



March 20, 2001

Ms. Sara Shiplet Waitt  
Senior Associate Commissioner  
Texas Department of Insurance  
P.O. Box 149104  
Austin, Texas 78714-9104

OR2001-1096

Dear Ms. Waitt:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 145090.

The Texas Department of Insurance (the "department") received a request for copies of any and all documents regarding "Nyl Care Health Plans, Inc.; Nylcare of Texas, Inc.; and Aetna U.S. Healthcare, Inc." You state that some of the information will be provided to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information and representative samples.<sup>1</sup>

You advise this office that portions of the submitted information may involve the proprietary or property interests of Nylcare Health Plans and Aetna Health Plans. You have submitted copies of letters notifying Texas Gulf Coast HMO, Inc., Southwest Texas HMO, Inc., Aetna U.S. Healthcare of North Texas, Inc., and Aetna U.S. Healthcare, Inc. about the request as required by section 552.305(d). *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). We have received a brief from Aetna U.S. Healthcare, Inc. ("Aetna"). This office also received a brief from an attorney representing Texas Gulf Coast HMO, Inc., d/b/a HMO Blue Texas and Southwest Texas HMO, Inc., d/b/a HMO Blue Texas. In the brief, the attorney explains that prior to April 3, 2000, these companies were known as NYLCare Health Plans of the Gulf Coast, Inc. and NYLCare Health Plans of the Southwest, Inc. ("NYLCare").

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<sup>1</sup>In reaching our conclusion here, 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.

Aetna and NYLCare both contend that the department expanded the scope of the request to include legal entities not identified in the request. Specifically, Aetna contends that the department expanded the request to include any entity with the words "Aetna U.S. Healthcare, Inc." and the attorney for NYLCare contends that it does not represent any of the three companies identified in the request, but has concerns about the department releasing any information of his clients. Pursuant to section 552.301(e)(1)(D) of the Government Code, the governmental body that receives a request for information must submit a copy of the specific information requested. The department contends that it identified several companies with the words "Aetna U.S. Healthcare" and "Nylcare Health Plans" in the company name. Further, the department sought clarification from the requestor pursuant to section 552.222(b) of the Government Code. *See Gov't Code § 552.222(b)* (allowing governmental body to ask the requestor to clarify the request or discuss how the request could be narrowed). The requestor replied that he was seeking all "NYLCare and Aetna entity documents for the categories requested." The department represents that it has forwarded responsive information to this office. We cannot resolve disputes of fact in the open records process, and therefore, we must rely on the representations of the governmental body requesting our opinion. *See Open Records Decision Nos. 554 (1990), 552 (1990)*. Accordingly, we will assume that all submitted documents are responsive to the request and we will address the arguments concerning those documents.

As section 552.111 is the most inclusive exception to disclosure, we will address section 552.111 first. In Open Records Decision No. 647 (1996), this office concluded that a governmental body may withhold attorney work product under section 552.111 of the Government Code if the governmental body can show (1) that the information was created for trial or in anticipation of litigation under the test articulated in *National Tank v. Brotherton*, 851 S.W.2d 193 (Tex. 1993), and (2) that the information consists of or tends to reveal an attorney's "mental processes, conclusions, and legal theories." Open Records Decision No. 647 at 5 (1996). Under the *National Tank* test, it must be shown that a reasonable person would have concluded that there was a substantial chance that litigation would ensue and that the party resisting disclosure believed in good faith that there was a substantial chance that litigation would ensue and prepared or collected the information in question for purposes of such litigation. *National Tank Co.*, 851 S.W.2d at 207; *Id.* at 4.

You have provided affidavits from department attorneys in the enforcement section that state that the seven closed case files were developed because enforcement actions were being pursued in connection with the allegations in these files. Further, the attorneys state that administrative litigation was anticipated at the time of the investigation. *See Open Records Decision No. 588 at 7 (1991)* (contested cases under the APA are considered litigation under section 552.103). Based on your representations and our review of the submitted information, we conclude that you have shown that there was a substantial chance of litigation involving the department and that the seven closed case files were prepared for litigation purposes.

