



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 2, 2014

Mr. Nick Lealos
Staff Attorney
Office of Agency Counsel, Legal Section
Texas Department of Insurance
P.O.Box 149104, MC 110-1A
Austin, Texas 78714-9104

OR2014-15393

Dear Mr. Lealos:

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# 534842 (TDI Nos. 151837 and 151389).

The Texas Department of Insurance (the "department") received a request for four categories of information pertaining to BlueCross BlueShield of Texas ("BCBS") during a specified time period.¹ You state the department is releasing some of the requested information. You state the department will withhold e-mail addresses of members of the public under section

¹We note the department sought and received clarification of the request for information. *See* Gov't Code § 552.222(b) (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification or narrowing of unclear or overbroad request for public information, ten-day period to request attorney general ruling is measured from date request is clarified or narrowed).

552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).² We understand the department redacted information that identifies enrollees in health plans under section 552.101 of the Government Code in conjunction with common-law privacy pursuant to the previous determination issued in Open Records Letter No. 2001-4777 (2001).³ Although you take no position as to whether the remaining requested information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of BCBS. Accordingly, you state, and provide documentation showing, you notified BCBS 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 from BCBS. We have reviewed the submitted information and the submitted arguments.

BCBS contends the portions of the submitted information consisting of claims and payment data information are currently the subject of a lawsuit pending against the Office of the Attorney General. *See Health Care Serv. Corp. v. Greg Abbott*, No. D-1-GN-14-001128 (261st Dist. Ct., Travis County, Tex.). Upon review, we determine the submitted claims and payment data information is not at issue in the pending lawsuit. Accordingly, we will address the submitted arguments against its 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. This exception encompasses information that other statutes make confidential. BCBS claims the release of portions of the submitted information could be a violation of the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. §§ 1320d-1320d-8. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. pts. 160, 164 ("Privacy Rule"); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164.

²Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

³Open Records Letter No. 2001-4777 authorized the department to withhold information that identifies an enrollee in a health plan, including the enrollee's name, address, telephone number, birth date, social security number, and claim number, under section 552.101 of the Government Code in conjunction with common-law privacy without the necessity of requesting an attorney general's decision.

Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. *Id.* § 164.502(a).

This office addressed the interplay of the Privacy Rule and the Act in Open Records Decision No. 681 (2004). In that decision, we noted section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent such use or disclosure is required by law and the use or disclosure complies with, and is limited to, the relevant requirements of such law. *See id.* § 164.512(a)(1). We further noted the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” *See* ORD 681 at 8; *see also* Gov’t Code §§ 552.002, .003, .021. We, therefore, held that the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See Abbott v. Tex. Dep’t of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9; *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make information that is subject to disclosure under the Act confidential, the department may not withhold any portion of the submitted information on this basis.

BCBS also raises section 552.101 of the Government Code in conjunction with section 36.252 of the Insurance Code, which provides:

- (a) Information or material acquired by the department that is relevant to an investigation is not a public record for the period that the department determines is relevant to further or complete an investigation.
- (b) Investigation files are not open records for purposes of [the Act], except as specified herein.

Ins. Code § 36.252. Section 36.251 of the Insurance Code states “investigation file”

means any information collected, assembled, or maintained by or on behalf of the department with respect to an investigation conducted under this code or other law. The term does not include information or material acquired by the department that is:

- (1) relevant to an investigation by the insurance fraud unit; and
- (2) subject to Section 701.151 [of the Insurance Code].

Id. § 36.251. BCBS states some of the information at issue is related to an investigation by the department into claims of late payments of reimbursement to BCBS's network providers. Pursuant to section 36.252 of the Insurance Code, the investigation file must be withheld under section 552.101 of the Government Code until such time as the department determines the information at issue is no longer relevant to further or complete its investigation. Upon review, we note the department does not seek to withhold the information pursuant to section 36.252, and we find the information at issue pertains to a completed investigation. Accordingly, we conclude the department may not withhold the submitted information under section 552.101 of the Government Code in conjunction with section 36.252 of the Insurance Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. The types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). This office has also found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision Nos. 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

BCBS claims the submitted claims and payment data information are excepted from disclosure by the litigation exception, section 552.103 of the Government Code. Because section 552.103 protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties, we do not address BCBS's argument under section 552.103. *See* Open Records Decision Nos. 542 (statutory predecessor to section 552.103 does not implicate the rights of a third party), 522 (1989) (discretionary exceptions in general). Furthermore, although BCBS states the information at issue is related to pending litigation initiated by BCBS against our office, we note, and the department acknowledges, the department is not a party to this lawsuit. The litigation exception only applies when the governmental body is a party to the pending or reasonably anticipated litigation. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2

(1990). Accordingly, none of the submitted information may be withheld under section 552.103 of the Government Code.

BCBS raises section 552.110(b) of the Government Code for some of its information. This section excepts from disclosure “[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). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

BCBS argues some of its information, including its pricing information, consists of commercial information the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find BCBS has not established any of its remaining information at issue constitutes commercial or financial information, the disclosure of which would cause the company substantial competitive harm. *See id.* Accordingly, none of BCBS’s remaining information at issue may be withheld under section 552.110(b) of the Government Code.

We note that some of the remaining information may be 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. *See* Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See id.*; *see also* Open Records Decision No. 109 (1975). 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 of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The department must release the remaining information, but any information protected by copyright may only be released in accordance with copyright law.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Britni Fabian
Assistant Attorney General
Open Records Division

BF/bhf

Ref: ID# 534842

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. D. Keith George
BlueCross BlueShield of Texas
P.O. Box 655730
Dallas, Texas 75265-5730
(w/o enclosures)