



Office of the Attorney General
State of Texas

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ATTORNEY GENERAL

November 22, 1994

Ms. Alesia L. Sanchez
Legal Assistant
Legal Services, 110-1A
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR94-738

Dear Ms. Sanchez:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 26434.

The Texas Department of Insurance (the "department") received a request for the portion of Benesys, Inc.'s ("Benesys") utilization review plan (the "plan") that was used to determine the medical necessity or appropriateness of certain medical services provided to an individual. You state that Benesys is a licensed utilization review agent and its plan was submitted to the department as part of the licensing process. A utilization review plan is defined as a utilization review agent's screening criteria and utilization review processes. Ins. Code art. 21.58A, § 2(22). Utilization review is "a system for prospective or concurrent review of the medical necessity and appropriateness of health care services being provided or proposed to be provided." *Id.* § 2(20). You contend that the plan is made confidential under article 21.58A of the Insurance Code.

Section 4(i) of article 21.58A of the Insurance Code provides:

Each utilization review agent shall utilize written medically acceptable screening criteria and review procedures which are established and periodically evaluated and updated with appropriate involvement from physicians, including practicing physicians, and other health care providers. Such written screening criteria and review procedures shall be available for review and inspection by the commissioner and copying as necessary for the commissioner to carry out his or her lawful duties under this code, provided,

however, that *any information obtained or acquired under the authority of this subsection and article is confidential and privileged and not subject to the open records law or subpoena* except to the extent necessary for the board or commissioner to enforce this article. (emphasis added).

Access to the plan is therefore governed by section 4(i) of article 21.58A rather than chapter 552 of the Government Code. The statute provides for the release of information about the plan only to the extent necessary for the Commissioner of Insurance (the "commissioner") to carry out his or her duties, and for the commissioner and the State Board of Insurance to enforce article 21.58A.

We note that the requestor indicates that neither he nor his physician received information as to the reasons for an adverse determination by Benesys concerning certain medical treatment. An "adverse determination" is defined as the utilization review agent's determination "that the health care services furnished or proposed to be furnished to a patient are not medically necessary or not appropriate in the allocation of health care resources." *Id.* § 2(3). Section 5 of article 21.58A provides the following procedure that the utilization review agent must follow when an adverse determination is made:

(a) A utilization review agent shall notify the enrollee, a person acting on behalf of the enrollee, or the enrollee's provider of record of a determination made in a utilization review.

(b) The notification required by this section must be mailed or otherwise transmitted no later than two working days after the date of the request for utilization review and all information necessary to complete the review is received by the agent.

(c) In the event of an adverse determination, the notification by the utilization review agent must include

(1) the principal reasons for the adverse determination;

(2) *a description or the source of the screening criteria that were utilized as guidelines in making the determination; and*

(3) a description of the procedure for appeal.

(d) The notification of adverse determination required by this section shall be provided by the utilization review agent:

(1) within one working day by telephone or electronic transmission to the provider of record in the case of a patient who is hospitalized at the time of the adverse determination; or

(2) within three working days in writing to the provider of record and the patient if the patient is not hospitalized at the time of adverse determination. (emphasis added).

Section 6 of article 21.58A provides for an appeal procedure from an adverse determination. When an adverse determination is appealed, the enrollee or his physician "shall be provided, on request, a clear and concise statement of the clinical basis for the adverse determination." *Id.* § 6(b)(1).

Access to the requested portion of Benesys utilization review plan is governed by article 21.58A of the Insurance Code rather than chapter 552 of the Government Code. Sections 5 and 6 provide for the utilization review agent to provide the enrollee reasons for an adverse determination. However, section 4(i) provides that the department keep Benesys utilization review plan confidential except to the extent necessary for the commissioner to carry out his or her duties, and for the commissioner and the State Board of Insurance to enforce article 21.58A.¹

We are resolving this matter with an informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Government Section

RHS/KHG/rho

Ref.: ID# 26434

Enclosures: Submitted documents

¹We note that you also asserted that the information was protected as a trade secret under section 552.110. *See* Open Records Decision No. 592 (1991). Pursuant to section 552.305 of the Government Code, Benesys was given the opportunity to submit reasons as to why it contended the plan should be withheld from disclosure. Benesys did not contend that the plan contains trade secrets, but argued that the plan is confidential under section 4(i) of article 21.58A. Since access to the plan is governed by article 21.58A, and Benesys did not assert that the plan contains trade secrets, we need not address your section 552.110 argument. *Id.*; Open Records Decision No. 402 (1983).