OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

June 29, 2001

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

OR2001-2804

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# 148939.

The Texas Department of Insurance (the "department") received a request for four categories of information concerning the following entities and/or individuals: National Association of Working Americans, National Association for Working Americans, Managed Healthcare, Inc. ("MHI"), Specialty Benefits Underwriters, R. David Neal, and Ed Horn. You inform us that the department does not have any information indicating that any of the named individuals or entities have been issued multiple employer welfare arrangement certificates, and therefore, the department has no information responsive to categories one and two of the request. Nor, you state, are any of the named individuals or entities an admitted carrier licensed to write health insurance in Texas. Thus, the department has no information responsive to category four of the request. You further state that the department has located no records regarding an entity named Specialty Benefit Underwriters. You inform us, however, that the department does have information responsive to category three of the request, which seeks "copies of any complaints against or disciplinary actions against any of the [named individuals or entities]." You state that you will release information responsive to category three pertaining to R. David Neal in accordance with this office's ruling in OR2000-4653 (2000), and that certain other information responsive to category three will be released to the requestor. You assert that a portion of the category three information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. In

addition, because you believe the proprietary and/or property rights of MHI may be implicated, you notified MHI of the request.[1] MHI did not submit a response to this office. Thus, we have considered the exceptions you claim and reviewed the submitted representative sample of information.[2]

First, with regard to the categories of requested information that you state the department does not possess, we note that the Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986). Nor is a governmental body required to prepare new information to respond to a request for information. Open Records Decision No. 605 (1992), 572 (1990), 416 (1984). However, a governmental body has a duty to make a good faith effort to relate a request for information to information the governmental body holds. Open Records Decision No. 561 at 8 (1990).

Next, we address the information regarding R. David Neal which you state has been ruled upon by this office in Open Records Letter No. 2000-4653 (2000). In that ruling, the department received a request for all complaints and disciplinary actions that have been taken against Mr. Neal. Therefore, assuming that the documents at issue are precisely the same records that we addressed in Open Records Letter No. 2000-4653 (2000), we conclude that the department may rely on that letter ruling as a previous determination with regard to the request for information concerning complaints or disciplinary actions against Mr. Neal. *See* Open Records Decision No. 673 (2001) (previous determination exists where requested information is precisely same information addressed in prior attorney general ruling, ruling is addressed to same governmental body, ruling concludes that information is or is not excepted from disclosure, and law, facts, and circumstances on which ruling was based have not changed).

We next address your arguments under section 552.101. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You argue that certain information in the submitted documents is confidential under article 21.07-6, section 14A(a) of the Insurance Code. Section 14A of article 21.07-6 provides:

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[1]*See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); 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 in Public Information Act in certain circumstances).

[2]We assume that the "representative samples" of records submitted to this office are truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

> (a) Information that identifies an individual covered by a plan is confidential.
>
> (b) During the time the information described in Subsection (a) of this section is in an administrator's custody or control, the administrator shall take all reasonable precautions to prevent disclosure or use of the information for a purpose unrelated to administration of the plan.

Ins. Code art. 21.07-6, § 14A(a)-(b). We conclude that this provision applies only to information in the custody or control of an "administrator." *See* Ins. Code art. 21.07-6, § (1)(1) (defining "administrator"). You have not demonstrated that any of the submitted information is in the administrator's custody or control. Therefore, we conclude that you have failed to demonstrate the applicability of section 14A of article 21.07-6 of the Insurance Code to the submitted information. Accordingly, the identities of insured persons may not be withheld under article 21.07-6 of the Insurance Code.

You also claim that the submitted information contains medical records which are excepted under section 552.101. The Medical Practice Act ("MPA"), section 159.002(b) of the Occupations Code, provides the following:

> A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

Occ. Code § 159.002(b). The submitted information contains medical records subject to the MPA. The medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). For your convenience, we have marked the medical records subject to the MPA.

You assert that portions of the submitted information are excepted under section 552.101 in conjunction with common law privacy. This section encompasses common law privacy and excepts from public disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Personal information must be withheld from the public on the basis of common law privacy when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685.

This office has found that information identifying the enrollees in a particular health insurance plan is excepted from public disclosure, because such information implicates the

common law right of privacy of the enrollee. *See, e.g.*, Open Records Decision No. 600 at 9-12 (1992) (personal financial choices concerning insurance are generally confidential). The department must withhold the identifying information of enrollees in health plans pursuant to section 552.101 in conjunction with the common law right of privacy. Identifying information includes the insured's name, address, telephone number, birth date, and social security numbers. We agree with most of the identifying information that you have marked under common law privacy. However, we do not believe that the employer's name, policy number, claim number, or group number identifies the insured and, therefore, this information may not be withheld under section 552.101 in conjunction with common law privacy and must be released. We have marked the information that you seek to withhold that must be released.

Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath,* 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News,* 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.--Austin 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5. We have reviewed the information you have marked to withhold under section 552.111 and agree that this information is excepted from disclosure under section 552.111.

To summarize, you may withhold a portion of the information you have marked pursuant to common law privacy and section 552.101. You may also withhold the portion you have marked under section 552.111. Certain records, which we have marked, may only be released in accordance with the MPA. The remainder of the submitted information must be released to the requestor.

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,

Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/seg

Ref: ID# 148939

Enc: Submitted documents

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