



July 8, 1999

Ms. Stacy E. Sallee
Associate Counsel
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR99-1907

Dear Ms. Sallee:

You ask us to reconsider Open Records Letter No. 99-0853 (1999). Your request for reconsideration was assigned ID# 125522.

The Texas Health and Human Services Commission (the "commission") received a request for information relating to a complaint made against Dr. Billy Morgan. In Open Records Letter No. 99-0853, we concluded that the commission: 1) must withhold certain information from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 12.003 of the Human Resources Code; 2) may withhold information that identifies the informer pursuant to the informer's privilege; and 3) may not withhold any of the requested information under section 552.108 of the Government Code. You indicate that the markings on several documents are unclear, and you ask that we clarify these markings. You state that Exhibits B and C are not responsive to the request for information and were submitted to this office to support the commission's arguments against disclosure. You ask that we clarify that the commission need not disclose Exhibits B and C to the requestor. Finally, you ask that we reconsider whether section 552.108 applies to the submitted information.¹

¹You state that the commission will release to the requestor "correspondence to the Medicaid provider and correspondence to the National Heritage Insurance Company regarding the funds to be recouped." The commission is seeking reconsideration under section 552.108 only for the remaining responsive documents to which no other exception applies.

We have remarked the documents that were unclearly marked. We also agree that Exhibits B and C to your original submission, ID# 123089, are not subject to the request for information. Therefore, the commission is not required to release these documents to the requestor.

Section 552.108 of the Government Code exempts from disclosure certain records of law enforcement agencies and prosecutors. Section 552.108 applies only to records created by an agency, or a portion of an agency, whose primary function is to investigate crimes and enforce criminal laws. *See* Open Records Decision Nos. 493 (1988), 287 (1981). Section 552.108 generally does not apply to records created by an agency whose chief function is essentially regulatory in nature. Open Records Decision No. 199 (1978). An agency that does not qualify as a law enforcement agency may, under certain limited circumstances, claim that section 552.108 protects records in its possession. *See, e.g.*, Attorney General Opinion MW-575 (1982), Open Records Decision Nos. 493 (1988), 272 (1981).

You explain that Texas has delegated responsibility for the enforcement of anti-fraud provisions of state and federal law to the Medicaid Fraud Control Unit (MFCU) of the Office of the Attorney General and the Medicaid Program Integrity (MPI) division of the commission's Office of Investigations and Enforcement. You contend that MPI is a law enforcement agency, and therefore section 552.108 should apply to MPI's Medicaid investigations. MPI is "responsible for investigating allegations, referrals, and complaints of Medicaid fraud, abuse, waste, or misuse and assessing sanctions and referring potential criminal violations to MFCU." You describe MPI as "the investigative arm of MFCU" and note that we have previously found MFCU to be a law enforcement agency for purposes of section 552.108. You also emphasize the fact that MFCU and MPI possess authority to regulate comparable provider conduct. Because the same conduct may subject a provider to civil and/or criminal penalties, civil and criminal law enforcement efforts overlap.

Having carefully considered your arguments, we conclude that MPI is not a law enforcement agency for purposes of section 552.108. Although MPI performs an investigative function for MFCU and refers potential criminal violations to MFCU for prosecution, MPI also performs many civil law enforcement functions. We decline to recognize MPI as a law enforcement agency, because to do so would result in the application of section 552.108 to both the civil and criminal functions of MPI. Neither the language of section 552.108 nor the previous decisions of this office support such an expansive application of section 552.108.

Alternatively, you contend that section 552.108 should apply to MPI as a custodian of information collected and maintained on behalf of MFCU. We believe that this is the appropriate standard for applying section 552.108 to MPI's records. If an administrative agency's investigation reveals possible criminal conduct that the administrative agency

intends to report or has already reported to the appropriate law enforcement agency, section 552.108 will apply to information gathered by the administrative agency if its release would interfere with law enforcement. *See* Gov't Code § 552.108(a)(1), (b)(1), Attorney General Opinion MW-575 (1982), Open Records Decision Nos. 493 (1988), 272 (1981). Therefore, if the submitted documents relate to an open MPI investigation, and MPI intends to refer the case to MFCU for criminal prosecution if MPI uncovers evidence sufficient to warrant referral, then MPI may withhold the submitted documents from disclosure under section 552.108. If, however, MPI had decided that it will not refer the case to MCFU for criminal prosecution, then MPI must release those portions of the documents which are not excepted from disclosure under section 552.101 of the Government Code. Open Records Letter No. 99-0853 is overruled to the extent that it conflicts with this ruling.

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,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref: ID# 125522

Encl. Submitted documents

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(w/o enclosures)