



November 1, 2001

Ms. Ann Bright
Section Chief
Legal & Compliance Division
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2001-5034

Dear Ms. Bright:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 154212.

The Texas Department of Insurance (the "department") received a request for information regarding the supervision of Medical Select Management ("MSM") and Medical Pathways Management ("MPM"). You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. You also indicate that the request implicates the proprietary rights of several third parties, including MSM, MPM, PacifiCare of Texas, Inc. ("PacifiCare"), Aetna U.S. Healthcare of North Texas ("Aetna"), and Lifeline Managed Homecare ("Lifeline"). Consequently, you have notified these third parties of the request pursuant to section 552.305 of the Government Code. In turn, we have received correspondence from MPM, PacifiCare, Aetna, and Lifeline. We have considered all of the submitted arguments and reviewed the submitted information.

We begin by noting that some of the submitted information did not come into existence until after the department received the instant request for information. The Public Information Act (the "Act") does not apply to information that did not exist at the time a governmental body received a request. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986). Therefore, we do not address whether the information that came into existence after the date of the request is subject to disclosure under the Act. We have marked this information with red flags.

Next, we address your arguments under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Article 20A.17 of the Insurance Code provides in relevant part:

(a) The [Commissioner of Insurance] may make an examination concerning the quality of health care services and of the affairs of any applicant for a certificate of authority or any health maintenance organization as often as the commissioner deems necessary, but not less frequently than once every three years.

(b) (1) Every health maintenance organization shall make its books and records relating to its operation available for such examinations and in every way facilitate the examinations. Every physician and provider with whom a health maintenance organization has a contract, agreement, or other arrangement need only make available for examination that portion of its books and records relevant to its relationship with the health maintenance organization.

(2) A copy of any contract, agreement, or other arrangement between a health maintenance organization and a physician or provider shall be provided to the commissioner by the health maintenance organization on the request of the commissioner. Such documentation provided to the commission under this subsection shall be deemed confidential and not subject to the open records law, Chapter 552, Government Code.

You indicate that portions of the submitted information are confidential under article 20A.17(b)(2) because they consist of contracts between Aetna and PacifiCare, health maintenance organizations, and MSM, a provider. Assuming the information you seek to withhold under article 20A.17(b)(2) was provided to the insurance commissioner by Aetna and PacifiCare under that subsection, we agree that the information is confidential and must be withheld under section 552.101 of the Government Code.

You also contend that portions of the submitted information are confidential under article 21.07-6, section 11(c) of the Insurance Code. Article 21.07-6 provides, in relevant part:

(a) An administrator may provide services only pursuant to a written agreement with an insurer or plan sponsor.

(b) The administrator and the insurer, plan, or plan sponsor shall retain a copy of the written agreement as part of their official records for the term of the agreement, and on written request of the [Commissioner of Insurance], the administrator shall make the written agreement available for inspection by the commissioner or his designated representative.

(c) Information obtained by the commissioner or the commissioner's designated representative from the written agreement is confidential and may not be made available to the public. The information may be examined by employees of the [State Board of Insurance] and the commissioner in carrying out functions under this article.

An "administrator" is defined as "a person who collects premiums or contributions from or who adjusts or settles claims in connection with life, health, and accident benefits, including pharmacy benefits, or annuities for residents of this state . . ." V.T.C.S. art. 21.07-6, §1(1). You indicate that certain contracts between MSM and MPM, MSM and PacifiCare, and MPM and PacifiCare are confidential under article 21.07-6, section 11 of the Insurance Code. Assuming these agreements constitute written agreements between an administrator and an insurer or plan sponsor for the purpose of article 21.07-6, section 11, we find the information you have marked under that provision is confidential and must be withheld under section 552.101 of the Government Code.

Next, we address your argument that portions of the submitted information are excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides as follows:

(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.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a 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, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The department must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.¹ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

You contend that the department is involved in both pending and reasonably anticipated litigation. You state that the department has placed both MSM and MPM under supervision in accordance with article 21.28-A, section 3 of the Insurance Code. Under article 21.28-A, section 3, the Commissioner of Insurance generally may place an insurance company under supervision if it is in failing financial condition. V.T.C.S. art. 21.28-A, § 3. The Commissioner of Insurance may subsequently hold a hearing to determine whether "the insurance company has failed to comply with the lawful requirements of the Commissioner, it has not been rehabilitated, it is insolvent, or it is in such a condition as to render the continuance of its business hazardous to the public or to the holders of its policies or certificates of insurance," or whether the insurance company has "exceeded its power as defined in" article 21.28-A. *Id.* This hearing is governed, in part, by the Administrative Procedure Act. *See id.* art. 21.28-A, §§ 3, 3A. If the commissioner determines any one of the above listed facts to be true, it may appoint a conservator to the insurance company. *Id.* art. 21.28-A, §§ 3, 5. You state that, as a result of the financial condition of both MSM and MPM, the department has anticipated the initiation of conservation proceedings or litigation to place the companies in receivership.

