



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 9, 2007

Mr. Carey E. Smith  
General Counsel  
Texas Health and Human Services Commission  
P.O. Box 13247  
Austin, Texas 78711

OR2007-10212

Dear Mr. Smith:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 284649.

The Texas Health and Human Services Commission (the "commission") received a request for all documents submitted by Evercare of Texas, LLC ("Evercare") to the commission in 2006 or 2007, as well as all documents provided by the commission to Evercare in 2006 or 2007. On August 6, 2007, we received correspondence from the commission informing us that the requestor has withdrawn her request for information to the extent that it encompasses Medicaid client information, and therefore, the commission withdraws its assertion under section 552.101 of the Government Code. Therefore, this information, which we have marked, is not responsive to the instant request and need not be released. Moreover, we do not address such information in this ruling. The commission takes no position on the remaining requested information, but indicates that the proprietary interests of a third party may be implicated. Accordingly, the commission states, and provides documentation showing, that it notified Evercare of the request and its right to submit arguments to this office explaining why its information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability

of exception in the Act in certain circumstances). We have considered the submitted arguments and information.<sup>1</sup>

We next address the commission's obligations under section 552.301 of the Government Code in requesting this decision. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information that it wishes to withhold. Within fifteen business days of receiving the request, the governmental body must submit to this office (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples. Gov't Code § 552.301(e)(1)(A)-(D). Further, this section requires a governmental body to label the specific information requested, or the representative sample, indicating which exceptions apply to which parts of the copy. *Id.* § 552.301(e)(2).

You inform this office that the commission received this request for information on May 3, 2007. Accordingly, you were required to submit the items enumerated in subsection 552.301(e)(1), in the manner prescribed in subsection 552.301(e)(2), by May 24, 2007. The commission submitted four CD-ROMS containing hundreds of pages of information for our review and asserted that some, unspecified information on the disks is confidential under section 552.101 and the rest may be proprietary information. Because Evercare stated that some of the submitted information was subject to a prior ruling and subsequent pending litigation, this office contacted the commission to ascertain which records were subject to our ruling in Open Records Letter No. 2007-07436 (2007) and which records were subject to litigation as a result of the prior ruling. The commission then informed this office that it was still reviewing the four disks to determine whether all of the submitted information is responsive to the present request. The commission is required by section 552.301 to make this determination within fifteen business days of its receipt of the request for information. As late as July 18, 2007, the commission continued to inform us that it was still reviewing its records to determine their responsiveness. On July 23, 2007, the commission informed us that some of the submitted information is not responsive to this request. On this date the commission attempted to e-mail this office a copy of the list of non-responsive documents, but transmission was unsuccessful due to the large size of the file. The commission continued to use the electronic format although we informed the commission that such a format is not suited for the task at hand and that this office experienced difficulty with its electronic filing. The commission's delay in fulfilling its procedural obligations impinged upon this office's section 552.306 deadline to issue a decision. *See id.* § 552.306 (attorney general shall issue decision within 45 working days of receipt of request for decision). The commission finally delivered paper copies of the

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<sup>1</sup>We note that the submitted information contains a social security number. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

responsive documents to this office on August 2, 2007, four days before the 55-business-day deadline of August 9 permitted by section 552.306.<sup>2</sup> *See id.* (attorney general may extend deadline by ten working days). Accordingly, we find that the commission failed to comply with the procedural requirements of section 552.301 in requesting an opinion from this office.

A governmental body's failure to comply with the procedural requirements of section 552.301 of the Government Code 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 id.* § 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 section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Because the third party interests at issue and section 552.137<sup>3</sup> can provide compelling reasons to withhold information under section 552.302, we address the arguments submitted by Evercare and the submitted e-mail addresses.

Evercare asserts that certain categories of the responsive information are excepted from disclosure under section 552.110(b) of the Government Code. Section 552.110(b) protects “[c]ommercial 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[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.* § 552.110(b); Open Records Decision No. 661 (1999).

Evercare states that documents describing efforts to contract with certain providers, staff resumes, policies and procedures describing health plan processes, provider contracts, and certain information relating to its software are excepted from disclosure under section 552.110(b). Upon review, we find that Evercare has made only conclusory assertions, rather than a specific factual or evidentiary showing, that release of any of the information at issue would result in substantial competitive harm. We note that this office

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<sup>2</sup>In communicating with this office, the commission’s Open Records Coordinator stated that the information that is the subject of the recently filed lawsuit, *Evercare Texas v. Abbott*, No. D-1-GN-07-001929 (345<sup>th</sup> Dist. Ct., Travis County, Tex., June 25, 2007), is not responsive to this request.

<sup>3</sup>The Office of the Attorney General will raise mandatory exceptions like sections 552.137 of the Government Code on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

has found this type of information, as well as resumes, are not excepted under section 552.110(b). *See* Open Records Decision Nos. 319 at 2 (1982) (finding information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110), 306 at 1 (1982), 175 at 4 (1977) (resumes cannot be said to fall within any exception to the Act). Accordingly, no part of the responsive information may be withheld pursuant to section 552.110(b). Evercare additionally argues that the submitted organizational charts are not relevant to the request. Relevancy is not an argument or exception recognized by the Act. Thus, the commission may not withhold the organizational charts.

We next understand Evercare to raise section 552.111 of the Government Code.<sup>4</sup> 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.” Gov’t Code § 552.111. Section 552.111 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision No. 522 (1989) (discretionary exceptions in general). As the commission did not submit any arguments in support of withholding any information pursuant to section 552.111, the commission may not withhold any part of the responsive information pursuant to section 552.111 of the Government Code. *See* Open Records Decision No. 665 at 2 n. 5 (2000) (discretionary exceptions generally).

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection(c). Gov’t Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee’s work e-mail address because such an address is not that of the employee as a “member of the public,” but is instead the address of the individual as a government employee. This section does not protect the work e-mail addresses of the employees of an entity with which a governmental body has a contractual relationship. *Id.* § 552.137(c)(1). The responsive information contains private e-mail addresses. To the extent that the e-mail addresses contained in the responsive information are not specifically excluded by subsection (c), you must withhold the e-mail addresses pursuant to section 552.137 of the Government Code.

We note that some of the submitted information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *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 copies, the member

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<sup>4</sup>Evercare states that some of the submitted information is subject to the “policy-making privilege” of the commission. The correct exception to raise for this proposition is section 552.111.

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).

In summary, to the extent that the e-mail addresses contained in the responsive information are not excluded by subsection (c), they must be withheld under section 552.137 of the Government Code. The remaining information must be released. Information subject to copyright must be released in accordance with that law.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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,

A handwritten signature in black ink that reads "Kara A. Batey". The signature is fluid and cursive, with a large loop at the end of the last name.

Kara A. Batey  
Assistant Attorney General  
Open Records Division

KAB/mcf

Ref: ID# 284649

Enc. Submitted documents

c: Ms. Carol McClain  
Andrews & Kurth L.L.P.  
600 Travis, Suite 4200  
Houston, Texas 77002  
(w/o enclosures)

Mr. Mark Oberti  
Seyfarth Shaw, L.L.P.  
700 Louisiana Street, Suite 3700  
Houston, Texas 77002