



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

May 11, 1998

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

OR98-1197

Dear Ms. Keller:

You have asked 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# 113769.

The Texas Department of Insurance (the "department") received a request for "all department files on consumer and physician complaints lodged against health maintenance organizations that are licensed in the State of Texas" for the last quarter of 1997, including complaints filed after October 1, 1997, and responses from HMOs cited in the complaints. You assert that "some of the requested information may be exempt from public disclosure" pursuant to sections 552.101, 552.111, and 552.305 of the Government Code. As provided by section 552.305, this office provided the Health Maintenance Organizations ("HMOs") affected by this request an opportunity to submit reasons as to why the information at issue should be withheld from disclosure.

You submitted to this office for review a sample of complaint information.<sup>1</sup> We have reviewed the information submitted and the briefs provided by all interested parties. We conclude that most of the information is public, except for certain identifying information

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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.

regarding patients and records that are confidential under some other source of law. Further, we overrule Open Records Letter Nos. 97-2066 (1997), 97-2682 (1997), and 98-0260 (1998) to the extent they conflict with this ruling.

The argument has been made that article 20A.17 of the Insurance Code protects the complaint information at issue. However, we believe that article 20A.12, rather than article 20A.17, governs release of the complaint information submitted.

Insurance Code article 20A.12 requires every HMO to establish an internal system for resolution of complaints. Ins. Code art. 20A.12(a). HMOs must maintain a record of each complaint, any complaint proceeding, and any action taken. *Id.* art. 20A.12(n), *see also id.* 20A.12(o). Subsection (p) provides specific authority for the department to review HMO documents concerning each complaint. Additionally, subsection (q) authorizes the commissioner to examine an HMO's complaint system for compliance with the HMO Act. *See also id.* art. 20A.12A (as added by Acts 1997, 75<sup>th</sup> Leg., ch. 1026, § 12). Thus, article 20A.12 authorizes the department to obtain the documents at issue. We note that article 20A.12 contains no confidentiality provision for documents obtained under this provision.

On the other hand, article 20A.17, titled "Examinations," generally governs the commissioner's authority to examine records concerning quality of health care services. We do not believe that records obtained during an examination of quality of health care services include complaint records that are obtained under article 20A.12. Further, even assuming that an examination under 20A.17 includes an investigation of an HMO complaint system, the confidentiality provisions in article 20A.17 would not reach all HMO records so obtained.

Article 20A.17(b)(1) gives the commissioner access to contracts between HMOs and service providers and (b) (2) states that the contract and agreement "documentation provided to the commissioner under this subsection shall be deemed confidential and not subject to the open records law." Subdivision (b)(3) provides that the commissioner may examine medical, hospital and health records of enrollees and records of physicians and service providers under independent contract and provides for the confidentiality of that medical information. Subdivision (b)(4) of article 20A.17 provides as follows:

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.

Several HMOs argue that the subsection (b)(4) phrase "[t]hat information is confidential and privileged and is not subject to the open records law" should be interpreted

to provide broad protection for all information received from the HMOs. It is not reasonable that the legislature intended to provide sweeping protection for all documents obtained from HMOs by burying such a broad confidentiality provision in a subsection of an article providing for examinations. Further, the HMOs' interpretation of subsection (b)(4) is inconsistent with the language in subdivisions(b)(2) and(b)(3), because these subdivisions are narrowly drawn to provide confidentiality to specific types of documents only. It is consistent with the entire article to read the provision of subdivision (b)(4) as a grant to the commissioner of access to HMO records during an examination, including information otherwise made confidential and privileged under the Medical Practice Act. Subdivision (b)(4), standing alone, does not make confidential information that would otherwise be public. It merely acknowledges the confidentiality of specific documents as provided for in other statutes.

As we conclude that article 20A.12, rather than article 20A.17, governs the submitted complaint information, the records at issue are protected from public disclosure only to the extent that they are made confidential by other law.<sup>2</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." Our review of the submitted complaint information indicates that some of the information is confidential by statute. We will address the documents that are confidential under section 552.101 of the Government Code in conjunction with other statutes.

