



May 3, 2002

Ms. Amanda Crawford
Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2002-1773A

Dear Ms. Crawford:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 160383. This office issued Open Records Letter No. 2002-1773 (2002) on April 10, 2002. Since that ruling was issued however, we have received a letter from the interested third party, objecting to a portion of the ruling and asserting that certain documents were mischaracterized in that ruling. In addition, we have received a letter from you stating that you do not object to the interested third party's characterization of certain submitted documents, and apologizing for any confusion that your markings of the submitted documents may have caused. We have, therefore, re-examined our ruling in ORL No. 2002-1773, and determined that we made a factual error in the characterization of certain submitted documents, based upon your markings of those documents. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. *See generally* Gov't Code § 552.011 (providing that the Office of Attorney General may issue a decision to maintain uniformity in application, operation, and interpretation of this chapter). Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on April 10, 2002.

The Office of the Attorney General (the "OAG") received a request for the following:

- (1) All consumer complaints against Memberworks, Inc. and/or MWI Connections;

(2) All documents [the attorney general has] obtained from Memberworks Inc. and/or MWI connections and/or any other third party concerning the business practices of Memberworks; and

(3) All consumer complaints against Fleet Boston Financial Corporation and/or Fleet Bank (RI), N.A. and/or Fleet Credit Card Service, L.P. relating to Memberworks.

You state that approximately 800 pages of responsive information and one audio tape have been made available to the requestor.¹ You contend, however, that certain other documents, a representative sample of which you submitted to this office, are excepted from public disclosure pursuant to section 552.101 of the Government Code. You also assert that an interested third party, MemberWorks, Inc. ("MemberWorks"), may have a proprietary interest in the responsive information. You make no arguments in support of this contention, but you have notified MemberWorks of the request and its opportunity to submit comments. *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 Act in certain circumstances). We have considered the asserted arguments and reviewed the submitted representative sample of information.²

You first contend that a portion of the records submitted as Exhibit D, as well as the September 24, 2001 letter with attachments, are made confidential under section 17.61 of the Business and Commerce Code, and thus must be withheld from the public pursuant to section 552.101 of the Government Code.³ Section 17.61(f) governs the release of materials obtained by the OAG pursuant to a Civil Investigative Demand, and provides in pertinent part as follows:

No documentary material produced pursuant to a demand under this section, unless otherwise ordered by a court for good cause shown, shall be produced for inspection or copying by, nor shall its contents be disclosed to any person

¹You inform this office that the requestor has limited the request "to exclude personal financial information concerning consumers, social security numbers, and e-mail addresses made confidential by law under section 552.136 and 552.137." This ruling does not, therefore, address the disclosure of such records.

²We 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.

³Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

other than the authorized employee of the consumer protection division without the consent of the persons who produced the material. The consumer protection division shall prescribe reasonable terms and conditions allowing the documentary material to be available for inspection and copying by the person who produced the material or any duly authorized representative of that person.

This provision requires the OAG to withhold all documentary material the consumer protection division obtained pursuant to a Civil Investigative Demand. In this instance, the requestor does not appear to be acting as the authorized representative of MemberWorks. We therefore conclude that the OAG must withhold the documentary material you submitted under Exhibit D, together with the September 24, 2001 letter and attachments, in accordance with section 17.61(f) of the Business and Commerce Code, in conjunction with section 552.101 of the Government Code. We have marked the information accordingly.

You inform us that a portion of the submitted information was obtained by the Nebraska Office of the Attorney General (the "NOAG") from MemberWorks pursuant to its own civil investigative demand authority as provided in section 59-1611 of the Nebraska Revised Statutes. You advise that the NOAG provided the documents at issue to the OAG to assist in the OAG's investigation of MemberWorks. You argue that the documents transferred from the NOAG to the OAG are excepted from public disclosure under section 552.101 of the Government Code in conjunction with the Nebraska civil investigative demand statute. Section 59-1611 of the Nebraska Revised Statutes states in pertinent part:

No documentary material produced pursuant to a demand, or copies thereof, shall, unless otherwise ordered by a district court for good cause shown, be produced for inspection or copying by, nor shall the contents thereof be disclosed to, other than an authorized employee of the Attorney General, without the consent of the person who produced such material. . . The Attorney General . . . may use such copies of documentary material as he determines necessary in the enforcement of sections 59-1601 to 59-1622. . . .

Neb. Rev. St. § 59-1611(6)(2001). The statute regulates access to documents produced pursuant to the Nebraska Attorney General's investigatory demand.

