



May 11, 2001

Ms. Susan K. Steeg  
General Counsel  
Texas Department of Health  
1100 West 49th Street  
Austin, Texas 78756-3199

OR2001-1946

Dear Ms. Steeg:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code (the "Act"). Your request was assigned ID# 147087.

The Texas Department of Health (the "department") received two requests for information relating to the administration of the Medicaid program and/or National Heritage Insurance Company ("NHIC"), including:

1. The state's contract with Medicaid provider National Heritage Insurance Co. and all related documents.
2. The state's request for proposals to administer the Medicaid contract and all related documents, including but not limited to lists of responders, RFP evaluation forms and meeting notes of the evaluation committees.
3. Responses to the RFP submitted by NHIC and any other responders.
4. All documents related to preparation of the request for proposals to administer [the] Medicaid contract.
5. All records prepared to meet reporting requirements of the Medicaid contract, including those submitted by NHIC.
6. All documents related to amendments to and renegotiations of the Medicaid contract dating back to Jan. 1, 1997, including but not limited to memos, letters, e-mail and other correspondence.
7. All documentation of general and administrative expenses of NHIC.

8. Billings from NHIC to the state since Jan. 1, 1998.<sup>1</sup>

You indicate that the department has released information that is responsive to items 1 through 4 of the request. You claim that information responsive to items 5 through 8 is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you raise and have reviewed the representative samples of information you submitted.<sup>2</sup>

We first address your representation that a grand jury has subpoenaed certain records held by the department. You have submitted a copy of one of the grand jury's subpoenas. Article 20.02 of the Code of Criminal Procedure provides for the secrecy of grand jury proceedings. This office has concluded that grand juries are not governmental bodies that are subject to the Public Information Act, so that records within the actual or constructive possession of a grand jury are not subject to disclosure under the Act. *See* Gov't Code § 552.003(1)(B) (providing that "governmental body . . . does not include the judiciary"); Open Records Decision No. 513 (1988). When an individual or entity acts at the direction of the grand jury as its agent, information prepared or collected by the agent is within the grand jury's constructive possession and is not subject to the Act. *See* ORD 513 at 3. Information that is not so held or maintained is subject to the Act and may be withheld only if a specific exception to disclosure is shown to be applicable. *Id.*

As you correctly note, this office stated in Open Records Decision No. 513 (1988) that information held by a district attorney that he had obtained pursuant to a grand jury subpoena in the course of an investigation was within the grand jury's constructive possession. *Id.* at 4. But as we further explained in that same decision, the mere fact that information collected or prepared by the district attorney had been submitted to the grand jury did not mean that the information was in the grand jury's constructive possession, when the district attorney also held the same information. *Id.* Thus, information is not protected from public disclosure, either as a record of the judiciary under section 552.003 of the Government Code or as information deemed to be confidential under article 20.02 of the Code of Criminal Procedure, merely because a prosecutor presented the information to the grand jury. In this instance, you do not argue, nor does it appear from our review of the documents, that the department created or obtained the information at issue at the request or direction of the grand jury. We therefore conclude that the information at issue is subject to the Act and must be released, unless it shown to be excepted from disclosure.

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<sup>1</sup>The second request for information seeks "[a] breakdown by category of the payments made by the [department] to [NHIC] for administrative costs from 1995 through 2000. If possible, categories should include the specific administrative functions for which the money was used (e.g. provider relations, developing medical policy, etc.)." You represent to this office that this request "is asking for the same information sought in numbers 7 and 8."

<sup>2</sup>This letter ruling assumes that the submitted representative samples of information are truly representative of the responsive information as a whole. This ruling neither reaches nor authorizes the department to withhold any responsive information that is substantially different from the submitted information. *See* Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

We next note that some of the submitted records fall within the scope of section 552.022 of the Government Code. Section 552.022 provides in relevant part that

*the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:*

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]

Gov't Code § 552.022(a)(1), (3), (5) (emphasis added). The department must release any requested information that falls within subdivisions (1), (3), or (5) of section 552.022(a), unless that information is expressly confidential under other law or is part of a completed report, audit, evaluation, or investigation made of, for, or by a governmental body that is protected by section 552.108. *See id.* § 552.022(a)(1).

Section 552.103 of the Government Code is a discretionary exception to disclosure that protects the interests of the governmental body and may be waived. As such, section 552.103 is not "other law" that makes information expressly confidential for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475, 476 (Tex. App.--Dallas 1999, no pet.) (stating that governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (general discussion of discretionary exceptions), 542 at 4 (1990) (stating that statutory predecessor to section 552.103 does not implicate third-party interests and may be waived by governmental body). Therefore, the department may not withhold information that falls within the scope of section 552.022 under section 552.103.

Furthermore, the department may not withhold information that falls within subsections (3) or (5) of section 552.022(a) under section 552.108 of the Government Code. Section 552.108 also is a discretionary exception to disclosure and thus is not other law that makes information expressly confidential for the purposes of section 552.022. *See Open Records Decision No. 177 at 3 (1977)* (stating that governmental body may waive statutory predecessor to section 552.108). We have marked the types of information that the department must release under sections 552.022(a)(3) and (a)(5).

You claim that the rest of the requested information is excepted from disclosure under section 552.108. Section 552.108, the "law enforcement exception," excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). A governmental body that raises section 552.108 must reasonably explain, if the requested information does not supply the explanation on its face, how and why section 552.108 is applicable to that information. See Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

You inform this office that the information at issue is the subject of a pending criminal investigation. You have submitted a letter to the department from an Assistant District Attorney for Travis County. The letter states that information responsive to items 5 through 8 of the request for information is the subject of a criminal investigation. It asks the department not to release that information. Based on your representation, the letter, and our review of the information at issue, we find that the release of that information would interfere with the detection, investigation, or prosecution of crime. Therefore, with the exception of the information that the department must release under section 552.022 of the Government Code, the department may withhold the submitted information from the requestor under section 552.108(a)(1). See *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 186-87 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases); Open Records Decision No. 372 at 4 (1983) (stating that where an incident allegedly involving criminal conduct remains under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of related information).

In summary, the department must release information that falls within the scope of section 552.022(a)(3) or (5). The remaining records are excepted from disclosure under section 552.108(a)(1).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/er

Ref: ID# 147087

Encl: Marked documents

cc: Mr. Gary Susswein  
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(w/o enclosures)