Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 23, 1997

Ms. Nancy Barbour
Staff Attorney
Legal and Compliance, MC 110-1A
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR97-2361

Dear Ms. Barbour:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 109926.

The Texas Department of Insurance (the "department") received a request for complaints filed against PacifiCare of Texas, Inc. ("PacifiCare") during the last three years. You note that some of the requested complaint documents contain "medically related information." You contend that this information is excepted from disclosure by section 552.101 of the Government Code in conjunction with the common-law right to privacy. You have submitted a representative sample of the requested documents to this office for review.[1]

Pursuant to section 552.305 of the Government Code, we notified PacifiCare of the request for information and of its opportunity to claim that the documents at issue are excepted from disclosure. PacifiCare responded by claiming that the complaint documents are excepted from disclosure under section 552.110 of the Government Code and section 552.101 of the Government Code in conjunction with the common-law right to privacy and the Medical Practice Act (the "MPA"), article 4495b, V.T.C.S.

We note that the requestor specifically states that he is "not seeking any medical records provided by any of the complainants." However, the submitted documents include medical records that are deemed confidential by the MPA. Section 5.08(b) of the MPA provides as follows:

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

> (b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except at provided in this section.

V.T.C.S. art. 4495b, § 5.08(b). Medical records may be released only in accordance with the MPA. Open Records Decision No. 598 (1991). *See* V.T.C.S. art. 4495b, §§ 5.08(c), (j). We have marked the documents that are within the scope of the MPA.

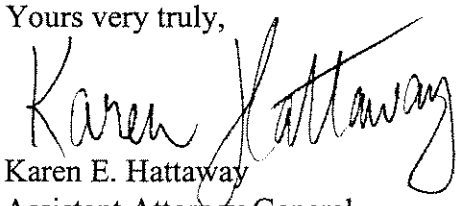
PacifiCare contends that some of the information contained in the requested complaint documents is commercial information that should be protected by section 552.110 of the Government Code. Section 552.110 protects the property interests of private parties by excepting from disclosure two types of information: (1) trade secrets and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. Commercial or financial information is excepted from disclosure under the second prong of section 552.110. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770. A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 (1996) at 4. To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure. *Id.* PacifiCare has not demonstrated with specificity how releasing the requested documents would cause it to suffer substantial competitive injury. Therefore, we conclude that the complaint documents are not excepted from disclosure pursuant to section 552.110.

The requested documents include confidential medical information not covered by a confidentiality statute, yet protected from required public disclosure based on the common-law right to privacy. *See Industrial Found of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information is protected by the doctrine of common-law privacy if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *See id.* While common-law privacy may protect an individual's medical history, it does not protect all medically related information. *See* Open Records Decision No. 478 (1987). Individual determinations are required. *See* Open Records Decision No. 370 (1983). This office has determined that common-law privacy protects the following information: the kinds of prescription drugs a person is taking, Open Records Decision No. 455 (1987); the results of mandatory urine testing, *id.*; illnesses, operations, and physical handicaps of applicants, *id.*; the fact that a person

attempted suicide, Open Records Decision No. 422 (1984); the names of parents of victims of sudden infant death syndrome, Attorney General Opinion JM-81; and information regarding drug overdoses, acute alcohol intoxication, obstetrical/gynecological illnesses, convulsions/seizures, or emotional/mental distress, Open Records Decision No. 343 (1982). In addition common-law privacy may protect certain financial information, including information about personal financial decisions. *See* Open Records Decision No. 600 (1992) at 9-12. In this case, we believe that withholding information that identifies the complainants will protect their privacy interests. We have marked the types of identifying information that the department must withhold from disclosure under section 552.101 in conjunction with the common-law right to privacy. With the exception of this marked information and the medical records discussed above, the requested information must be released.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have any questions about this ruling, please contact our office.

Yours very truly,



Karen E. Hattaway
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KEH/ch

Ref: ID# 109926

Enclosures: Marked documents

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