The second requirement that must be met is that the work product “consists of or tends to reveal the thought processes of an attorney in the civil litigation process.” Open Records Decision No. 647 at 4 (1996). Although the attorney work product privilege protects information that reveals the mental processes, conclusions, and legal theories of the attorney, it generally does not extend to facts obtained by the attorney. *Id.*

You contend that the seven closed case files should be withheld in their entirety pursuant to the rationale in *Curry v. Walker*, 873 S.W.2d 379, 381 (Tex. 1994). In *Curry*, the Texas Supreme Court held that a request for a district attorney’s “entire file” was “too broad” and that, citing *National Union Fire Insurance Company v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993), “the decision as to what to include in [the file] necessarily reveals the attorney’s thought processes concerning the prosecution or defense of the case.” *Curry*, 873 S.W.2d at 380. If a requestor seeks an attorney’s entire litigation file, and a governmental body seeks to withhold the entire file and demonstrates that the file was created in anticipation of litigation, we will presume that the entire file is excepted from disclosure under the attorney work product aspect of section 552.111. Open Records Decision No. 647 at 5 (1996)(citing *National Union*).

However, the present requestor asks for all documents regarding three companies rather than requesting specific litigation files. Because of the broad nature of the request, we do not believe that this request necessarily encompasses entire litigation files. Consequently, we conclude that the rationale underlying *Curry* is not applicable in this instance. Thus, the seven closed case files may not be withheld in their entirety pursuant to the rationale in *Curry*. However, portions of the submitted information in the closed case files reveal the mental processes, conclusions, and legal theories of an attorney and may be withheld under section 552.111 of the Government Code. However, some of the information is factual and may not be withheld as attorney work product under section 552.111 of the Government Code.

You also claim that some of the submitted information is intra-agency communications that are excepted under section 552.111 of the Government Code. Section 552.111 also excepts from required public disclosure interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity’s policymaking process. *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.–Austin 1992, no writ); Open Records Decision No. 615 at 5 (1993). The purpose of this section is “to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes.” *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.–San Antonio 1982, writ ref’d n.r.e.) (emphasis added).

You state that some of the documents are internal memoranda, e-mails and drafts between department staff that contain opinions, recommendations, and conclusions. After reviewing the submitted information, we conclude that some of the information contains advice, recommendations, opinions, and other material reflecting the policymaking processes of the department and, therefore, may be withheld under section 552.111 of the Government Code.

However, some of the submitted information contains purely factual information which you may not withhold under section 552.111. We have marked the information that you may withhold under section 552.111 of the Government Code.

Some of the submitted documents are marked as "drafts." The draft of a document that has been released or is intended for release in final form necessarily represents the advice, opinion, and recommendation of the drafter as to the form and content of the final document, and may therefore be withheld under section 552.111 of the Government Code. See Open Records Decision No. 559 (1990). Generally, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. Open Records Decision No. 615 at 4-5 (1993). Yet, where a document is a genuine preliminary draft that has been released or is intended for release in final form, factual information in that draft which also appears in a released or releasable final version is excepted from disclosure by section 552.111. Open Records Decision No. 559 (1990). However, severable factual information appearing in the draft but not in the final version is not excepted by section 552.111. *Id.*

Therefore, the department may withhold the factual information in the submitted drafts if the department has released or intends to release the factual information. Accordingly, we have marked the drafts that the department may withhold under section 552.111 of the Government Code. However, the submitted information contains some draft documents that have been sent to a third party. Because these drafts have been communicated to a third party, you may not withhold these drafts under section 552.111 of the Government Code.

You also assert that portions of the submitted information are excepted under section 552.101 in conjunction with common law privacy. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses common law privacy and excepts from public disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Personal information must be withheld from the public on the basis of common law privacy when (1) it is highly intimate and 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. *Id.* at 685.

This office has found that information identifying the enrollees in a particular health insurance plan is excepted from public disclosure, because such information implicates the common law right of privacy of the enrollee. *See, e.g.*, Open Records Decision No. 600 at 9-12 (1992) (personal financial choices concerning insurance are generally confidential). The department must withhold the identifying information of enrollees in health plans pursuant to section 552.101 in conjunction with the common law right of privacy. Identifying information includes the insured's name, address, relatives, and social security numbers. We agree with most of the identifying information that you have marked under common law

privacy. However, we do not believe that the employer's name, policy number, claim number, or group number identifies the insured and, therefore, this information may not be withheld under section 552.101 in conjunction with common law privacy and must be released.<sup>2</sup>

You have also marked tax identification numbers of businesses under section 552.101 in conjunction with common law privacy. A corporation or other business entity, however, does not have a common law right of privacy. *See* Open Records Decision No. 600 (1992). Therefore, the department may not withhold the tax identification numbers under section 552.101 in conjunction with common law privacy.