Article 20A.37(f) of the Insurance Code provides that HMO enrollees' clinical records "are confidential and privileged, and are not subject to the open records law, chapter 552, Government Code." Because article 20A.37(f) provides that the department may not publicly release enrollees' clinical records, this information must be kept confidential. For your convenience, we have marked these documents.

The department also submitted to this office copies of a contract between HMOs and providers. Article 20A.17(b)(2) of the Insurance Code states that copies of contracts, agreements, or other arrangements between HMOs and physicians or providers must be provided to the commissioner upon request, but that such documentation "shall be deemed confidential and not subject to the open records law, Chapter 552, Government Code." Thus, the Insurance Code provides that copies of contracts, agreements, and other arrangements between HMOs and physicians or providers, which are held by the department, are not subject to disclosure under the Open Records Act and thus must be withheld in their entirety. This information also has been marked.

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<sup>2</sup>The department explains that complaint information was generally obtained from HMOs pursuant to the procedural vehicle of article 1.24 of the Insurance Code, which provides that the board may address "any reasonable inquiries to any insurance company" and that such inquiries must be answered within ten days. However, article 1.24 contemplates the possibility that records provided by companies may be confidential by other statutes and that these records remain confidential when so obtained. Article 1.24 provides that if information provided in response to such inquiries is otherwise confidential by law, it generally retains that confidentiality.

Some of the submitted information implicates V.T.C.S. article 4495b, the Medical Practice Act (the "MPA"). V.T.C.S. art. 4495b § 5.06, 5.08; *see also* Health & Safety Code § 161.032. We note that information that is subject to the MPA may only be released as provided under the MPA. We have marked information that is confidential under the MPA.

Section 552.101 also protects from disclosure information that is confidential under a common-law right of privacy. Personal information must be withheld from public disclosure when it is (1) 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. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) ; Open Records Decision No. 611 (1992) at 1. We have reviewed the information at issue and agree that the information identifying individuals as enrollees in a particular HMO is confidential. Open Records Decision No. 373 (1983) (personal financial information generally confidential), Open Records Decision No. 600 (1992) at 9-12 (personal financial choices concerning insurance are generally confidential). Therefore, the department must redact all identifying information, 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 documents accordingly.

You indicate that release of some of the records at issue could implicate the property interests of the HMOs about which complaints have been raised. This office received briefs concerning release of the records at issue from various HMOs. The briefs raised concerns about client lists under section 552.110 of the Government Code, peer review information, patient records, and information made confidential by a variety of other statutes.<sup>3</sup> Section 552.110 is inapplicable to the submitted records. Further, our decision that portions of the requested records must be withheld under section 552.101 addresses the other concerns raised.

The department also asserts that it wishes to withhold certain records created by the department, pursuant to section 552.111 of the Government Code. However, the department makes no argument concerning the applicability of section 552.111 and did not mark the sample documents to indicate what might be protected from disclosure under this exception. Section 552.301(b) of the Government Code provides that when the governmental body

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<sup>3</sup>*See* V.T.C.S., art. 4495b, §§ 5.06 (providing for confidentiality of communications to and proceedings of medical peer review committees), 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), Health & Safety Code §161.032 (providing that "records and proceedings of a medical committee are confidential.") 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.

requests a decision from this office, the governmental body must provide to this office (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, and (3) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code 552.302 (failure to follow section 552.301 provisions results in presumption information is public). We conclude that section 552.111 is inapplicable to the records submitted. As previously discussed, we have marked the documents and portions of documents that are confidential. The remaining documents are public information and must be disclosed in their entirety.

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,



Ruth H. Soucy  
Assistant Attorney General  
Open Records Division

RHS/ch

Ref.: ID# 113769

Enclosures: Marked documents via courier

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All Third Party interests have been copied.