



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 6, 1998

Ms. Mary Keller
Senior Associate Commissioner
Texas Department of Insurance
Legal and Compliance
MC 110-1A
P.O. Box 149104
Austin, Texas 78714-9104

OR98-0366

Dear Ms. Keller:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 112786.

The Texas Department of Insurance (the "department") received a request for the "IRO application as made by Texas Medical Foundation." You state that some of the requested information will be provided to the requestor. You claim, however, that one remaining portion is protected from disclosure by section 552.101. You also indicate that several other portions of the application may be proprietary in nature, and therefore, confidential. You have submitted the documents that are at issue for our review.

Since the property and privacy rights of a third party may be implicated by the release of some of the requested information, this office notified the Texas Medical Foundation ("TMF") about the request for information. *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) (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). TMF responded to our notification by arguing that several portions of the documents are protected from disclosure by sections 552.101 and 552.110.

Both the department and TMF initially argue that some of the requested application must be withheld because it is confidential by law under article 21.58A of the Insurance Code. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 4(i) of article 21.58A of the Insurance Code provides:

Each utilization review agent shall utilize written medically acceptable screening criteria and review procedures which are established and periodically evaluated and updated with appropriate involvement from physicians, including practicing physicians, dentists, and other health care providers. Utilization review decisions shall be made in accordance with currently accepted medical or health care practices, taking into account special circumstances of each case that may require deviation from the norm stated in the screening criteria. Screening criteria must be objective, clinically valid, compatible with established principles of health care, and flexible enough to allow deviations from the norms when justified on a case-by-case basis. Screening criteria must be used to determine only whether to approve the requested treatment. Denials must be referred to an appropriate physician, dentist, or other health care provider to determine medical necessity. *Such written screening criteria and review procedures shall be available for review and inspection to determine appropriateness and compliance as deemed necessary by the commissioner and copying as necessary for the commissioner to carry out his or her lawful duties under this code, provided, however, that any information obtained or acquired under the authority of this subsection and article is confidential and privileged and not subject to the open records law or subpoena except to the extent necessary for the commissioner to enforce this article.*

Ins. Code art. 21.58A § 4(i) (emphasis added). In this case, the department argues that pages 15 - 21 of TMF's "Physician/Other Health Care Professional Reviewer's Manual" is screening criteria or review procedures made confidential by the statute. TMF additionally argues that Exhibit 1, pages 1 - 6, of its application and its reviewer's manual in its entirety are made confidential by section 4(i). After reviewing the submitted material and the arguments, we find that the department must withhold the marked portion, pages 15-21, of the submitted reviewer's manual.

TMF next argues that three portions of the requested information are protected from disclosure under section 552.110. TMF specifically argues that Exhibit 1 of its application, pages 1-6 including Attachment 1 (7a - 7e), Attachment 4 of Exhibit 4, pages 23 - 61L, and the 28 pages of its "Physician/Other Health Care Professional Reviewer's Manual" are protected. Exhibit 1 consists of TMF's independent review plan and its reviewer forms. Attachment 4 is the TMF's roster of professional reviewers. Section 552.110 protects the property interests of private parties by excepting from 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.

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 for commercial and financial information. In *National Parks & Conservation Association 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. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 (1996) at 4. 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. *Id.*

First, TMF has established that it faces competition in the field of medical peer review. Second, TMF argues that release of its independent review plan, its methodologies, and its roster of reviewers would cause substantial competitive harm. TMF contends that it has developed and maintained its internal processes, procedures, and forms over a 25 year period at great expense and it "specifically adapts and customizes its basic medical peer review program." TMF treats the information as confidential and does not release it. TMF also states that its approach is unique. This is an important strength in its competitive market. TMF also states that its roster of reviewers is important because it has gone to great expense to recruit, train, and license the individual practitioners. TMF indicates that the reviewers are independent contractors and not employees. After reviewing the submitted arguments and the application, we find that the department must withhold Exhibit 1 of TMF's application, pages 1-6 including Attachment 1 (7a - 7e), and Attachment 4 of Exhibit 4, pages 23 - 61L, and pages 8 - 13a of the "Physician/Other Health Care Professional Reviewer's Manual" under section 552.110.¹

TMF additionally asserts that Exhibit 9, pages 84 - 139e, of its application must be withheld because of a right to privacy. These pages contain the biographical information of TMF's Board of Trustees. TMF asserts that both sections 552.101 and 552.102 may be applicable. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). Even if we were to consider the submitted biographical information "personnel file" information, the court in *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section

¹Because we make a determination under section 552.110, we need not address TMF's additional argument under section 552.101 to withhold Attachment 4.

552.101 of the Open Records Act. Section 552.101 encompasses information protected by both constitutional and common-law privacy. Common-law privacy excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate or embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1.

The constitutional right to privacy protects two interests. Open Records Decision No. 600 (1992) at 4 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). The first is the interest in independence in making certain important decisions related to the "zones of privacy" recognized by the United States Supreme Court. Open Records Decision No. 600 (1992) at 4. The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. *See id.*

The second interest is the interest in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual's privacy interests against the public's need to know information of public concern. *See* Open Records Decision No. 455 (1987) at 5-7 (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional doctrine is far narrower than that under the common law; the material must concern the "most intimate aspects of human affairs." *See* Open Records Decision No. 455 (1987) at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)).

This office has found that the following types of information are excepted from required public disclosure under constitutional or common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), and information concerning the intimate relations between individuals and their family members. *See* Open Records Decision No. 470 (1987). We have reviewed the submitted materials at issue and have found no information protected by constitutional or common-law privacy.

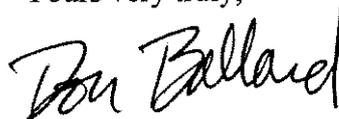
We point out, however, that question 3 of the affidavit asks for the trustee's social security number. Social security numbers may be withheld in some circumstances under section 552.101 of the Government Code. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and

related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security numbers are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Open Records Act on the basis of that federal provision. We caution, however, that section 552.353 of the Open Records Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law, enacted on or after October 1, 1990.

Finally, TMF raises a concern over the copyright protection of Attachment 3, pages 13 - 18r, of its application. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990). The department, therefore, must only allow the inspection of these pages of the application.

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,



Don Ballard
Assistant Attorney General
Open Records Division

JDB/ch

Ref: ID# 112786

Enclosures: Marked documents

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