



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 23, 2003

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

OR2003-7617

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# 189949.

The Texas Health and Human Services Commission (the "commission") received a request for "all documentation concerning the contract with Heritage Systems regarding [certain] audits." You claim that some of the requested information is excepted from disclosure under section 552.108 of the Government Code. Although you take no position regarding whether the requested information is proprietary, you have notified Heritage Information Systems, Incorporated ("Heritage") and EDS of the request for information and their opportunity to submit comments to this office. 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 section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). In its brief to this office Heritage claims that portions of the requested information are excepted from disclosure pursuant to sections 552.108, 552.110, and 552.137 of the Government Code. We have considered all claimed exceptions and reviewed the submitted information.

We begin by addressing the scope of this ruling. You state that the commission does not maintain information that is responsive to portions of the present request. See *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at time request was received). In addition, you inform us that much of the information presently being requested is subject to a previous ruling by this office. In Open Records Letter Nos. 2003-6963 (2003), this office considered a request to the commission from the same requestor for information regarding the same type of audits and the commission's relationship with Heritage. To the extent that the present request seeks information on which we have previously ruled, you must comply

with our prior ruling. *See* Open Records Decision No. 673 at 6-7 (2001) (criteria of previous determination regarding specific information previously ruled on). Thus, the only information at issue in this ruling consists of the information you have submitted at Tabs 1, 2, and 3 of your letter dated August 28, 2003 and the information that was previously submitted at Tab 7 but that was not considered in our prior ruling because it was not responsive to the previous request.¹

Section 552.108(a)(1) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). An agency whose function is essentially regulatory in nature is not a “law enforcement agency” for purposes of section 552.108. *See* Open Records Decision No. 199 (1978) (predecessor statute). However, a non-law-enforcement agency may withhold information under section 552.108 if the information relates to possible criminal conduct and has been or will be forwarded to an appropriate law enforcement agency for investigation. *See* Attorney General Opinion MW-575 (1982), Open Records Decision No. 493 (1988); *see also* Open Records Decision No. 372 (1983) (where incident involving allegedly criminal conduct is still under active investigation or prosecution, law enforcement exception may be invoked by any proper custodian of information which relates to incident). A governmental body that claims information is excepted from disclosure under section 552.108 must reasonably explain how and why section 552.108 is applicable to the information. *See* Gov’t Code §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

You indicate that the information at Tab 7 pertains to on-going investigations by the Medicaid Program Integrity (“MPI”) unit of the commission’s Office of Investigations and Enforcement (“OIE”) regarding possible violations of Medicaid regulations. You also state that the commission is required to cooperate with the Medicaid Fraud Control Unit (“MFCU”) of the Office of the Attorney General and other law enforcement agencies in appropriate cases. You indicate that MPI intends to refer this investigation to MFCU depending on the results of MPI’s investigation. Based on these representations, we conclude that the information at Tab 7 may be withheld pursuant to 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).

As for the information submitted at Tabs 1, 2, and 3, you inform us that it pertains to the techniques used in conducting Medicaid fraud investigation and assert that its release “would necessarily interfere with the detection, investigation, and prosecution of crime.” However, you have failed to explain how release of this information would interfere with any particular

¹Heritage only makes arguments regarding the information that was previously submitted at Tabs 2 through 6 and considered in our prior ruling. Because Heritage does not make any arguments regarding the information that is the subject of this ruling, we do not address the exceptions they raise.

pending criminal investigation or prosecution. Therefore, none of this information may be withheld pursuant to section 552.108(a)(1). As you raise no other exception for this information and it is not otherwise confidential by law, it must be released.

In summary, to the extent that the present request seeks information that we previously ruled on, you must comply with our prior ruling. Information submitted at Tab 7 may be withheld pursuant to section 552.108(a)(1). The information submitted at Tabs 1, 2, and 3 must be released.

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).

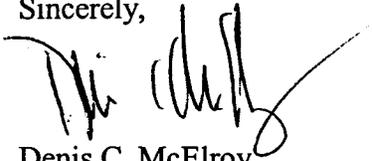
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 189949

Enc. Submitted documents

c: Mr. Scott Tatum
Davis & Davis, P.C.
P.O. Box 1588
Austin, Texas 78767
(w/o enclosures)

Mr. Thomas A. Forbes
Kemp Smith, P.C.
816 Congress Avenue, Suite 1650
Austin, Texas 78701-2443
(w/o enclosures)

Ms. Carol D. Meisel
EDS
12545 Riata Vista Circle
Austin, Texas 78727
(w/o enclosures)