



February 26, 1999

Mr. Richard Buck
Shafer, Davis, Ashley, O'Leary & Stoker
NationsBank Building
700 North Grant, Suite 201
Odessa, Texas 79760-1552

OR99-0563

Dear Mr. Buck:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 122460.

The Medical Center Hospital (the "hospital") received a request from Odessa Regional Hospital ("Odessa") for the contractual reimbursement rates and utilization data concerning the hospital's participation with the following health care networks or plans: Blue Choice, PHCS, the City of Odessa, Ector County, and Physician's Mutual. You assert that the requested information is protected from disclosure under sections 552.101 and 552.104 of the Government Code.

You also assert that section 552.104 of the Government Code protects release of the contractual reimbursement rates and utilization data. Section 552.104 protects from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect the government's interests when it is involved in certain commercial transactions. For example, section 552.104 is generally invoked to except information submitted to a governmental body as part of a bid or similar proposal. See Open Records Decision No. 463 (1987). In these situations, the exception protects the government's interests in obtaining the most favorable proposal terms possible by denying access to proposals prior to the award of a contract.

When a governmental body seeks protection as a competitor, however, it may claim the "competitive advantage" aspect of section 552.104 if it (a) demonstrates that it has specific marketplace interests, and (b) demonstrates actual or potential harm to its interests in a particular competitive situation. Open Records Decision No. 593 (1991). A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. *Id.* at 2. Whether release of particular information would harm the legitimate marketplace interests of a governmental body requires a showing of the possibility of some specific harm in a particular competitive situation. *Id.* at 5, 10. You have provided this office information

showing that the hospital is in current and direct competition with Odessa and, further, that release of the information requested would harm the hospital's legitimate marketplace interests. Thus, we agree that section 552.104 is applicable and that the information requested is protected from disclosure.

We note that you also contend that release of the requested information could be a violation of federal antitrust provisions, directing our attention to the Revised Federal Trade Commission, Justice Department Policy Statements on Health Care Antitrust Enforcement ("policy statements"). *See also* 15 U.S.C.A. § 12 *et. seq.* We have reviewed the policy statements, which outline the antitrust safety zones for health care providers to release pricing and cost information. The policy statements provide that when information is provided in a manner other than as outlined, such releases fall outside of the antitrust safety zone and may be a violation of federal antitrust laws. You assert that this particular release of current hospital price and cost information to Odessa, which is a competitor, falls outside the antitrust safety zone, as set out in the policy statements.

The introduction to the policy statements indicates that the Federal Trade Commission's ("FTC") determination of whether health care provider information releases are impermissible is dependent on the facts of each situation. Because each situation's facts may be unique, the FTC has an advisory opinion procedure by which the hospital can obtain an opinion concerning whether this particular release of information is impermissible.¹ The question of whether a release of the requested information to Odessa is a violation of federal antitrust law is a question for the FTC rather than this office.

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.

Sincerely,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/ch

¹The procedure and timeline to receive advisory opinions are set out in the introduction to the policy statements.

Ref: ID# 122460

Enclosures: Submitted documents

cc: Mr. Christopher Evans
Odessa Regional Hospital
520 E. Sixth Street
Odessa, Texas 79761
(w/o enclosures)