



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 26, 2006

Ms. Cynthia Villarreal-Reyna  
Section Chief, Agency Counsel  
Legal and Compliance Division, MC 110-1A  
Texas Department of Insurance  
P. O. Box 149104  
Austin, Texas 78714-9104

OR2006-06736

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# 252412.

The Texas Department of Insurance (the "department") received two requests for the following information: 1) the most recent application submitted by Access HealthSource Inc. ("Access HealthSource"); 2) the applications and attachment information filed by Access Administrators, Inc. ("Access Administrators"), Access HealthSource Administrators, Inc., Access HealthSource, and Advantage Care Network, Inc. since January 1, 2002. You state that the department has released a portion of the requested information to the requestors. You claim that portions of the remaining requested information are excepted from disclosure under sections 552.101, 552.136, and 552.137 of the Government Code.<sup>1</sup> You also claim that the requested information may contain the proprietary information of a third party. Although you take no position on the proprietary nature of the information, you state, and provide documentation showing, that you have notified Access Administrators and Access HealthSource of the requests and of their opportunity to submit comments to this office as to why the requested information should not be released to the requestors. *See Gov't Code* § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain the applicability of exception to disclose under Act in certain

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<sup>1</sup>The department informs us it has redacted social security numbers from the requested information pursuant to section 552.147 of the Government Code. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

circumstances). We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that you have not submitted any information pertaining to Advantage Care Network, Inc. To the extent information responsive to this portion of the request existed on the date the department received this request, we assume that it has been released. If you have not released any such records, you must release them to the requestor at this time. See Gov't Code §§ 552.301(a), .302.; *see also* Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances).

Additionally, you acknowledge, and we agree, that the department has not complied with the statutory deadlines prescribed by section 552.301 of the Government Code in seeking an open records decision from this office. When a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public and must be released unless a compelling reason exists for withholding the information from disclosure. See Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (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 Dist.] 1984, no writ); Open Records Decision No. 319 (1982). A compelling reason for withholding information is demonstrated where information is made confidential by other law or where third-party interests are at issue. Open Records Decision No. 150 (1977). Because third-party interests may be affected, and because sections 552.101, 552.136, and 552.137 can provide compelling reasons to withhold information, we will address the submitted arguments for the submitted information.

Section 552.101 of the Government Code excepts from required public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. The department claims that a portion 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 review procedures and screening criteria are part of Access HealthSource's 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 agree that the information you have marked is confidential pursuant to section 21.58A of the Insurance Code and must be withheld under section 552.101 of the Government Code.<sup>2</sup>

Access HealthSource asserts that its financial information is excepted from disclosure under section 552.110 of the Government Code.<sup>3</sup> Section 552.110(b) protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Access HealthSource and Access Administrators state that because they are licensed as third-party administrators by the department, the companies are required to file their financial statements with their application to the department, along with their annual reports. Access HealthSource and Access Administrators also state that both companies are privately-held companies whose financial information is not otherwise publicly available. However, Access HealthSource and Access Administrators have not provided any arguments explaining how the release of their financial information would result in competitive harm. Therefore, Access HealthSource and Access Administrators have failed to meet their burden under section 552.110(b) with respect to this information. Thus, the department may not withhold any of Access HealthSource's or Access Administrators' financial information on the basis of a proprietary interest that either company may have in that information.

The submitted information contains tax return information of private individuals. Both the department and Access HealthSource assert that this information is excepted from disclosure under section 6103(a) of title 26 of the United States Code. Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *dismissed*

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<sup>2</sup>As our ruling under section 21.58A of the Insurance Code is dispositive, we need not address Access HealthSource's arguments under section 552.110 of the Government Code for this portion of the submitted information.

<sup>3</sup>We have received comments from a firm indicating that they represent Access HealthSource and its subsidiaries, Access Administrators and Advantage Care Network, Inc.

*in part, aff'd in part, vacated in part, and remanded*, 993 F.2d 1111 (4th Cir. 1993). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of . . . income, payments, tax withheld, deficiencies, overassessments or tax payments . . . or any other data, *received by, recorded by, prepared by, furnished to, or collected by the Secretary* [of the Internal Revenue Service] with respect to a return or . . . the determination of the existence, or possible existence, of *liability* . . . for any tax, penalty, . . . or offense[.]" See 26 U.S.C. § 6103(b)(2)(A) (emphasis added). Accordingly, the tax return information we have marked is confidential under section 6103(a), and the department must withhold it under section 552.101 of the Government Code.

The department also asserts that the marked insurance policy numbers are excepted from disclosure under section 552.136 of the Government Code. Section 552.136 provides that "[n]otwithstanding 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." Gov't Code § 552.136. Accordingly, the department must withhold the insurance policy numbers it has marked in the submitted information pursuant to section 552.136.

Next, the department claims that section 552.137 of the Government Code applies to the marked e-mail address. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). See Gov't Code § 552.137(a)-(c). The department does not indicate that the e-mail address at issue falls within the scope of section 552.137(c). The department informs us that the individual at issue has not affirmatively consented to the release of the e-mail address at issue. Therefore, we agree that the marked e-mail address must be withheld under section 552.137.

In summary, the department must withhold the following: 1) the information the department has marked pursuant to section 21.58A of the Insurance Code in conjunction with section 552.101 of the Government Code; 2) the tax return information we have marked pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of the United States Code; 3) the insurance policy numbers the department has marked pursuant to section 552.136 of the Government Code; and 4) the marked e-mail address pursuant to section 552.137 of the Government Code. The remaining submitted 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).

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 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. 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,



Candice M. De La Garza  
Assistant Attorney General  
Open Records Division

CMD/krl

Ref: ID# 252412

Enc. Submitted documents

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