



June 5, 2001

Ms. Sara Shiplet Waitt
Senior Associate Commissioner
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2001-2347

Dear Ms. Waitt:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 147496.

The Texas Department of Insurance (the “department”) received a request for “each and every document in the files of the [department] . . . pertaining to the supervision and receivership of Comprehensive Health Services of Texas, Inc. (“CHST”), including any evaluations of CHST’s financial condition, any attempts to obtain financial guarantees for payment of CHST’s financial obligations, and all [of the department’s] memoranda, policies or statutory authority which provide [the department] guidance or legal authority for obtaining financial guarantees from health maintenance organizations or companies operating within the State of Texas.” You state over 1,600 pages of information have been provided to the requestor. However, you claim the remainder of the submitted documents are excepted from disclosure under section 552.101 of the Government Code in conjunction with article 21.28 of the Texas Insurance Code, common law privacy, and the informer’s privilege and sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received the requestor’s letter dated April 25, 2001, and your response dated May 4, 2001.

Initially, we note you have not submitted to this office any documents concerning policies or statutory authority which provide the department with guidance or legal authority for obtaining financial guarantees from health maintenance organizations (“HMOs”) or companies operating within the State of Texas. You state you have been unable to locate

internal policies or procedures regarding financial guarantees from HMOs or information about procedures for reviewing such financial guarantees prior to the adoption of section 11.808 [of the Texas Administrative Code]. You further state that you will make available to the requestor the complete file regarding the adoption of the rule package that included section 11.808. We note the Public Information Act (the "Act") compels disclosure of public information that is in existence, but it does not require a government entity to prepare or assemble new information in response to a request. *See* Gov't Code § 552.002 (defining "public information" as that "collected, assembled, or maintained " by a government body); *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 268 (Tex. Civ. App. – San Antonio 1978, writ dismissed) (ruling that a government agency could not be required to make copies of documents no longer in its possession).

We further note that you have not submitted for our review certain other receivership and attorney work product documents, instead relying on Open Records Letter No. 2000-4817 (2000) as a previous determination to except that information from required disclosure. Section 552.301 of the Government Code generally requires a governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the Act's exceptions to ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions. *See* Gov't Code § 552.301(a). In Open Records Decision No. 673 (2001), this office ruled one type of previous determination exists when all of the following criteria have been met:

- (1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code;
- (2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general;
- (3) the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and
- (4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling.¹

¹ A governmental body must make an initial finding that it in good faith reasonably believes the requested information is excepted from disclosure. Open Records Decision No. 665 at 3 (2000). A governmental body should request a decision from this office if it is unclear to the governmental body whether there has been a change in law, facts, or circumstances on which the prior decision was based.

Open Records Decision No. 673 at 6-7 (2001). Therefore, to the extent the department has complied with the requirements of Open Records Decision No. 673, the department may now rely on Open Records Letter No. 2000-4817 as a previous determination with regard to that information.

You also have not submitted to this office any examination reports or related work papers concerning CHST prior to its placement into receivership, instead relying on Open Records Letter No. 99-1264 (1999) as a previous determination to withhold this information. Open Records Letter No. 99-1264 states that the department need not ask this office for a ruling in order to withhold this information because section 9 of article 1.15 of the Insurance Code makes confidential a clearly delineated category of information. Open Records Letter No. 99-1264 is the second type of previous determination addressed in Open Records Decision No. 673, which pertains to clearly delineated categories of information and requires all of the following criteria be met:

- (1) the requested records or information at issue fall within a specific, clearly delineated category of information about which this office has previously rendered a decision;
- (2) the previous decision is applicable to the particular governmental body or type of governmental body from which the information is requested;
- (3) the previous decision concludes that the specific, clearly delineated category of information is or is not excepted from disclosure under the Act;
- (4) the elements of law, fact, and circumstances are met to support the previous decision's conclusion that the requested records or information at issue is or is not excepted from required disclosure; and²
- (5) the previous decision explicitly provides that the governmental body or bodies to which the decision applies may withhold the information without the necessity of again seeking a decision from this office.

² Thus, in addition to the law remaining unchanged, the facts and circumstances must also have remained unchanged to the extent necessary for all of the requisite elements to be met. As with the first type of previous determination, a governmental body seeking to withhold requested information must make an initial finding that it in good faith reasonably believes the information is excepted from disclosure. With respect to previous determinations of the second type, a governmental body should request a decision from this office if it is unclear to the governmental body whether all of the elements on which the previous decision's conclusion was based have been met with respect to the requested records or information.

Open Records Decision No. 673 at 7-8 (2001). Thus, the department may rely on Open Records Letter No. 99-1264 as a previous determination with regard to any examination reports or related work papers concerning CHST prior to the its placement into receivership.

We now address the submitted information not encompassed by the previous determinations under Open Records Letter Nos. 2000-4817 and 99-1264. First, you assert the information marked "Receivership Documents" are records of a receivership, and therefore, "not subject to the provisions of the [Act]." Article 21.28, section 11(f) of the Texas Insurance Code provides:

(f) Open Records. Chapter 552, Government Code, shall not apply to any records of a receivership estate, or to the records of an insurance company prior to its receivership, held by the receiver or by a special deputy under this Article.

