



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

December 30, 2002

Ms. Steve Aragon  
General Counsel  
Texas Health and Human Services Commission  
P. O. Box 13247  
Austin, Texas 78711

OR2002-7473

Dear Mr. Aragon:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 174256.

The Health and Human Services Commission (the "commission") received a request for copies of fourteen categories of information relating to a specified investigation of potential fraud or abuse in the Texas Medicaid program. You indicate that the commission will provide the requestor with information that is responsive to request items 2 and 10 through 13. You also indicate that no documents exist that would be responsive to request items 6 through 8 and 14.<sup>1</sup> You claim that request items 1, 3, and 4 would require the commission to perform legal research and that the Act does not require governmental bodies to perform such research in responding to a request for information. We agree. *See* Open Records Decision Nos. 563 at 8 (1990) (considering request for federal and state laws and regulations). However, since the commission has provided information to us that would be responsive to request items 1, 3, and 4, we will rule on the public availability of that information. You claim that portions of the remaining requested information are excepted from disclosure pursuant to sections 552.101, 552.103, 552.107, and 552.108 of the

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<sup>1</sup> We note that it is implicit in several provisions of the Public Information Act (the "Act") that the Act applies only to information already in existence. *See* Gov't Code §§ 552.002, .021, .227, .351. The Act does not require a governmental body to prepare new information in response to a request. *See* Attorney General Opinion H-90 (1973); *see also* Open Records Decision Nos. 87 (1975), 342 at 3 (1982), 416 at 5 (1984), 452 at 2-3 (1986), 555 at 1-2 (1990), 572 at 1 (1990). A governmental body must only make a good faith effort to relate a request to information which it holds. *See* Open Records Decision No. 561 at 8 (1990).

Government Code.<sup>2</sup> We have considered the exceptions you claim and have reviewed the submitted representative sample documents.<sup>3</sup>

You claim that a portion of the submitted information, which you marked as Exhibit “#4,” is excepted from disclosure pursuant to section 552.108 of the Government Code. Section 552.108, the “law enforcement exception,” provides in relevant part:

(a) [i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of 552.021 if: (1) release of the information would interfere with the detection, investigation or prosecution of crime; [or] (2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(1), (2). This office has held that records of criminal investigations conducted by governmental agencies may be withheld under limited circumstances. For example, records that otherwise qualify for the section 552.108 exception, such as documentary evidence in a police file on a pending case, do not necessarily lose that status while in the custody of an agency not directly involved with law enforcement. *See* Open Records Decision No. 272 at 1-2 (1981). Similarly, this office has concluded that if an investigation by an administrative agency reveals possible criminal conduct that the agency intends to report or has already reported to the appropriate law enforcement agency, then section 552.108 will apply to the information gathered by the administrative agency if its release would interfere with law enforcement. *See* Gov't Code § 552.108(a)(1), (b)(1); *see also* Attorney General Opinion MW-575 (1982); Open Records Decision Nos. 493 (1988), 272 (1981).

You state that the requestor represents an organization and three individuals who are the subjects of an ongoing investigation by the Medicaid Program Integrity (the “MPP”) division of the commission’s Office of Investigation and Enforcement. You also state that

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<sup>2</sup> Although you claim that portions of the remaining requested information are excepted from disclosure pursuant to section 552.107, you failed to provide us with any written comments stating reasons why section 552.107 applies to such information. *See* Gov't Code §§ 552.301, .302. Accordingly, we find that the commission has waived any claim regarding section 552.107 with respect to any portion of the remaining requested information. *See* Open Records Decision No. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)).

<sup>3</sup> 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.

Exhibit “#4” comprises the entire MPI investigation file regarding the organization and three individuals and that it should be excepted from disclosure under section 552.108 because the MPI is the custodian of information collected and maintained on behalf of the Medicaid Fraud Control Unit (the “MFCU”) of the Office of the Attorney General (the “OAG”). Thus, in this instance, we understand the commission to contend that the MPI is conducting a fraud and abuse investigation and that Exhibit “#4” relates to that investigation. You explain that if MPI uncovers sufficient evidence to warrant referral, it will refer this investigation to the MFCU of the OAG, a law enforcement agency, for criminal prosecution. Therefore, based on our review of your representations and the information in Exhibit “#4,” we find in this instance that section 552.108 is applicable to the information in Exhibit “#4.” Accordingly, we conclude that the commission may withhold the entirety of Exhibit “#4” pursuant to section 552.108 of the Government Code.<sup>4</sup>

We note that portions of Exhibit “#5” appear to be subject to section 552.101 of the Government Code in conjunction with section 12.003 of the Human Resources Code.<sup>5</sup> Section 12.003 prohibits the disclosure of information concerning clients of a state plan for medical assistance, except for a purpose directly connected with the administration of the plan. *See* Hum. Res. Code §§ 12.003, 21.012; *see also* 42 U.S.C. § 1396a(a)(7); 42 C.F.R. § 431.301; Open Records Decision Nos. 584 (1991), 166 (1977). Section 12.003 provides:

(a) Except for purposes directly connected with the administration of the [Department of Human Services’s (the “department”)] assistance programs, it is an offense for a person to solicit, disclose, receive, or make use of, or to authorize, knowingly permit, participate in, or acquiesce in the use of the names of, or any information concerning, persons applying for or receiving assistance if the information is directly or indirectly derived from the records, papers, files, or communications of the department or acquired by employees of the department in the performance of their official duties.

Hum. Res. Code § 12.003(a). In Open Records Decision No. 584 (1991), this office concluded that “[t]he inclusion of the words ‘or any information’ juxtaposed with the prohibition on disclosure of the names of the department’s clients clearly expresses a legislative intent to encompass the broadest range of individual client information, and not merely the clients’ names and addresses.” Consequently, it is the specific information pertaining to individual clients, and not merely the clients’ identities, that is made confidential under section 12.003. *See* Hum. Res. Code § 21.012 (department shall provide

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<sup>4</sup> As we are able to make this determination under section 552.108 of the Government Code, we need not address your remaining claimed exceptions to disclosure regarding Exhibit “#4.”

<sup>5</sup> Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov’t Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by other statutes.

safeguards restricting use or disclosure of information concerning applicants for or recipients of department's assistance programs to purposes directly connected with administration of programs); *see also* Open Records Decision No. 166 (1977).

It appears that the information that we have marked in Exhibit "#5" was directly or indirectly derived from the records, papers, files, or communications of the commission or was acquired by employees of the commission in the performance of their official duties. It also appears that the release of this information would not be for purposes directly connected with the administration of the commission. Accordingly, we conclude that this information is confidential under section 12.003 of the Human Resources Code and, thus, must be withheld pursuant to section 552.101 of the Government Code.

In summary, the commission may withhold Exhibit "#4" in its entirety pursuant to section 552.108 of the Government Code. The commission must withhold the information that we have marked in Exhibit "#5" pursuant to section 552.101 of the Government Code in conjunction with section 12.003 of the Human Resources Code. The commission must release the remaining submitted information in Exhibits 1, 3, and 5 to the requestor.

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).

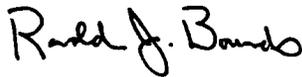
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/lmt

Ref: ID# 174256

Enc. Marked documents

c: Mr. Mark S. Kennedy  
COCHRAN & COCHRAN, P.C.  
P. O. Box 141104  
Dallas, Texas 75214-1104  
(w/o enclosures)