



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 15, 2004

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

OR2004-0352

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# 193576.

The Texas Health and Human Services Commission (the "commission") received a request for any and all non-confidential information contained within the case files for a list of thirty commission tracking identification numbers/vendor names. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.<sup>1</sup> We have also considered the written comments submitted by an individual from the Fort Worth Star-Telegram, who has a similar request pending with this office. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

You argue that all of the submitted information is excepted under section 552.101 of the Government Code in conjunction with section 531.1021 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information that other statutes make confidential. Section 531.1021 of the Government Code provides in relevant part as follows:

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<sup>1</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.

(g) All information and materials subpoenaed or compiled by the office [of inspector general] in connection with an investigation are confidential and not subject to disclosure under Chapter 552, and not subject to disclosure, discovery, subpoena, or other means of legal compulsion for their release to anyone other than the office [of inspector general] or its employees or agents involved in the investigation conducted by the office, except that this information may be disclosed to the office of the attorney general and law enforcement agencies.

Gov't Code § 531.1021(g).<sup>2</sup> To begin our analysis, we note that the primary goal in statutory interpretation is ascertaining and effectuating the Legislature's intent. *In re Canales*, 52 S.W.3d 698, 702 (Tex. 2001). In discerning the Legislature's intent, we begin with a statute's plain language because we assume that the Legislature tries to say what it means and, thus, that the words it chooses are the surest guide to legislative intent. *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865-66 (Tex. 1999). "In applying the plain and common meaning of a statute, [one] may not by implication enlarge the meaning of any word in the statute beyond its ordinary meaning, especially when [one] can discern the legislative intent from a reasonable interpretation of the statute as it is written." *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 324 (Tex. App.-Austin 2002, no pet.) (citing *Sorokolit v. Rhodes*, 889 S.W.2d 239, 241 (Tex.1994)).

In *Fleming Foods of Texas, Inc. v. Rylander*, 6 S.W.3d 278 (Tex. 1999), the Texas Supreme Court addressed an apparently inadvertent omission of significant language from a nonsubstantive codification of the Tax Code. It determined that the plain language of the codification must be effectuated, despite the legislature's stated intent that no substantive change in the law was intended by the codification. *See Fleming Foods*, 6 S.W.3d at 286-87; *see also* Gov't Code § 311.011 ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage."); *RepublicBank Dallas, N.A. v. Interkal, Inc.*, 691 S.W.2d 605, 607-08 (Tex. 1985) (directing that statute be construed according to its plain language); *Smith v. Nelson*, 53 S.W.3d 792, 796 (Tex. App.-Austin 2001, pet. denied) (court must interpret legislative intent as expressed in plain language of statute). Accordingly, the plain language of section 531.1021 must be effectuated.

With these rules of statutory construction in mind, we now turn to the facts at hand. You state that it is the commission's duty to detect and investigate fraud and abuse by health care providers who contract to provide health care services under the Medicaid program. You further state that the commission's Office of Inspector General ("OIG") carries out these responsibilities. You state that "[a]ll of the information contained within the thirty requested case files was compiled by the Commission in connection with Medicaid fraud and abuse

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<sup>2</sup>Added by Act of April 24, 2003, 78<sup>th</sup> Leg., R.S., ch. 198, § 2.20, eff. Sept. 1, 2003, Tex. Sess. Law Serv. 4, 652 (Vernon) (to be codified at Gov't Code § 531.1021).

investigations. These case files are maintained by the Commission's OIG." The detection of fraud and abuse by the commission was, prior to the passage of House Bill 2292, handled by the commission's Office of Investigations and Enforcement ("OIE"). Effective September 1, 2003, the legislature created at the commission the OIG, to consolidate compliance and enforcement activities currently taking place across HHSC agencies. The OIG has been given some of the duties formerly belonging to the OIE. Section 531.1021(g) clearly states that all materials subpoenaed or compiled by the OIG in connection with an investigation are confidential. Thus, any files that were compiled by the OIE that relate to investigations that were closed prior to the existence of the OIG would not have been "subpoenaed or compiled" by the OIG. These closed files, therefore, are not made confidential under section 531.1021(g).

