



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 11, 2004

Ms. Sara Shiplet Waitt
Senior Associate Commissioner
Legal and Compliance Division
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2004-8621

Dear Ms. Waitt:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 209877.

The Texas Department of Insurance (the "department") received two requests from the same requestor for information concerning ten entities currently or previously regulated by the department.¹ You inform us that some of the information responsive to these requests is being withheld from disclosure in accordance with a previous determination issued to the department in Open Records Letter Nos. 2001-4777 (2001) (identifying information regarding enrollees in health plans). *See also* Open Records Decision No. 673 at 7-9 (2001) (delineating elements of second type of previous determination under Gov't Code § 552.301(a)). You claim that most of the remaining requested information is excepted from

¹On July 23, 2004, this office received a request for a ruling from you pertaining to the second request from Mr. Jon Powell. We originally assigned ID#209963 to this request for a ruling. However, because both requests seek much of the same information, we are combining ID#209963 with this ruling and addressing both of Mr. Powell's requests here. Additionally, you state and provide documentation showing that, on July 21, 2004, the department sought clarification of the first request. The department received such clarification on July 22, 2004.

disclosure under section 552.101 of the Government Code.² In addition, pursuant to section 552.305 of the Government Code, you have notified North American Medical Management (“North American”), Quality Care Network (“Quality Care”), and Humana Health Plan of Texas (“Humana”), third parties whose proprietary interests may be implicated by the request, of this request and of their right to submit comments to this office in accordance with section 552.305. *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 to disclosure in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information, some of which consists of representative samples.³ We have also received and considered comments submitted by Humana.

Initially, we address the department’s claims under section 552.101 of the Government Code. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. You claim that a social security number of a licensee of the department, which you have marked, is excepted from disclosure. Section 58.001 of the Occupations Code provides as follows:

The social security number of an applicant for or holder of a license, certificate of registration, or other legal authorization issued by a licensing agency to practice in a specific occupation or profession that is provided to the licensing agency is confidential and not subject to disclosure under Chapter 552, Government Code.

Occ. Code § 58.001. You indicate that the commission obtained the licensee’s social security number in connection with the issuance of a professional license. Accordingly, we find that the licensee’s social security number is confidential under section 58.001 of the Occupations Code and thus must be withheld from disclosure under section 552.101 of the Government Code.

² Although you raise section 552.305 as an exception to disclosure, we note that this section is a procedural provision permitting a governmental body to withhold information that may be private while the governmental body seeks a decision from this office as provided for under the Act.

³ 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.

The department claims that some of the submitted information is confidential under article 21.58A of the Insurance Code. Article 21.58A relates to Health Care Utilization Review Agents and provides in part:

(i) Each utilization review agent shall utilize written medically acceptable screening criteria and review procedures which are established and periodically evaluated and updated with appropriate involvement from physicians, including practicing physicians, dentists, and other health care providers. . . . Such written screening criteria and review procedures shall be available for review and inspection to determine appropriateness and compliance as deemed necessary by the commissioner and copying as necessary for the commissioner to carry out his or her lawful duties under this code, provided, however, that any information obtained or acquired under the authority of this subsection and article is confidential and privileged and not subject to the open records law or subpoena except to the extent necessary for the commissioner to enforce this article.

Ins. Code art. 21.58A § 4(i). You explain that the submitted screening criteria and review procedures are part of the utilization review plan, and are the types of information that are confidential under section 4(i) of article 21.58A. Based on your representations, we conclude that the information you have marked pursuant to section 21.58A is confidential and, therefore, it is excepted from disclosure under section 552.101 of the Government Code.

You also contend that the submitted contract is confidential under section 843.156 of the Insurance Code, which provides in relevant part:

On request of the commissioner, a health maintenance organization shall provide to the commissioner a copy of any contract, agreement, or other arrangement between the health maintenance organization and a physician or provider. Documentation provided to the commissioner under this subsection is confidential and is not subject to the public information law, Chapter 552, Government Code.

Ins. Code § 843.156(d). You inform us that the contract at issue was “provided to [the department] at [the department’s] request” and contend that the submitted documents are confidential because they constitute a contract between a Health Maintenance Organization (“HMO”) and a provider. Based on your representations and our review of the contract at issue, we conclude that it is confidential pursuant to section 843.156(d) of the Insurance Code and therefore must be withheld pursuant to section 552.101 of the Government Code as information made confidential by law.

Next, with respect to the remainder of the information, we address the third parties' arguments. We note that an interested third party is allowed ten business days after the date

of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, neither North American nor Quality Care has submitted any comments to this office explaining how release of the requested information would affect their proprietary interests. Therefore, we have no basis to conclude that these third parties have a protected proprietary interest in any of the submitted information. *See, e.g.*, Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). We therefore conclude the submitted information concerning North American and Quality Care that we have marked is not excepted from required public disclosure and must be released to the requestor.

Humana argues that a submitted two page document, or portions thereof, titled "Attachment E [Fee-For-Service (III)] Physician Reimbursement," is confidential under specified provisions of the Insurance and Administrative Codes. Section 843.078(l) of the Insurance Code provides in relevant part:

An application for a certificate of authority must include a written description of the types of compensation arrangements, such as compensation based on fee-for-service arrangements, risk-sharing arrangements, or capitated risk arrangements, made or to be made with physicians and providers in exchange for the provision of or an arrangement to provide health care services to enrollees, including any financial incentives for physicians and providers. *The compensation arrangements are confidential and are not subject to the public information law, Chapter 552, Government Code.*