Ins. Code art. 21.28, § 11(f). After reviewing the submitted information, we conclude most of the information which you have identified as "Receivership Documents" is not subject to the Act. Accordingly, we have marked those documents the department must withhold under section 11(f) of article 21.28 of the Insurance Code.

As for the remainder of the information that you have identified as "Receivership Documents," we will consider your section 552.103 claim. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no

pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The department must meet both prongs of this test for information to be excepted under 552.103(a). You state that the information relates to the lawsuit initiating the receivership, which is pending in district court. After reviewing your arguments and the submitted documents, we conclude that litigation is pending in this instance. We also find that the submitted information is related to the pending litigation for the purposes of section 552.103(a). Therefore, the department may withhold the remaining information under section 552.103.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Second, you contend some of the submitted information is excepted from disclosure under section 552.107(1) of the Government Code. Section 552.107(1) of the Government Code excepts information "that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct[.]" While section 552.107(1) appears to apply to information within rule 1.05 of the Texas Disciplinary Rules of Professional Conduct, this office determined that section 552.107 cannot be applied as broadly as written to information in the possession of an attorney for a governmental body. Open Records Decision No. 574 (1990). Section 552.107(1) was found to protect only the attorney's communication of legal advice or opinion to the client and communications from a client to an attorney where those communications are made in confidence and in furtherance of the attorney rendering professional legal service to the governmental body. *Id.* at 5. Moreover, section 552.107(1) does not except purely factual information from disclosure. *Id.* We determine the applicability of section 552.107(1) on a case-by-case basis. We agree that some of the submitted information reflects a client confidence or an attorney's legal advice or opinions that you may withhold under section 552.107. We have marked the information that is excepted from disclosure under section 552.107(1).

Third, you state some of the submitted information is protected from disclosure under section 552.111 of the Government Code. Section 552.111 of the Government Code excepts from required public disclosure "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]" Section 552.111 can apply to requested information in three distinct ways. First, this exception applies to a governmental body's internal communications consisting of advice, recommendations, or opinions reflecting the policymaking process of the governmental body at issue. *See* Open

Records Decision No. 615 (1993). This exception does not except from disclosure purely factual information that is severable from the opinion portions of the communication. *See id.* Second, the exception also protects preliminary drafts of a document that has been or will be released to the public and any comments or other notations on the drafts because they necessarily represent the advice, opinion, and recommendation of the drafter as to the form and content of the final document. *See* Open Records Decision No. 559 (1990). Finally, section 552.111 may cover attorney work product. This office stated that if a governmental body wishes to withhold attorney work product under section 552.111, it must show that the material was created for trial or in anticipation of litigation under the test articulated in *National Tank v. Brotherton*, 851 S.W.2d 193 (Tex. 1993),³ and consists of or tends to reveal an attorney's mental processes, conclusions, and legal theories. *See* Open Records Decision No. 647 at 5 (1996). We agree that section 552.111 applies to portions of the information at issue and have marked the documents accordingly.

Fourth, you contend some of the submitted documents include information protected by the doctrine of common law privacy and is, therefore, exempt from disclosure pursuant to section 552.101 of the Government Code. The doctrine of common law privacy protects information if it is highly intimate or embarrassing such that its release would be highly objectionable to a reasonable person and the public has no legitimate interest in it. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). This office has determined that some personal financial information is highly intimate or embarrassing and thus meets the first part of the *Industrial Foundation* test. Open Records Decision Nos. 600 (1992) (personal financial choices concerning insurance are generally confidential), 545 (1990) (common law privacy protects personal financial information not relating to the financial transaction between an individual and a governmental body), 523 (1989) (common law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (common law privacy protects assets and income source information). We have reviewed the information at issue and agree that the information identifying individuals as enrollees in a particular HMO is confidential. Therefore, the department must redact all identifying information, including names, street addresses, home and work telephone numbers, email addresses, social security numbers, names of family members, names of employers, and individual and group policy

³ The supreme court in *National Tank* stated that information is created in anticipation of litigation when:

- a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue;
- and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation.

Id. at 207; *Henry P. Roberts Inves., Inc., v. Kelton*, 881 S.W.2d 952, 953 (Tex. App.--Corpus Christi 1994, no writ).

numbers. We have marked those portions of the submitted documents that must be withheld under section 552.101 and common law privacy.

Lastly, you assert an email contained within the responsive information identifies a person who reported a violation of a law over which the department has enforcement authority. The informer's privilege, incorporated into the Act by section 552.101, has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). We have marked informer's identifying information that you may withhold under the informer's privilege.

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

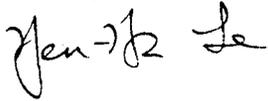
that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/DBF/seg

Ref: ID# 147496

Encl. Marked documents

cc: Mr. John H. Kyles
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(w/o enclosures)