("United HealthCare"). The responding companies assert that the requested information is excepted from required public disclosure based on Government Code section 552.101 in conjunction with various confidentiality statutes, the common-law right to privacy, and the constitutional right to privacy. In addition, AUSHC, One Health Plan, CHC, HMO Texas, MethodistCare, and TUHP raise section 552.110 of the Government Code.

Section 552.101 of the Government Code excepts from required public disclosure information that is deemed confidential by law, including information that is made confidential by statute. 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 the health maintenance organizations that the department examined or used in carrying out the purposes of the Health Maintenance Organization Act, including the health maintenance organizations' records of their quality of care assurance program and their medical peer review committees. The provision permits the release of information when "necessary for the commissioner to enforce" the Health Maintenance Organization Act. *Id.* Thus, the department must withhold from public disclosure all information that the department obtained from the health maintenance organization. Gov't Code § 552.101. We have marked the type of information within the sample of documents you have provided that we believe is covered by this provision.

The Seventy-Fifth Legislature's amendments to the Texas Health Maintenance Organization Act also include a confidentiality provision that specifically covers health maintenance organization 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 health maintenance organization enrollees' clinical records that are not covered by the new provision to be codified at section 17(b)(4) of the Insurance Code. Thus, section 37(f) protects enrollee clinical records that the department obtained from the enrollees themselves rather than from the health maintenance organizations. Thus, based on section 552.101 of the Government Code, the department must not release enrollees' clinical records.³ For your

³In light of our conclusion under section 552.101, we need not address the arguments of those health maintenance organizations which raised section 552.110 and other state statutory confidentiality provisions. *See, e.g.,* 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); Health and Safety Code § 576.005 (pertaining to disclosure of health care information by hospital or agent or employee of hospital), § 611.002 (regarding confidentiality of mental health records), § 773.091 (pertaining to patient records by emergency medical services personnel or physician), § 81.103(a) (regarding AIDS and HIV test results). Some of the responding health maintenance organizations also assert 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, and regarding the Americans with Disability Act, 42 U.S.C. §§ 12112(c)(3)(B), (4)(C). In light of our conclusion under section 552.101 for enrollees' clinical records, we need not address the applicability of the federal regulations.

convenience, we have marked a sample document of enrollee clinical records which you must not release.

Regarding the remaining information which you submitted to this office, we note that the requestor does not seek the identities of the complainants, and requests that "other information" be removed to secure the confidentiality of the complainant. Therefore, the department must redact any identifying information in the remaining submitted documents, including names, street addresses, telephone numbers, social security numbers, names of family members, names of employers, and individual and group policy numbers. We have marked the types of identifying information which must be redacted. As the complainants' identities are not sought here, we need not consider the applicability of the right to common-law privacy or the constitutional right to privacy encompassed by section 552.101 of the Government Code. These privacy doctrines are inapplicable in this instance.

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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Vickie Prehoditch
Assistant Attorney General
Open Records Division

VDP/alg

Ref.: ID# 107850

Enclosures: Submitted documents

cc: Ms. Kathy Mitchell
Mr. Michael Cohen
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(w/o enclosures)

Attachment A

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