ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 18, 2012

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

OR2012-00873

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# 442622.

The Texas Health and Human Services Commission (the "commission") received a request for forty-six categories of information pertaining to the commission's Executive Waiver Committee (the "committee") and any of its subcommittees, the Proposed 1115 Waiver, a specified request for proposal, the expansion of Medicaid managed care in Texas, and the Medicaid Managed Care Prescription Carve-In. You state that you are releasing some of the requested information for categories 23 and 24 of the request and will rely on Open Records Letter No. 2012-00822 (2012) and withhold or release the remaining information responsive to categories 23 and 24 of the request.[1] You claim some of the remaining requested information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that portions of the submitted e-mail strings and some entire e-mail strings, which we have marked, are not responsive to the instant request because they were created after the date the instant request for information was received. *See Economic Opportunities*

[1]*See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely the same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Dev. Corp. v. Bustamante, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983). This ruling does not address the public availability of any information that is not responsive to the request, and the commission need not release such information.

Next we note you state you have submitted a representative sample of information; however, no portion of the submitted representative sample pertains to the information requested in categories 11 through 12, 25 through 27, or 39 through 42 of the request.[2] Thus, we find the submitted information is not representative of all the information sought in the request for information. Please be advised this ruling applies to only the types of information you have submitted for our review. Therefore, this ruling 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. *See* Gov't Code § 552.302 (where request for attorney general decision does not comply with requirements of section 552.301, information at issue is presumed public). To the extent any information responsive to categories 11 through 12, 25 through 27, or 39 through 42 existed on the date the commission received the information, we assume the commission has released it. If the commission has not released any such information, it must do so at this time. *See id.* §§ 552.301-.302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to the requested information, it must release information as soon as possible).

We note some of the submitted information is subject to section 552.022 of the Government Code, which provides in pertinent part:

> (a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:
>
> > (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The completed Community Needs Assessment constitutes a completed report that is subject to section 552.022(a)(1) and must be released unless it is either excepted under section 552.108 of the Government Code or is confidential under the Act or other law. You do not claim section 552.108. Although you assert this information is excepted from disclosure under section 552.103 and the deliberative process privilege in

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[2]These categories of the request are: (11) bylaws of the Executive Waiver committee; (12) bylaws of subcommittees of the committee; (25) subcontracts pertaining to a specified request for proposals (the "RFP"); (26) documents sufficient to demonstrate the date the commission granted each "tentative award" for the RFP; (27) documents sufficient to demonstrate the date the commission granted each final award for the RFP; and (39) - (42) all studies and analyses pertaining to the Medicaid Managed Care Prescription Drug Carve-In performed by the commission regarding payments to pharmacy providers by managed care organizations and reimbursement rates.

section 552.111, these sections are discretionary and do not make information confidential under the Act. *See* Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, §§ 3-21, 23-26, 28-37 (providing for "confidentiality" of information under specified exceptions); *see also Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111 deliberative process); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the commission may not withhold the information that is subject to section 552.022 under section 552.103 or section 552.111. As you raise no further exceptions to its disclosure, the commission must release this information, which we have marked.

You claim that the remaining responsive information is protected under section 552.103 of the Government Code. Section 552.103 provides in part:

> (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.
>
> . . .
>
> (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a). *See* ORD 551 at 4.

You state that a lawsuit styled *Southwest Pharmacy Solutions, Inc. v. Texas Health and Human Services Commission*, Cause No. D-1-GN-11-002612, was filed in the 126th District

Court of Travis County, prior to the commission's receipt of the instant request for information. As such, litigation was pending against the commission at the time of the request. You explain that the lawsuit concerns alleged violations of the rulemaking requirements of the Texas Administrative Procedures Act and *ultra vires* conduct on the part of the commission. Based on your representations and our review, we find the information at issue is related to the pending litigation. Accordingly, the commission may withhold the remaining responsive information you have marked under section 552.103 of the Government Code.[3]

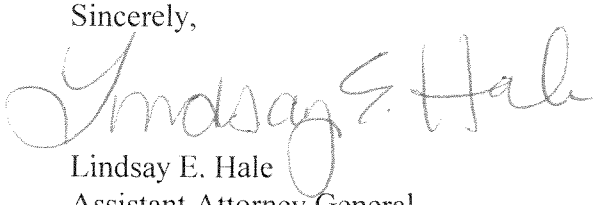
We note that once the information has been obtained by all parties to the pending litigation, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation is concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

In summary, with the exception of the information we have marked that must be released in accordance with section 552.022 of the Government Code, the commission may withhold the remaining responsive information under section 552.103 of the Government Code.

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,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/ag

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[3]As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Ref: ID# 442622

Enc. Submitted documents

c: Requestor
(w/o enclosures)