In Open Records Decision No. 661 (1999), this office ruled that whether a governmental entity may release information to another governmental entity is not a question under the Public Information Act (the "Act") as the Act is concerned with the required release of information to the *public*. Gov't Code §§ 552.001, .002, .021; *see* Attorney General Opinions, H-683 (1975), H-242 (1974), M-713 (1970); Open Records Decision No. 655 (1997). For many years, this office has recognized that it is the public policy of this state that governmental bodies should cooperate with each other in the interest of the efficient and economical administration of statutory duties. *See, e. g.*, Attorney General Opinion H-836 (1976); Open Records Decision No. 655 (1997). *But see* Attorney General Opinions

DM-353 at 4 n. 6 (1995) (interagency transfer prohibited where confidentiality statute enumerates specific entities to which release of confidential information is authorized and where receiving agency is not among statute's enumerated entities), JM-590 (1986) (same); Open Records Decision No. 655 (1997) (same), 650 (1996) (transfer of confidential information to federal agency impermissible unless federal law requires its disclosure). In adherence to this policy, this office has acknowledged that information may be transferred between governmental bodies within the state without violating its confidential character on the basis of a recognized need to maintain an unrestricted flow of information between governmental bodies. *See* Attorney General Opinions H-836 (1976), H-242 (1974), M-713 (1970); Open Records Decision Nos. 655 (1997), 561 (1990), 414 (1984). Moreover, the release of information by one state agency to another state agency is not a release to the public for the purposes of section 552.007 of the Government Code, which prohibits the selective disclosure of information, or for purposes of section 552.352, which provides criminal penalties for the release of information that is considered to be confidential. Open Records Decision No. 516 (1989).

In this case, the public policy that encourages the exchange of information from an agency of the state of Nebraska to an agency of the state of Texas is as strong as when the exchange is between Texas agencies. *See* Open Records Decision No. 561 at 7 (1990). Public policy advocates continued cooperation between governmental bodies in making information available, particularly in relation to enforcement actions, as here. *See id.* However, public policy does not support a transfer of information from an agency in this state to an agency in another state, where the Texas agency cannot ensure that information which is confidential under Texas law will remain so under the law of the receiving state. *See id.* at 6 (providing that information may not be transferred to federal agency because Freedom of Information Act is not as strict as Act). We find that the confidentiality of the documents was not waived during the transfer from the NOAG to the OAG, and that the documents that we have marked are confidential by law. Neb. Rev. Stat. § 59-1611; Open Records Decision No. 561 at 6-7 (1990); *cf.* Open Records Decision No. 565 at 7 (1990) (person receiving confidential medical records may not disclose information except to extent disclosure is consistent with authorized purposes for which information first obtained). We note, however, that while the documentary material submitted in response to the Civil Investigative Demand is confidential, the Civil Investigative Demand itself is not confidential under section 59-1611 because it is not "documentary material produced pursuant to a demand." Neb. Rev. Stat. § 59-1611. We conclude, therefore, that section 552.101, in conjunction with section 59-1611 of the Nebraska Revised Statutes, excepts the information we have marked from public disclosure.

MemberWorks argues that eight categories of information are excepted from disclosure as trade secrets. The OAG did not submit information related to categories (b), (d), (e), (g) and (h), however, and therefore this ruling does not address that information. We have already determined that the submitted information related to categories (a), (c), and (f) is excepted from disclosure under section 552.101 of the Government Code in conjunction with

section 17.61(f) of the Business and Commerce Code. Therefore, as section 552.101 is dispositive, we do not address the section 552.110 claim.

In summary, the OAG must withhold the marked documentary material and the September 24, 2001 letter with attachments in accordance with section 17.61(f) of the Business and Commerce Code, in conjunction with section 552.101 of the Government Code. The documents transferred from the Nebraska Attorney General to the OAG are excepted from disclosure under section 552.101. Open Records Letter No. 2002-1773 is overruled to the extent it conflicts with this current ruling.

Finally, you have requested a finding that this decision letter may be relied upon as a "previous determination" under section 552.301(a) of the Government Code. We decline to issue such a finding at this time.

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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/seg

Ref: ID# 160383

Enc. Submitted documents

c: Ms. Tamara E. Gross
Law Clerk
Shalov Stone & Bonner, L.L.P.
485 7th Avenue, Suite 1000
New York, New York 10018
(w/o enclosures)

Mr. Gaylord Armstrong
McGinnis, Lochridge & Kilgore, L.L.P.
919 Congress Avenue, Suite 1300
Austin, Texas 78701
(w/o enclosures)