



May 23, 2001

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

OR2001-2128

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. Your request was assigned ID# 147579.

The Texas Department of Health ("TDH") received two requests for information relating to National Heritage Insurance Company ("NHIC") and its contract with TDH to administer Medicaid claims. The request dated March 7, 2001, seeks the following information:

- (1) Number of Medicaid claims as processed by [NHIC] for FY 1995 through FY 2000. I need the . . . annual number of claims that was used to compute the company's administrative fees for those years as previously reported by TDH: \$62.7 million for 95; \$79.4 million for 96; \$88.4 million for 97; \$105.8 million for 98; \$77.2 million for 99; and \$99 million for 2000 [sic].
- (2) Any documents or analysis explaining the factors leading to the decline in administrative fees from \$105.8 million to \$77.2 million and the rebound to \$99 million.
- (3) Any documents indicating that [NHIC] or EDS disclosed to [TDH] that it [sic] was including expenses related to [NHIC's] capital reserves in its formula for Home Office or General and Administrative Expenses or any other formula used for state payments to [NHIC] under the current contract. Please include the components [sic] of the General & Administrative costs as reported by NHIC under the current contract.

- (4) Any documents indicating that [NHIC] used expenses for its capital reserves in contracts PRIOR to the current one in effect for FY 98-2002.
- (5) NHIC monthly and annual financial reports to [TDH], including Home Office and/or General and Administrative Expenses.
- (6) [TDH] audits of the [NHIC] contract for FY 1997, 1998, 1999 and 2000.
- (7) Any documents, reports, analysis [sic] showing the impact on the fees paid to NHIC under its Medicaid contract as result of the state moratorium on managed care expansion in Medicaid programs.
- (8) Provisions in TDH contract with NHIC that allows [sic] for termination of contract.¹

You have submitted a representative sample of documents that TDH deems to be responsive to paragraph no. 3 of the March 7 request.² You claim that the submitted documents are excepted from disclosure under sections 552.103 and 552.108 of the Government Code. You indicate that you have released the remaining requested information. We have considered the exceptions you raise and have reviewed the documents you submitted.

We first address your statement that a grand jury has subpoenaed certain records held by TDH. 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.*

¹The second request, dated April 4, 2001, seeks access to "[a]ll monthly, quarterly and annual reports or memos or financial statements filed by NHIC with [TDH] for the period beginning September 1, 1998, to the present." You inform us that this request seeks the same information as that which is responsive to paragraph no. 5 of the March 7 request.

²This 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).

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 also 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 submitted documents, that TDH created or obtained the information at issue at the request or direction of the grand jury. We therefore conclude that the submitted documents are subject to the Act and must be released, unless they are shown to be excepted from disclosure.

You also believe that these requests for information may implicate NHIC's proprietary interests. You notified NHIC of its right to submit arguments to this office as to why the information at issue should not be released. *See* Gov't Code § 552.305(d); 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 to disclosure under Public Information Act in certain circumstances). An interested third party is allowed 10 business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). This office received no comments from NHIC within the time permitted by section 552.305(d). We thus have no basis for concluding that NHIC has a proprietary interest in any of the information at issue. *See* Gov't Code § 552.110(a), (b); Open Records Decision Nos. 552 at 5 (1990) (stating that if governmental body takes no position, attorney general will grant exception to disclosure under statutory predecessor to Gov't Code § 552.110(a) if third party makes *prima facie* case that information qualifies as trade secret under section 757 of Restatement of Torts, and no argument is presented that rebuts claim as matter of law), 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under Gov't Code § 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm).

You claim that the submitted documents are excepted from disclosure under section 552.108 of the Government Code. 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 NHIC's administration of Medicaid claims is the subject of a pending criminal investigation. You have submitted a letter to TDH from the Travis County District Attorney's Office. Referring to the March 7 request for information, the letter states in pertinent part:

The documents requested in all of Paragraph 3 and all documents in Paragraphs 4 and 5 that contain information similar to the substance of the request under Paragraph 3, are the subject of a criminal grand jury investigation being conducted by the Travis County District Attorney's Office and the Travis County Grand Jury.

Our office requests that these records not be released[.]

Based on your representation, the district attorney's letter, and our review of the documents at issue, we find that the release of those documents would interfere with the detection, investigation, or prosecution of crime. Therefore, TDH may withhold the submitted documents 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). As we are able to make this determination, we need not address your arguments under section 552.103.

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

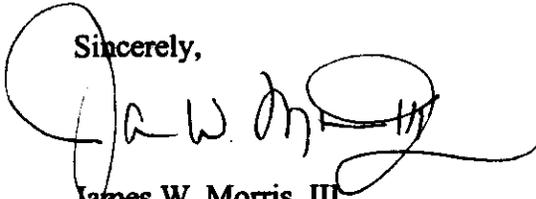
provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to 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/sdk

Ref: ID# 147579

Encl. Submitted documents

cc: Mr. Laylan Copelin
Austin American-Statesman
305 South Congress Avenue
Austin, Texas 78704
(w/o enclosures)

Mr. Dan C. Guthrie, Jr.
P.O. Box 191966
Dallas, Texas 75219
(w/o enclosures)