You also claim that one document is a medical record which is excepted under section 552.101 in conjunction with the Medical Practice Act ("MPA"), section 159.002(b) of the Occupations Code. Section 552.101 also encompasses information protected by statute. Section 159.002(b) provides the following:

A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

Thus, access to medical records is governed by provisions outside the Public Information Act. *See* Open Records Decision No. 598 (1991). The MPA provides for both confidentiality of medical records and certain statutory access requirements. Occ. Code §§ 159.002, .003. Medical records may be released only in accordance with the MPA. Open Records Decision No. 598 (1991). We agree that the department must withhold the marked document under section 552.101 and the MPA.

We also note that the submitted information contains a Form 1099. Title 26 section 6103(a) of the United States Code renders tax return information confidential. The term "return information" includes "the nature, source, or amount of income" of a taxpayer. 26 U.S.C. 6103(b)(2). This term has been interpreted by federal courts to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *Mallas v. Kolak*, 721 F. Supp 748 (M.D.N.C. 1989). Because the Form 1099 constitute tax return information, the department must withhold this information under section 552.101 in conjunction with federal law.

You also contend that a pending file, #44304, is excepted under section 552.103 of the Government Code. Section 552.103(a) provides as follows:

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<sup>2</sup>Because we agree that the submitted information must be de-identified, we need not address NYLCare's argument concerning article 20A.25 of the Insurance Code.

(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.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991). Further, litigation must be pending or reasonably anticipated on the date the requestor applies to the public information officer for access. Gov't Code § 552.103(c).

You have provided an affidavit from a department attorney in the enforcement section who states that an enforcement action is being pursued in connection with the allegations in file #44304. Further, the attorney claims that administrative litigation under the Texas Administrative Procedure Act (APA) will be pursued. See Open Records Decision No. 588 at 7 (1991) (contested cases under the APA are considered litigation under section 552.103). Based on your representations and our review of the submitted information, we conclude that you have shown that litigation involving the department is reasonably anticipated and that the pending file relates to the anticipated litigation.

If the opposing party in the litigation has seen or had access to any of the information in these records, there is no section 552.103(a) interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). Although it is not clear that Aetna is the potential opposing party, we note that the file contains a document that was sent by Aetna and "Aetna Outstanding Balances" that have been seen by Aetna. Therefore, if Aetna is the potential opposing party, the department may not withhold these documents under section 552.103 of the Government Code.<sup>3</sup> The department may withhold the remainder of the pending file pursuant to section 552.103 of the Government Code.<sup>4</sup> We note that the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982), Open Records Decision No. 350 (1982).

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<sup>3</sup>Please note that the identifying information of the enrollees in the "Aetna Outstanding Balances" must be withheld under section 552.101 in conjunction with common law privacy if the entire document is not excepted under section 552.103.

<sup>4</sup>Having found the pending file excepted under section 552.103, we need not address your remaining exceptions for the pending file.

Further, you contend that portions of the submitted information are excepted under section 552.107 of the Government Code. Section 552.107(1) excepts information that an attorney of a political subdivision cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only “privileged information,” that is, information that reflects either confidential communications from the client to the attorney or the attorney’s legal advice or opinions; it does not apply to all client information held by a governmental body’s attorney. Open Records Decision No. 574 at 5 (1990). A “confidential communication” is a communication “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” Tex. R. Evid. 503(a)(5). When communications from attorney to client do not reveal the client’s communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney’s legal opinion or advice. *Id.* at 3. In addition, purely factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.*

You assert that some of the submitted information contains communications between staff attorneys in the Legal & Compliance Division of the department and clients from divisions within the department. Further, you state that department staff are authorized to seek, obtain, and act on legal advice on behalf of the department. After reviewing the submitted information, we agree that most of the documents you claim are excepted under section 552.107(1) reveal the client’s communications or the attorney’s legal opinion or advice. However, portions of the communications contain purely factual communications that are not protected. *See* Open Records Decision No. 574 (1990) (the factual recounting of events, including the documentation of calls made, meetings attended, and memos sent, are not excepted from disclosure by section 552.107(1)). We have marked the information which the department may withhold under section 552.107(1).

