ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 20, 2006

Ms. Cynthia Villarreal-Reyna
Section Chief, Agency Counsel
Legal and Compliance Division
Texas Department of Insurance
P. O. Box 149104
Austin, Texas 78714-9104

OR2006-04008

Dear Ms. Villarreal-Reyna:

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# 246925.

The Texas Department of Insurance (the "department") received a request for the current medical malpractice underwriting manuals of seven named medical malpractice carriers, including American Physicians Insurance Exchange ("APIE"), the Doctor's Company, the Medical Protective Company ("Medical Protective"), and Texas Medical Liability Trust ("Medical Liability"). You inform us that the department does not have information pertaining to three of the carriers.[1] You claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code. You also state, and provide documentation showing, that you notified APIE, the Doctor's Company, Medical Protective, and Medical Liability of the department's receipt of the request for information and of the right of each to submit arguments to this office as to why the requested information should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990). APIE asserts that its information is excepted under section 552.101 of the Government Code, and Medical Protective and Medical Liability assert that their information is excepted under sections 552.110 and 552.114 of the Government Code. We have considered the submitted arguments and reviewed the submitted information.

[1]We note the Act does not require a governmental body to disclose information that did not exist when the request for information was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.App.–San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986).

Section 552.101 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 assert that the submitted information is confidential under section 38.003 of the Insurance Code, which provides the following:

> (a) This section applies to all underwriting guidelines that are not subject to Section 38.002.
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> (b) For purposes of this section, "insurer" means a reciprocal or interinsurance exchange, mutual insurance company, capital stock company, county mutual insurance company, Lloyd's plan, life, accident, or health or casualty insurance company, health maintenance organization, mutual life insurance company, mutual insurance company other than life, mutual, or natural premium life insurance company, general casualty company, fraternal benefit society, group hospital service company, or other legal entity engaged in the business of insurance in this state. The term includes an affiliate as described by Section 2, Article 21.49-1, or Section 823.003(a) if that affiliate is authorized to write and is writing insurance in this state.
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> (c) The department or the office of public insurance counsel may obtain a copy of an insurer's underwriting guidelines.
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> (d) Underwriting guidelines are confidential, and the department or the office of public insurance counsel may not make the guidelines available to the public.
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> (e) The department or the office of public insurance counsel may disclose to the public a summary of an insurer's underwriting guidelines in a manner that does not directly or indirectly identify the insurer.
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> (f) When underwriting guidelines are furnished to the department or the office of public insurance counsel, only a person within the department or the office of public insurance counsel with a need to know may have access to the guidelines. The department and the office of public insurance counsel shall establish internal control systems to limit access to the guidelines and shall keep records of the access provided.
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> (g) This section does not preclude the use of underwriting guidelines as evidence in prosecuting a violation of this code. Each copy of an insurer's underwriting guidelines that is used in prosecuting a violation is presumed to be confidential and is subject to a protective order until all appeals of the case have been exhausted. If an insurer is found, after the exhaustion of all appeals, to have violated this code, a copy of the underwriting guidelines used as evidence of the violation is no longer presumed to be confidential.

(h) A violation of this section is a violation of Chapter 552, Government Code.

Ins. Code § 38.003. Section 38.003(a) makes section 38.003 applicable to all insurance underwriting guidelines not subject to section 38.002. Section 38.002 is applicable only to automobile and residential property insurance underwriting guidelines. *See id.* § 38.002(a)(4) (underwriting guideline means insurer's guideline to decide whether to accept or reject an application for personal automobile or residential property insurance policy or to determine how to classify those risks accepted for purposes of determining policy rate). You state that the submitted information consists of the underwriting guidelines of the medical malpractice carriers at issue. As we understand you to assert that these carriers are insurers under section 38.003(b), and that the department obtained these guidelines pursuant to section 38.003(c), we find that the guidelines at issue are confidential under section 38.003(d) of the Insurance Code. You inform us that the department does not maintain a summary of any of these guidelines. *See id.* § 38.003(e); *see also Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.App.–San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986) (Act does not require governmental body to disclose information that did not exist when request for information was received). Accordingly, we agree that the department must withhold from release the submitted underwriting guidelines pursuant to section 552.101 of the Government Code in conjunction with section 38.003 of the Insurance Code.[2]

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the

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[2]As we are able to resolve this under section 552.101, we do not address the remaining arguments for exception of the submitted information under the Act.

Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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,

James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/er

Ref: ID# 246925

Enc. Submitted documents

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