



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 4, 2003

Ms. Lee Shapleigh  
Assistant County Attorney  
El Paso County  
500 East San Antonio, Room 203  
El Paso, Texas 79901

OR2003-8690

Dear Ms. Shapleigh:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 192169.

El Paso County (the "county") received a request for several categories of information pertaining to the county's relationship with benefits administrator Access Administrators, Incorporated. You state that most of the requested information is being released but take issue with the portions of the request that seek:

The financials of Access Administrators for the years 2001, 2002, and 2003 by month and annually[.]

Access Administrators['] enrollment by plan and by month for the past 24 months.

Access Administrators['] list of commercial clients.

You contend that information responsive to these categories of the request "is not information which the County of El Paso owns or has a right of access to by our third-party administration contract." We have considered your arguments.

Section 552.002 of the Government Code defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." You indicate that the county does not maintain information responsive to the quoted portions of the request. The Public Information Act (the "Act") does not ordinarily require a governmental body to obtain information that is not in its possession. Open Records Decision Nos. 445 (1986), 317 (1982). However, information that is collected, assembled, or

maintained by a third party may be subject to disclosure under chapter 552 of the Government Code if a governmental body owns or has a right of access to the information. *See* Open Records Decision No. 462 (1987). Where a third party has prepared information on behalf of a governmental body, the information is subject to the Act, even though it is not in the governmental body's custody. Open Records Decision No. 558 (1990).

In support of your contention that the county does not own or have a right of access to the information at issue, you have submitted the county's contract with Access Administrators. The contract includes various provisions regarding the status of benefit plan information, the county's access to information, and the reporting duties of Access Administrators.

The first of these provisions, entitled "Maintenance of Plan Records" provides:

[Access Administrators] shall maintain all benefit payment records as to requests for benefits for a period of five years following the month in which final benefit payment was made as to a benefit file. In the event of discontinuance of this Agreement, any such records in the possession of [Access Administrators] shall be forwarded to [the county] as provided in Section IX. All books and records *pertaining to the Plan* shall belong to [the county. Access Administrators] shall have the right to make copies of such records as it in its discretion determines is necessary.

Administrative Services Agreement Sec. II, F (emphasis added).

The contract also quotes and incorporates several provisions of the Texas Insurance Code, including section 14 of article 21.07-6, which provides in pertinent part:

(a) Each administrator shall maintain at its principal administrative office adequate books and records of all transactions in which the administrator engages with insurers, plans, plan sponsors, insureds, and plan participants.

....

(f) An insurer, plan, or plan sponsor *is entitled to continuing access* to these books and records *sufficient to permit the insurer, plan, or plan sponsor to fulfill contractual obligations to insureds and plan participants*. The right provided by this subsection is subject to any restrictions included in the written agreement between the administrator and the insurer, plan, or plan sponsor relating to proprietary rights of the parties to the books and records.

....

*Id.* Sec. III, F, 4 (quoting Tex. Ins. Code art. 21.07-6 § 14) (emphasis added).

Section VIII of the contract requires:

By the tenth day of each month of the Agreement, [Access Administrators] shall submit to [the county] a statement of the Administrative Service Charge for services to be provided under this Agreement for such month. . . .

*Id.* Sec. VIII, D.

Finally, section X of the contract, entitled "Examination of Records" provides:

[The county] shall have the right to examine any records of [Access Administrators] *relating to* benefit payments and requests for benefit payments *under [the county's] Plan* by providing a request to examine such records in writing with a minimum of five (5) days notice to provide such records.

*Id.* Sec X.

The quoted provisions clearly provide the county with ownership of and access to records that relate to the plan that Access Administrators administers for the county. Nothing in the quoted language or any other provision of the contract provides the county with ownership or the specific right to inspect Access Administrators's "financials," the company's "enrollment by plan" for any plans that the company administers for other entities, or "Access Administrators['] list of commercial clients." Neither does the contract provide the county with a general right to access or inspect information that Access Administrators maintains for its own use or for use in administering plans for other entities. Therefore, we agree that the contract at issue does not give the county a right of access to the information sought by the quoted portions of the request.

In summary, based on the county's representation that it does not maintain information responsive to the quoted portions of the request and the fact that the county's contract with Access Administrators does not give the county a right of access to such information, we conclude that the information at issue is not public information for purposes of section 552.002. Therefore, such information need not be provided in response to this request.

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).

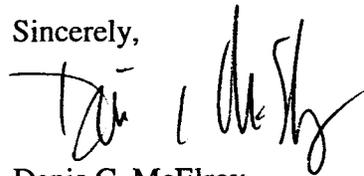
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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



Denis C. McElroy  
Assistant Attorney General  
Open Records Division

DCM/lmt

Ref: ID# 192169

c: Mr. John Farnsley  
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