You also indicate that since the department placed MSM and MPM under supervision, MSM has filed for bankruptcy in the Northern District of Texas. Furthermore, you state that the department has filed an appearance in the bankruptcy action. Based on your arguments, we agree that litigation involving the department was pending and reasonably anticipated at the time it received the instant request for information. Furthermore, because the information you seek to withhold under section 552.103 relates to the supervision and financial situation of both MSM and MPM, we agree that the information relates to the pending and anticipated litigation.

¹In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a). We have found several documents that have been obtained by representatives of both MSM and MPM and therefore cannot be excepted from disclosure under section 552.103. With the exception of the information that has already been seen by both MSM and MPM, you may withhold the information you seek to withhold under section 552.103 of the Government Code.²

You also claim that portions of the submitted information are excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) excepts information that an attorney 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). Section 552.107(1) does not except purely factual information from disclosure. *Id.* Section 552.107(1) does not except from disclosure factual recounting of events or the documentation of calls made, meetings attended, and memos sent. *Id.* at 5. After reviewing the information you seek to withhold under section 552.107 that we have not already determined to be excepted under section 552.103, we are unable to find any client confidences or attorney advice. Therefore, you may not withhold any of the remaining information under section 552.107.

You further contend that portions of the submitted information are excepted from disclosure under section 552.111 of the Government Code. Section 552.111 provides that "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency is excepted from [required public disclosure]." This section encompasses both the deliberative process and attorney work product privileges. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000). The deliberative process privilege, as incorporated into the Act by section 552.111, protects from disclosure interagency and intra-agency communications consisting of advice, opinion, or recommendations on policymaking matters of a governmental body. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 615 at 5 (1993). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, the deliberative process privilege does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington*

²We note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Indep. Sch. Dist. v. Texas Attorney Gen., 37 S.W.3d 152 (Tex. App.--Austin 2001, no pet.); ORD 615 at 4-5. We do not believe that any of the information you seek to withhold under section 552.111 that is not otherwise protected under section 552.103 reveals any advice, opinion, or recommendations. Therefore, we find that the information in question is not protected from disclosure under the deliberative process privilege as incorporated into the Act by section 552.111.

A governmental body may withhold attorney work product from disclosure under section 552.111 if it demonstrates that the material was (1) created for trial or in anticipation of civil litigation, and (2) consists of or tends to reveal an attorney's mental processes, conclusions, and legal theories. *Id.* In order for this office to conclude that information was created in anticipation of litigation, we must be satisfied that

- a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation.

See National Tank, 851 S.W.2d at 207. A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204.

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.* None of the information you seek to withhold under the work product privilege that is not otherwise protected under section 552.103 reveals the mental processes, conclusions, or legal theories of a department attorney. Consequently, you may not withhold the information in question under section 552.111 in conjunction with the work product privilege.

Next, we turn to the arguments of the interested third parties submitted pursuant to section 552.305 of the Government Code. Although Aetna submitted a response to our office, it was content to join the department's argument under section 20A.17(b)(2). On the other hand, MPM has submitted specific arguments for withholding the requested information in addition to those submitted by the department. MPM contends, among other things, that some of the requested information pertaining to MPM is excepted from disclosure under section 552.110. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial 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. With respect to the trade secret prong of section 552.110, we note that the Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him 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 A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] 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). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).³ This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

With respect to the commercial and financial information prong of section 552.110, we note that the exception requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure.

³The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company];
- (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 [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (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 Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Gov't Code § 552.110(b); *see* Open Records Decision No. 661 (1999). MPM argues that the following information is excepted from disclosure under both prongs of section 552.110: compensation formulae and data; contract forms; identities of its customers; financial statements, balance sheets, and budgets; general ledger details; company minutes and consents, insurance policy information; check runs, and the summaries of claims to be paid. Specifically, MPM contends that the disclosure of this information would allow its competitors "to define their operations better, either by copying [MPM's] methods, or by improving their own methods of operation" and "would help [its] competitors immensely in developing strategic plans to compete with [MPM]." Based on MPM's arguments and our review of the information at issue, we agree that the information is excepted from disclosure under section 552.110(b).

