



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 1, 2004

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

OR2004-7430

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# 208360.

The Texas Health and Human Services Commission (the "commission") received a request for four categories of information pertaining to certain dental providers, procedures, and "South Texas Dental." You state that the commission will release some of the requested information to the requestor. You claim that the remaining requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.101, 552.108, and 552.136 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted representative sample documents.¹

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information made confidential by other statutes. Gov't Code § 552.101. You contend that the information that you submitted to us for review as Exhibit B is confidential under section 531.1021 of the Government Code, which pertains to fraud or abuse investigations conducted by the commission's office of inspector general ("OIG"). You advise that the OIG is responsible for "the detection and investigation of fraud and abuse by

¹ We 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.

health care providers who contract to provide health care services under the Medicaid program.” See Gov’t Code §§ 531.102, .1021. Section 531.1021(g) provides:

All information and materials subpoenaed or compiled by the [OIG] in connection with an investigation are confidential and not subject to disclosure under [the Public Information Act (the “Act”)], and not subject to disclosure, discovery, subpoena, or other means of legal compulsion for their release to anyone other than the [OIG] or its employees or agents involved in the investigation conducted by the [OIG], except that this information may be disclosed to the office of the attorney general and law enforcement agencies.

Gov’t Code § 531.1021(g). You state that Exhibit B was compiled by the commission in connection with pending Medicaid fraud and abuse investigations, and you advise that this information is maintained by the OIG. Based on your representations, we find that Exhibit B is confidential under section 531.1021(g) of the Government Code and must be withheld in its entirety pursuant to section 552.101 of the Government Code.

We next address your arguments with respect to the information that you submitted to us for review as Exhibit C. You contend that information contained within Exhibit C that identifies Medicaid recipients is excepted from disclosure pursuant to section 552.101 as information made confidential by law. We note that sections 12.003 and 21.012 of the Human Resources Code prohibit the disclosure of information concerning clients of a state plan for assistance, except for a purpose directly connected with the administration of the plan. See Hum. Res. Code §§ 12.003, 21.012; see also 40 T.A.C. §§ 71.4 (information may be released if for purposes reasonably necessary for administering assistance program); Open Records Decision Nos. 584 (1991), 166 (1977). Section 12.003 provides in relevant part:

(a) Except for purposes directly connected with the administration of the department’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 or acquired by employees of the department in the performance of their official duties.

Hum. Res. Code § 12.003(a). The term “assistance” in sections 12.003 and 21.012 of the Human Resources Code includes “all forms of assistance and services for needy persons authorized by Subtitle C.” Hum. Res. Code § 11.001(4); see also *id.* § 31.001 *et seq.* (subtitle C, pertaining to assistance programs).

In Open Records Decision No. 584 (1991), this office determined that “[t]he inclusion of the words ‘or any information’ juxtaposed with the prohibition on disclosure of the names of the

department's clients clearly expresses a legislative intent to encompass the broadest range of individual client information, and not merely the clients' names and addresses." *Id.* at 3. 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 also* Hum. Res. Code § 21.012(a) (requiring provision of safeguards that restrict use or disclosure of information concerning applicants for or recipients of assistance programs to purposes directly connected with administration of programs).

You indicate that Exhibit C contains information pertaining to individual recipients of Medicaid benefits. We find that the release of such information in this instance is not a release for purposes directly connected with the administration of the Medicaid program. *See* 40 T.A.C. §§ 71.4, 71.11-71.14; *see also* 42 C.F.R. § 431.302 (setting forth purposes directly related to state Medicaid and Medicare administration). Accordingly, we conclude that the commission must withhold the information that you have marked, as well as the additional information that we have marked in Exhibit C, pursuant to section 552.101 of the Government Code in conjunction with section 12.003 of the Human Resources Code.

You also claim that portions of Exhibit C are excepted from disclosure pursuant to section 552.101 in conjunction with the common-law informer's privilege. The common-law 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); *see also Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The common-law informer's privilege 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. *See* Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The common-law 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).

You indicate that Exhibit C pertains to an investigation of the Medicaid Program Integrity unit regarding possible violations of Medicaid regulations. You also indicate that the commission is required to cooperate with the Medicaid Fraud Control Unit of the Office of the Attorney General and other law enforcement agencies in appropriate cases. You further indicate that it is the commission's duty to recommend civil sanctions against providers who violate these regulations. On this basis, and upon review of Exhibit C, we conclude that the commission may withhold the complainant identifying information that you have marked pursuant to section 552.101 of the Government Code in conjunction with the common-law informer's privilege.

In addition, you claim that Medicaid provider numbers contained within Exhibit C are excepted from disclosure pursuant to section 552.136 of the Government Code. Section 552.136 provides:

(a) In this section, “access device” means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value;
or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov’t Code § 552.136. You argue that Medicaid provider numbers are the numbers assigned to a provider who has been accepted into the Medicaid program. You state that these numbers are assigned for identification and billing purposes. As such, they “may be used to obtain money from the Medicaid program or to initiate the transfer of funds from the program.” Based on these representations, we conclude that the Medicaid provider numbers that you have marked in Exhibit C may be used to obtain money and are, thus, excepted from disclosure pursuant to section 552.136 of the Government Code.

Further, we note that portions of Exhibit C are copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making such copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

Finally, you ask this office to issue a previous determination to the commission for information made confidential under section 531.1021(g) of the Government Code. We decline to issue such a previous determination at this time.²

In summary, the commission must withhold Exhibit B pursuant to section 552.101 of the Government Code in conjunction with section 531.1021(g) of the Government Code. The

² As our ruling is dispositive, we need not address your remaining arguments.

commission must withhold the information that you have marked, as well as the additional information that we have marked, in Exhibit C pursuant to section 552.101 in conjunction with section 12.003 of the Human Resources Code. The commission may withhold the complainant identifying information that you have marked in Exhibit C pursuant to section 552.101 in conjunction with the common-law informer's privilege. The commission must withhold the Medicaid provider numbers that you have marked in Exhibit C pursuant to section 552.136 of the Government Code. The commission must release the remainder of Exhibit C to the requestor; however, in doing so, the commission must comply with the applicable copyright law for the portions of Exhibit C that are copyrighted.

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).

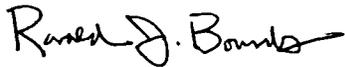
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/krl

Ref: ID# 208360

Enc. Marked documents

c: Mr. Pablo Lastra
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Fort Worth, Texas 76102
(w/o enclosures)