ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 16, 2004

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

OR2004-0394

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# 194378.

The Health and Human Services Commission (the "commission") received two requests for information related to the Medical Transportation Program. In his first request, the requestor seeks "all publicly available information on investigations conducted into cases involving the Medical Transportation Program," to consist of five years' worth of data. In his second request, the requestor seeks information related to final determinations in investigations involving the Medical Transportation Program where problems were found to have occurred, as well as aggregate information on investigations conducted into cases involving the Medical Transportation Program. You claim that the requested information is excepted from disclosure under sections 552.101, 552.108, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, some of which consists of representative samples.[1]

Initially, we note, and you acknowledge, that the commission has not sought an open records decision from this office regarding the first request within the ten business day time period prescribed by section 552.301 of the Government Code. *See* Gov't Code § 552.301(a), (b). When a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.–Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.–Houston [1st

[1]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.

Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling interest to withhold the information to overcome this presumption. *See id.*

Normally, a compelling interest exists when some other source of law makes the information confidential or when third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Although the department raises section 552.108 as an exception to this information, section 552.108 is a discretionary exception and does not provide a compelling reason to overcome the presumption of openness. *See* Open Records Decision Nos. 586 (1991) (governmental body may waive section 552.108), 522 at 4 (1989) (discretionary exceptions in general). *But see* Open Records Decision Nos. 630 at 3 (1994), 586 at 3 (1991) (need of another governmental body to withhold information under predecessor to section 552.108 can provide a compelling reason under section 552.302). Thus, the department may not withhold any information responsive to the first request under section 552.108. However, as the presumption of openness can be overcome by a showing that information is confidential by law, we will consider your arguments under sections 552.101 and 552.136 for this information, as well as all of your claimed exceptions for the information responsive to the second request, for which you timely sought a decision from this office.

You first assert that all of the submitted information is excepted from disclosure 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:

> (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).[2] 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

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

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 in the requested case files was compiled by the Commission in connection with Medicaid fraud and abuse 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. You indicate that some of the submitted information relates to open investigations. This information, therefore, which you have labeled "open," is confidential under section 531.1021(g) and must be withheld under section 552.101 of the Government Code. However, you also indicate that other submitted information relates to closed cases. We conclude 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.[3] Thus, we now turn to your alternative arguments for the information related to closed case files.

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 most of 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. We note, however, that we have marked additional information that is confidential under section 12.003 of the Human Resources Code, as well as a small amount of information which is not confidential under section 12.003. Thus, the commission must withhold the information made confidential by

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[3]Because section 531.1021(g) is dispositive, we do not address the commission's section 552.108 argument for the green highlighted information responsive to the second request.

section 12.003 of the Human Resources Code under section 552.101 of the Government Code.

Next, you argue that certain information responsive to the first request that 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); *see also Roviaro v. United States*, 353 U.S. 53, 59 (1957). 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). We note, however, that the purpose of the privilege is to encourage "citizens" to report wrongful behavior to the appropriate officials. *See Roviaro*, 353 U.S. at 59. The privilege is not intended to protect the identities of public officials who have a duty to report violations of the law. In this case, the complainants are employees of the Department of Health. Since the public employees were acting within the scope of their employment when filing the complaints with the commission, then the informer's privilege does not protect the public employees' identities. *Cf. United States v. St. Regis Paper Co.*, 328 F.Supp. 660, 665 (W.D. Wis. 1971) (concluding that public officer may not claim informer's reward for service it is his or her official duty to perform). In addition, we note that the subjects of the information know the complainants' identities. Therefore, the commission may not withhold the complainants' identities in this case.

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:
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> > (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. We note, however, that some of the numbers you have marked under section 552.136 are not Medicaid provider numbers. Thus, we have marked the numbers that may not be withheld under section 552.136.

To summarize, we conclude: (1) the submitted information which relates to open Medicaid fraud and abuse investigations is confidential under section 531.1021(g) and must be withheld under section 552.101 of the Government Code; (2) you must withhold most of the Medicaid recipient identifying information you have highlighted in yellow and the information we have marked under section 552.101 of the Government Code in conjunction with sections 12.003 and 21.002 of the Human Resources Code; we have marked some additional information which you have highlighted in yellow, but which may not be withheld on this basis; and (3) you must withhold the Medicaid provider numbers under section 552.136 of the Government Code. The remaining submitted information must be released.

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,

Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/lmt

Ref: ID# 194378

Enc. Submitted documents

c: Mr. Mark Horvit
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(w/o enclosures)