



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 2, 1998

Ms. Mary Keller
Senior Associate Commissioner
Legal and Compliance
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR98-1374

Dear Ms. Keller:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 115263.

The Texas Department of Insurance (the "department") received a request for "all documents in your files" concerning a complaint made by a named individual against NYLCare Health Plans of the Gulf Coast, Inc. ("NYLCare"). It is our understanding that NYLCare is a Health Maintenance Organization ("HMO"). The requestor is not the named individual, although from your correspondence, it appears the requestor may represent the named individual. You seek a decision from this office as to whether any of the information at issue is protected from disclosure under various provisions of law.

We note initially that if the requestor does not represent the named individual, none of the information at issue may be disclosed. Section 552.101 protects from disclosure information that is confidential under a common-law right of privacy. Personal information must be withheld from public disclosure when it is (1) highly intimate or embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) ; Open Records Decision No. 611 (1992) at 1. This office has determined that information identifying individuals as enrollees in a particular HMO is confidential. Open Records Decision No. 373 (1983) (personal financial information generally confidential), Open Records Decision No. 600 (1992) at 9-12 (personal financial choices concerning insurance are generally confidential). Generally, in order to protect the identity of enrollees in a particular HMO, the department is required to redact the enrollee's name, street address, telephone number, social security number, names of family members, name of employer, and

individual and group policy numbers. However, redacting information is not sufficient to protect an individual's privacy interest when the requestor knows the identity of the person about whom information is sought. Thus, if the requestor does not represent the named individual, the department must withhold all complaint records concerning the named individual.

Assuming that the requestor actually represents the named individual and seeks the information on that person's behalf, the privacy interests of the named individual are not implicated by this request. We will therefore address your other arguments against disclosure. You assert that some of the information at issue is otherwise protected from disclosure. You have marked some information as protected peer review information. Sections 5.06 of article 4495b of Vernon's Texas Civil Statutes and 161.031 of the Health and Safety Code contain provisions making certain records of medical peer review committees confidential. Section 5.06(g) states that, "[e]xcept as otherwise provided by this Act, all proceedings and records of a medical peer review committee are confidential, and all communications made to a medical peer review committee are privileged." Section 161.032(a) provides that "records and proceedings of a medical committee are confidential." However, neither section 5.06 nor section 161.032 make confidential "records made or maintained in the regular course of business by a hospital, health maintenance organization, medical organization, university medical center or health science center, or extended care facility." Health & Safety Code § 161.032(b); see *Memorial Hosp.-the Woodlands v. McCown*, 927 S.W.2d 1, 10 (Tex. 1996) ("The reference to section 5.06 in section 161.032 is a clear signal that records should be accorded the same treatment under both statutes in determining if they were made 'in the regular course of business.'"). We agree that the marked information is confidential and may not be disclosed.

Also, one of the records at issue appears to be a medical record, which may be released only as provided by section 5.08 of article 4495b of Vernon's Texas Civil Statutes. Open Records Decision No. 598 (1991). We note that although section 5.08(j)(1) provides for release of medical records upon the patient's written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released, no such written consent was submitted to this office.

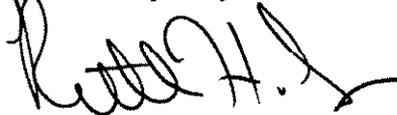
You also ask that this office determine if release of any of the information at issue implicates the third party privacy or property interests of the HMO. We will address whether release of this information implicates the third party interests of NYLCare. Pursuant to section 552.305 of the Government Code, this office provided NYLCare an opportunity to submit reasons as to why the information at issue should be withheld from disclosure. NYLCare submitted a brief in which it addresses the HMO enrollee's common-law and statutory privacy interests, and the confidentiality of medical record and peer review information, which we have discussed. NYLCare also asserts that certain complaint information is protected from disclosure under article 20A.17 of the Insurance Code. We

note that the complaint information is not made confidential under article 20A.17, as discussed in Open Records Letter No. 98-1197 (1998) (copy enclosed).

NYLCare also asserts that the records at issue are protected financial or commercial information under section 552.110 of the Government Code. Section 552.110 protects the property interests of third 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. In Open Records Decision No. 639 (1996), this office concluded that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act in determining whether commercial or financial information is protected under 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.* NYLCare has not shown that the submitted information is protected from disclosure under section 552.110.

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 questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/ch

Ref.: ID# 115263

Enclosures: Submitted documents
(Open Records Letter No. 98-1197 (1998))

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