On the other hand, files that may have been transferred from the OIE to the OIG that relate to open and ongoing investigations by the OIG can be said to have been "compiled" by the OIG. We believe the plain language of the statute, then, clearly applies to files of this sort, as well as to any future files "subpoenaed or compiled" by the OIG. Because in this case all of the submitted information relates to closed cases, we find that this information is not confidential and may not be withheld under section 552.101 in conjunction with section 531.1021(g) of the Government Code. We now turn to your alternative arguments.

You argue that the information you have highlighted in yellow is excepted from disclosure under section 552.101 of the Government Code in conjunction with sections 12.003 and 21.002 of the Human Resources Code. Section 12.003 provides in relevant part:

(a) Except for purposes directly connected with the administration of the department's 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." *Id.* at 3. 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 also* 42 U.S.C. § 1396a(a)(7) (state plan for medical assistance must provide safeguards that restrict use or disclosure of information concerning applicants and recipients to purposes directly connected with administration of plan); 42 C.F.R. §§ 431.300 *et seq.*; Hum. Res. Code § 21.012(a) (requiring provision of

safeguards that restrict use or disclosure of information concerning applicants for or recipients of assistance programs to purposes directly connected with administration of programs); Open Records Decision No. 166 (1977).

You contend that the submitted documents consist of or contain information that identifies, or could lead to the identification of, Medicaid recipients. You also inform us that the release of the information in question in this instance is not directly connected for use in the administration of the Medicaid program. Based on your representations and our review of the information at issue, we conclude that the documents and portions of documents that you have marked as consisting of client information are confidential under section 12.003 of the Human Resources Code. Therefore, the commission must withhold that information under section 552.101 of the Government Code as information made confidential by law.

Next, you argue that certain information you have highlighted in green is excepted under section 552.101 in conjunction with the common-law informer's privilege. The informer's privilege, incorporated into the Public Information Act (the "Act") by section 552.101, has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988).

You state that the "information provided to the Commission by complainants . . . raises questions regarding possible violations of the Medicaid regulations. You also state that the commission is required to cooperate with the Medicaid Fraud Control Unit of the Office of the Attorney General and other law enforcement agencies in appropriate cases. On this basis, and upon review of the submitted information, we conclude that the commission may withhold the complainant identifying information you have highlighted in green pursuant to section 552.101 and the informer's privilege.

You also argue that Medicaid provider numbers are confidential under section 552.136 of the Government Code, which provides:

- (a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile

identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value;  
or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

You argue that Medicaid provider numbers are the numbers assigned to a provider who has been accepted into the Medicaid program. You state that these numbers are assigned for identification and billing purposes. As such, they “may be used to obtain money from the Medicaid program or to initiate the transfer of funds from the program.” Based on these representations, we conclude that the Medicaid provider numbers may be used to obtain money and are therefore confidential under section 552.136 of the Government Code.

To summarize, we conclude: (1) you must withhold the Medicaid recipient identifying information you have highlighted in yellow under section 552.101 of the Government Code in conjunction with sections 12.003 and 21.002 of the Human Resources Code, (2) you may withhold the complainant identifying information you have highlighted in green under section 552.101 in conjunction with the common-law informer’s privilege, and (3) you must withhold the Medicaid provider numbers you have marked under section 552.136 of the Government Code. The remaining submitted information must be released.

Lastly, you ask this office to issue a previous determination authorizing the commission to withhold records pertaining to Medicaid fraud and abuse investigations if requested in the future. We decline to issue such a previous determination at this time. *See* Open Records Decision No. 673 (2001). Therefore, this letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us. 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,



Sarah I. Swanson  
Assistant Attorney General  
Open Records Division

SIS/lmt

Ref: ID# 193576

Enc. Submitted documents

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(w/o enclosures)