PacifiCare argues that any contracts between it and MSM or MPM are excepted from disclosure as trade secrets under section 552.110(a). However, we do not believe that these contracts constitute trade secrets as defined in section 757 of the Restatement of Torts, and therefore we find that none of the contracts between PacifiCare and MSM or MPM may be withheld under section 552.110.

Lifeline also submitted a response to the notice it received under section 552.305. In the response, Lifeline contends that it "could be harmed by the public disclosure of the amount of dollars owed us by the failed company(ies)," and that it would like to avoid the disclosure of competitive facts. Although Lifeline does not raise any specific exception to the disclosure of its information, we relate its argument to section 552.110(b) of the Government Code. However, we do not believe that Lifeline has made a specific factual or evidentiary showing that substantial competitive injury would result from disclosure of its information as required under section 552.110(b). Furthermore, because Lifeline raises no other specific exception to disclosure, we have no other grounds for determining that its information is excepted.

Finally, with respect to the information that we have not determined to be excepted from disclosure under section 552.101, 552.103, or 552.110, we address your contention that certain e-mail addresses contained in the submitted information are excepted from disclosure under section 552.137 of the Government Code. Section 552.137, recently added to the Public Information Act by the Seventy-seventh Legislature,⁴ provides that "[a]n e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Public Information Act]." We agree that the e-mail addresses you have marked in the documents that are not otherwise protected under sections 552.101, 552.103, and 552.107 of the Government Code are excepted from disclosure under section 552.137.

⁴Act of May 14, 2001, 77th Leg., R.S., ch. 356, § 1, 2001 Tex. Gen. Laws 614; *see also* Act of May 22, 2001, 77th Leg., R.S., ch. 545, § 5, 2001 Tex. Gen. Laws 974, 975 (adding this exception as § 552.136).

In summary, you must withhold the information you have marked under article 20A.17(b)(2) of the Insurance Code to the extent the information was provided to the Insurance Commissioner by Aetna and PacifiCare under that subsection. You must also withhold the information you have marked under article 21.07-6, section 11 to the extent the information was obtained from written agreements between an administrator and an insurer or plan sponsor as contemplated by article 21.07-6, section 11. Except for the information that has already been seen by both MSM and MPM, you may withhold the information you seek to withhold under section 552.103 of the Government Code. We have marked the information that may be withheld under section 552.103. You must withhold certain commercial and financial information of MPM, which we have marked, under section 552.110(b). Finally, you must withhold the e-mail addresses you have marked under section 552.137 from those documents that are not otherwise excepted from disclosure. You must release the remainder of the submitted information.⁵

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).

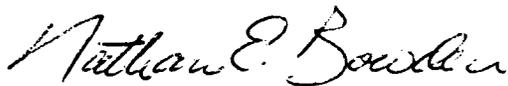
⁵Based on this finding, we need not reach the remainder of the submitted arguments.

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); *Tex. Dep't of Pub. 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,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/sdk

Ref: ID# 154212

Enc: Submitted documents

c: Mr. Lee Spangler
Texas Medical Association
401 West 15th Street
Austin, Texas 78701
(w/o enclosures)

Mr. Fred C. Miller
Medical Pathways Management and
Medical Select Management
201 Main Street, Suite 1000
Fort Worth, Texas 76102
(w/o enclosures)

Mr. Ramiro D. Cavazos, M.D.
Chairman
Medical Select Management
201 Main Street, Suite 1000
Fort Worth, Texas 76102-3123
(w/o enclosures)

Ms. Madeline Harlan
Director, Legal & Regulatory Affairs
PacifiCare of Texas, Inc.
14205 Burnet Road, Suite #360
Austin, Texas 78728-6521
(w/o enclosures)

Mr. Bruce McCandless III
Long, Burner, Parks, McClellan & DeLargy, P.C.
P.O. Box 2212
Austin, Texas 78678-2212
(w/o enclosures)

Mr. Edward E. Rotan
President
Medical Pathways Management
201 Main Street, Suite 1000
Fort Worth, Texas 76102-3123
(w/o enclosures)

Mr. Gerald W. Connor
Regional General Counsel
Aetna U.S. Healthcare of North Texas
P.O. Box 569440
Dallas, Texas 75365-9440
(w/o enclosures)

Mr. C. Jackson Pfeffer
President
Lifeline Managed Home Care
801 East Campbell Road, #420
Richardson, Texas 75081
(w/o enclosures)