



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 17, 2010

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

OR2010-17430

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# 398788.

The Texas Health and Human Services Commission (the "commission") received a request for the raw data used to generate psychotropic medication utilization review reports and the names, medical license numbers, dates of review, reasons for review, and any resulting actions for providers identified as prescribing outside psychotropic medication parameters. We understand some information has been released to the requestor. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. You also state release of the submitted information may implicate the proprietary interests of Superior HealthPlan Network ("Superior"). Accordingly, you state, and provide documentation showing, you notified Superior of the request for information and of its right to submit arguments to this office as to why the submitted 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 received comments on behalf of Superior. We have considered the submitted arguments and reviewed the submitted representative sample of information.¹

Superior asserts the submitted information is not subject to the Act. The Act is applicable only to "public information." *See id.* §§ 552.002, .021. Section 552.002(a) provides that "public information" consists of

¹We assume 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 those records contain substantially different types of information than that submitted to this office.

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body; or

(2) for a governmental body and the governmental body owns the information or has a right of access to it.

Id. § 552.002(a). Thus, virtually all of the information in a governmental body's physical possession constitutes public information and thus is subject to the Act. *Id.* § 552.002(a)(1); see Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); see Open Records Decision Nos. 558 at 2 (1990), 462 at 4 (1987).

Superior states the commission does not own or have a right of access to the submitted information. We note the Act generally does not require a governmental body to obtain information not in its possession. See ORD 558 at 2 (1990) (Act not applicable if governmental body does not have right of access to or ownership of information prepared for it by an outside entity), 445 at 2 (Act not applicable to information governmental body never possessed or was entitled to receive). Thus, the Act does not require a governmental body to release information if the governmental body that receives the request has neither possession of the information nor a right of access to it. See Open Records Decision Nos. 534 at 2-3 (1989), 518 at 2-3 (1989). Superior provides an affidavit from its chief medical director stating Superior has a contract with the commission to provide health services to Texas foster care children and Superior maintains the submitted information internally for its own use as an independent contractor.² Pursuant to section 552.303 of the Government Code, we asked the commission for a copy of its contract with Superior and to explain its position as to whether the requested information is subject to the Act.³ In response, you inform us, "Superior created the documents at issue during the course of fulfilling the scope of work required under [the] contract." You further assert, "It is the [c]ommission's position that the records at issue constitute public information." You also have provided us with a copy of the contract at issue. We note the contract requires Superior to provide the commission with "prompt, reasonable, and adequate access to any records,

²We note that whether a party to a contract with a governmental body is an independent contractor and/or an agent is not dispositive of whether information held by the party is subject to the Act. See Open Records Decision No. 462 at 4-5 (1987). We also note a governmental body cannot compromise its obligations under the Act simply by deciding to enter into a contract. See Open Records Decision Nos. 541 at 4 (1990), 514 at 1 (1988).

³See Gov't Code § 552.303(c)-(d) (if attorney general determines information in addition to that required by section 552.301 is necessary to render decision, written notice of that fact shall be given to governmental body and requestor, and governmental body shall submit necessary additional information to attorney general not later than seventh calendar day after date of receipt of notice).

books, documents, and papers that are related to the performance of the [s]cope of [w]ork.” Amendment 7 to HHSC Managed Care Contract Document for the Foster Care Program, HHSC Contract No. 529-06-0293-00001-G, Attachment A, version 1.7, § 9.02(a) (effective September 1, 2010). Upon review of the arguments, contract, and submitted information, we conclude the commission has a right of access to the information at issue. Accordingly, the requested information constitutes information “collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business . . . by [or] for” the commission for purposes of section 552.002 of the Government Code. *See* Gov’t Code § 552.002(a)(1)-(2). Therefore, the submitted information is subject to the Act, and must be released, unless an exception to disclosure is applicable. Accordingly, we will address the submitted arguments against disclosure.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses information protected by other statutes. The commission and Superior raise section 552.101 in conjunction with section 160.007 of the Occupations Code for the requested information. Section 160.007 provides in pertinent part:

(a) Except as otherwise provided by this subtitle, each proceeding or record of a medical peer review committee is confidential, and any communication made to a medical peer review committee is privileged.

...

(c) A record or proceeding of a medical peer review committee or a written or oral communication made to the committee may be disclosed to:

....

(2) an appropriate state or federal agency[.]

Occ. Code § 160.007(a), (c). “Medical peer review” is defined by the Medical Practice Act (the “MPA”), found at subtitle B of title 3 of the Occupations Code, as “the evaluation of medical and health care services, including evaluation of the qualifications and professional conduct of professional health care practitioners and of patient care provided by those practitioners.” *Id.* § 151.002(a)(7). A medical peer review committee is “a committee of a health care entity . . . or the medical staff of a health care entity, that operates under written bylaws approved by the policy-making body or the governing board of the health care entity and is authorized to evaluate the quality of medical and health care services or the competence of physicians [.]” *Id.* § 151.002(a)(8). The definition of a health care entity under the MPA includes “an entity, including a health maintenance organization . . . that provides or pays for medical care or health care services and follows a formal peer review process to further quality medical care or health care[.]” *Id.* § 151.002(a)(5)(B).

The affidavit from Superior's chief medical director states the requested information constitutes records of a medical peer review committee compiled by its subcontractor. The affidavit further states Superior's subcontractor is required to function as a health maintenance organization, and its peer review committee operates under the health maintenance organization's bylaws. Based on these representations and our review, we conclude the submitted information consists of confidential records of a medical peer review committee under section 160.007 of the Occupations Code. Therefore, the commission must withhold the submitted information under section 552.101 of the Government Code. As our ruling is dispositive, we need not address Superior's remaining argument against disclosure.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/em

Ref: ID# 398788

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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(w/o enclosures)