Next, we consider Aetna and NYLCare’s claims that the submitted information is proprietary and, therefore, confidential. In its brief, Aetna makes references to the fact that some of the submitted documents were stamped “confidential” and that an agreement contains a confidentiality provision. However, information that is subject to disclosure under the Public Information Act may not be withheld simply because the party submitting it anticipates or requests confidentiality. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 676-78 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Further, it is well-settled that a governmental body’s promise to keep information confidential is not a basis for withholding that information from the public, unless the governmental body has specific authority to keep the information confidential. *See* Open Records Decision Nos. 514 at 1 (1988), 476 at 1-2 (1987), 444 at 6 (1986). Consequently, the submitted information must fall within an exception to disclosure in order to be excepted from disclosure.

Aetna claims that portions of the submitted information are excepted under section 552.110 of the Government Code. Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. A “trade secret”

may consist of any formula, pattern, device or compilation of information which is used in one’s business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978). There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company’s] business;
- (2) the extent to which it is known by employees and others involved in [the company’s] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979).

This office must accept a claim that information is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, where no demonstration of the factors necessary to establish a trade secret claim is made we cannot conclude that section 552.110 applies. Open Records Decision No. 402 (1983). Having reviewed the submitted arguments and the submitted information, we do not believe that Aetna has demonstrated that any of the information contains trade secrets. Therefore, we find that the information may not be withheld under section 552.110(a) of the Government Code.

Section 552.110(b) protects “[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). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov’t Code § 552.110(b); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

With regard to the commercial or financial prong of section 552.110(b), Aetna claims that “disclosure of pricing and other commercially sensitive information would reveal a critical mechanism by which [it] competes in a highly specialized market.” After reviewing Aetna’s arguments, we conclude that Aetna has demonstrated that release of its fee information would cause substantial competitive injury. We have marked the fee information that must be withheld under section 552.110(b). However, we believe that Aetna has failed to demonstrate that release of the remainder of its information would cause substantial competitive injury. Accordingly, the department must withhold the marked information pursuant to section 552.110(b), but release Aetna’s remaining information.

NYLCare contends that its documents are proprietary but does not argue section 552.110 of the Government Code. Rather, NYLCare contends that specific documents are privileged pursuant to section 38.001 of the Insurance Code. Chapter 38 of the Insurance Code pertains to the department’s data collection and reports. Section 38.001 provides that the department may address a reasonable inquiry to an insurance company relating to any matter connected with the company’s transactions and that the company shall later respond in writing. Ins. Code § 38.001(b), (c). Further, section 38.001(d) provides:

A response made under this section that is *otherwise privileged or confidential by law* remains privileged or confidential until introduced into evidence at an administrative hearing or in a court.

Ins. Code § 38.001(d) (emphasis added). Section 38.001(d) does not make information privileged but rather provides that information remains privileged in the possession of the department. Therefore, in order to withhold the information, it must be demonstrated that the information is excepted under section 552.110 of the Government Code. Because NYLCare does not argue nor demonstrate that its information is excepted under 552.110 of the Government Code, we have no basis to conclude that the submitted information regarding NYLCare is excepted from disclosure. See Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party 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); Open Records Decision Nos. 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). Thus, the department must release NYLCare's information to the requestor.

In conclusion, the department must withhold the identifying information under section 552.101 in conjunction with common law privacy. You must also withhold the medical record under the MPA and the form 1099 pursuant to federal law. Further, the department must withhold the marked fee information under section 552.110(b) of the Government Code. The department may withhold the pending file under section 552.103 and the marked information under sections 552.107 and 552.111. The department must release the remaining information.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the

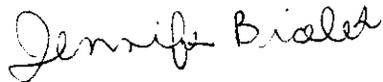
governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jennifer H. Bialek  
Assistant Attorney General  
Open Records Division

JHB/er

Ref: ID# 145090

Encl: Submitted documents

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