Ins. Code § 843.078(l) (emphasis added). The section 843.078(l) filing requirements pertain to an HMO's original application for a certificate of authority. *See* Ins. Code § 843.078. Department rules provide that an HMO, as part of its initial filing for a certificate of authority, shall file a copy of the form of any contract or monitoring plan between the applicant and any physician, medical group, or association of physicians, or any other provider. 28 T.A.C. § 11.204(13)(B). Further, an HMO must also file a copy of the form of any subcontract between the medical group, physicians' association, any physician or provider who has contracted with any physician, medical group, association of physicians, or any other provider to provide health care services. *Id.*

Section 843.080(a) of the Insurance Code authorizes the Commissioner of Insurance (the "commissioner") to adopt rules considered necessary to require an HMO, after receiving its certificate of authority, to submit modifications or amendments to the operations documents described in section 843.078. *See* Ins. Code § 848.080(a). Pursuant to section 11.301 of the

Administrative Code, subsequent to the issuance of a certificate of authority, each HMO is required to file certain information with the commissioner, either for approval prior to effectuation or for information only. Specifically, subsection 11.301(5)(G) requires an HMO to file a copy of the form of any new contract or subcontracts or any substantive changes to previously filed copies of forms of all contracts between the HMO and any physicians or other providers described in section 11.204(13)(B). *See* § 28 T.A.C. 11.301(5)(G). Subsection 11.301(5)(L) requires an HMO to file modifications to compensation arrangements made to physicians and providers in exchange for the provision of, or the arrangement to provide, health care services to enrollees, including any financial incentives for physicians and providers. *See* 28 T.A.C. § 11.301(5)(L). Humana advises that the document at issue was filed by Humana subsequent to the issuance of its certificate of authority, and that “[t]he two-page document, specifically the marked percentages, constitutes both a change of the form of a physician contract previously submitted and a modification of compensation arrangements.” Therefore, Humana argues that the document at issue is confidential under section 843.078(1) of the Insurance Code. *See also* 28 T.A.C. § 11.204(19) (providing for confidentiality of written descriptions of compensation arrangements submitted to the department by an HMO as part of an application for certificate of authority).

The department advises, however, that it received the document at issue as an attachment to a template of a participation agreement between Humana and a primary care physician, and not as a written description of a compensation arrangement. *See* Ins. Code § 843.078(1). The department further notes that, although the attachment includes information about Humana’s compensation arrangements with primary care physicians, the document was not filed under section 843.078(1). Rather, the department advises that it considers the document at issue to be a filing under section 843.078(c)⁴ of the Insurance Code and section 11.301(5)(G) of the Administrative Code, and that neither sections 11.204(19) or 11.301(5)(L) of the Administrative Code are applicable. Thus, the department concludes that the document is not confidential under section 843.078(1).

The question of whether or not the document at issue was submitted to the department under section 843.078(1) or corresponding administrative rules, and therefore, whether the document is confidential under this provision presents a fact issue. This office cannot resolve factual disputes in the opinion process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where a fact issue cannot be resolved as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernible from the documents submitted for our inspection. *See* Open Records Decision No. 552 at 4 (1990). Thus, as the department has determined that it did not receive the document at issue from Humana pursuant to section

⁴Section 843.078(c) requires that an application for a certificate of authority include a copy of any independent contract or other contract made or to be made between the applicant and any physician, provider, or person listed under section 843.078(b). *See* Ins. Code § 843.078(c).

843.078(l) or corresponding administrative rules, we find that no portions of the document at issue are made confidential pursuant to this section.

Alternatively, Humana argues that, if the document was submitted to the department as part of an executed contract with a physician upon the request of the department pursuant to section 843.156(d), then the document is confidential in accordance with this section of the Insurance Code. However, as noted, the department considers the document to be a filing under section 843.078(c). Further, the department states that, because the document fails to identify all of the parties to the agreement and lacks evidence of execution, the department does not consider the document to be confidential under section 843.156(d).⁵ Based on the department's representations and our further review, we are unable to conclude that the document at issue is a contract, agreement or other arrangement between an HMO and a physician or provider that was provided to the department upon request pursuant to section 843.156(d). Accordingly, we find that no portions of the document at issue are made confidential pursuant to section 843.156(d) of the Insurance Code.

In summary, the department must withhold the licensee's social security number under section 552.101 in conjunction with 58.001 of the Occupations Code. The department must withhold the information that you have marked under section 552.101 in conjunction with article 21.58A of the Insurance Code. The contract at issue must be withheld under section 552.101 in conjunction with section 843.156(d) of the Insurance Code. All remaining information must be released 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).

⁵The department has provided us with a copy of Humana's entire template of a participation agreement to which it indicates the document at issue was attached when the participation agreement was submitted to the department. We note that the participation agreement does not identify any physician or related entity as a party and is not executed.

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,



Cary Grace
Assistant Attorney General
Open Records Division

ECG/jev

Ref: ID# 209877

Enc. Submitted documents

c: Mr. Jon Powell
Powell Law Firm
314 East Commerce Street, Suite 710
San Antonio, Texas 78205
(w/o enclosures)

Mr. Joseph Clair Hutts, President
North American Medical Management of Texas
1235 North Loop West, Suite 450
Houston, Texas 77008
(w/o enclosures)

Mr. Jeff Maloney
North American Medical Management - San Antonio
7411 John Smith Drive, Suite 1200
San Antonio, Texas 78229
(w/o enclosures)

Mr. Donn Merrill
Quality Care Network
7411 John Smith Drive, Suite 1200
San Antonio, Texas 78229
(w/o enclosures)

Ms. Sherry Humphres
Phycor of Dallas, L.P.
30 Burton Hills, Suite 400
Nashville, Tennessee 37215
(w/o enclosures)

Ms. Judy Frederick
McGinnis, Lochridge & Kilgore, L.L.P.
1300 Capitol Center
919 Congress Avenue
Austin, Texas 78701
(w/o enclosures)