



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

June 9, 2003

Mr. Steve Aragón
General Counsel
Texas Health & Human Services Commission
P. O. Box 13247
Austin, Texas 78711

OR2003-3929

Dear Mr. Aragón:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 182374.

The Texas Health & Human Services Commission (the "commission") received a request for information relating to the commission's Children's Health Insurance Program ("CHIP") contract with Clarendon National Insurance Company ("Clarendon"). You claim that portions of the requested information are excepted from disclosure under sections 552.101 and 552.137 of the Government Code. You also claim that some of the requested information may be excepted from disclosure under section 552.110 of the Government Code but make no arguments and take no position as to whether the submitted information is so excepted. You inform this office and provide documentation showing that you have notified Clarendon and Community Health Solutions, LLC ("CHS"), the interested third parties whose proprietary interests are implicated by the request, of the request for information and of their right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act (the "Act") in certain circumstances). The

commission also submitted representative samples of the requested information.¹ This office has received a response from CHS on behalf of both CHS and Clarendon arguing that portions of the submitted information may be withheld from disclosure pursuant to section 552.110(b) of the Government Code. We have considered all arguments and have reviewed the submitted information.

Initially, we note that a portion of the information you have submitted to us for review is the identical information that was the subject of a previous ruling from this office. In Open Records Letter No. 2003-3516 (2003), we concluded that the submitted information was not excepted from public disclosure and must be released to the requestor. Therefore, the commission must release that portion of the submitted information previously ruled upon in Open Records Letter No. 2003-3516 (2003).² See Gov't Code § 552.301(f); Open Records Decision No. 673 (2001). To the extent that the remaining submitted information was not the subject of the ruling in Open Records Letter No. 2003-3516 (2003), we will address your arguments.

We next address the commission's duties under the Public Information Act. Subsections 552.301(a) and (b) of the Government Code provide:

- (a) 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 . . . must ask for a decision from the attorney general about whether the information

¹We assume that the "representative sample" of records submitted to this office is 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.

²The four criteria for this type of "previous determination" are 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 Public Information 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. See Open Records Decision No. 673 (2001).

is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

It appears that the commission received the request for information on March 17, 2003. However, you acknowledge that the commission did not submit the request to this office until April 4, 2003. Consequently, you failed to request a decision within the ten business day period mandated by section 552.301(b) of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See Gov't Code § 552.302; Hancock v. State Bd. Of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest is that some other source of law makes the information confidential or that third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Because third party interests are at stake, we will consider CHS's arguments against required public disclosure of the submitted information. Additionally, you assert that portions of the information at issue are excepted from disclosure under sections 552.101 and 552.137 of the Government Code. Here, the application of sections 552.101 and 552.137 may present a compelling reason to overcome the presumption of openness. Thus, we will also consider your arguments.

As the argument of CHS and Clarendon under section 552.110(b) of the Government Code is more inclusive, we will address it first. Section 552.110(b) excepts from public disclosure commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. The governmental body, or interested third party, raising this exception must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from

disclosure. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). We find that CHS and Clarendon have not provided a specific factual or evidentiary showing that release of any of the submitted information would cause either company substantial competitive harm. *See* Open Records Decision No. 509 at 5 (1988) (stating that because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative); *see also* Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency). Accordingly, we determine that the commission may not withhold any portion of the submitted information pertaining to CHS or Clarendon under section 552.110(b) of the Government Code.

You claim that individually identifiable information concerning CHIP recipients contained in the submitted information is confidential pursuant to section 552.101 of the Government Code. Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Federal and state statutes prohibit the disclosure of information concerning a state plan for medical assistance, except for a purpose directly connected with the administration of the plan. *See* 42 U.S.C. § 1396a(a)(7); 42 C.F.R. § 457.1110(a), (b); Hum. Res. Code §§ 12.003, 21.012; Open Records Decision Nos. 584 (1991), 166 (1977); *see also* 42 U.S.C. § 1396a(a)(7); 42 C.F.R. § 431.301; Open Records Decision Nos. 584 (1991), 166 (1977). Section 12.003 of the Human Resources Code provides:

(a) Except for purposes directly connected with the administration of the [Department of Human Service's] assistance programs, it is an offense for a person to solicit, disclose, receive, or make use of, or to authorize, knowingly permit, participate in, or acquiesce in the use of the names of, or any information concerning, persons applying for or receiving assistance if the information is directly or indirectly derived from the records, papers, files, or communications of the [Department of Human Services] or acquired by employees of the [Department of Human Services] in the performance of their official duties.

Hum. Res. Code § 12.003(a). In Open Records Decision No. 584 (1991), this office concluded that "[t]he inclusion of the words 'or any information' juxtaposed with the

prohibition on disclosure of the names of the [Department of Human Service's] clients clearly expresses a legislative intent to encompass the broadest range of individual client information, and not merely the clients' names and addresses." Consequently, it is the specific information pertaining to individual clients, and not merely the clients' identities, that is made confidential under section 12.003. *See* Hum. Res. Code § 21.012 (department shall provide safeguards restricting use or disclosure of information concerning applicants for or recipients of department's assistance programs to purposes directly connected with administration of programs); *see also* Open Records Decision No. 166 (1977). In this instance, it appears that release of portions of the requested information would not be for purposes directly connected with the administration of the Department of Human Service's assistance programs. Therefore, the information we have marked is confidential under sections 12.003 and 21.012 of the Human Resources Code and must be withheld from disclosure under section 552.101 of the Government Code.

Finally, we note that the submitted information includes e-mail addresses of members of the public. With regard to this information, section 552.137 of the Government Code provides as follows:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. Section 552.137 is applicable only to an individual's personal e-mail address. Section 552.137 is not applicable to an institutional e-mail address, an internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked a representative sample of the type of e-mail address that is confidential under section 552.137. You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The commission must, therefore, withhold e-mail addresses of members of the public under section 552.137.

In summary, to the extent that the submitted information is the identical information previously ruled upon in a previous ruling by this office, it must be released to the requestor. The commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with sections 12.003 and 21.012 of the Human Resources Code. We have marked a representative sample of the type of e-mail address that is confidential under section 552.137. The remaining 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).

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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 Dep't of Pub. 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 182374

Enc. Submitted documents

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