



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 16, 2010

Mr. Carey E. Smith
General Counsel
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2010-18980

Dear Mr. Smith:

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# 403119.

The Texas Health and Human Services Commission (the "commission") received a request for five categories of information requesting: any agreement between the state of Texas (the "state") or any administrative agency of the state and a named entity regarding audits of Texas Medicaid Claims during a specified period of time; any correspondence between the state or administrative agency of the state and a named entity regarding any Medicare audit of a named pharmacy during a specified period of time; any agreements or correspondence between the state or administrative agency of the state and the federal Centers for Medicare & Medicaid Services (the "CMS") regarding "Medicaid audits being conducted by [the] CMS by and through the Medicaid Integrity Contractors" for a specified period of time; and any audit reports regarding a named entity's audit of a named pharmacy during a specified period of time. You state the commission does not possess any records responsive to part one of the request. We note the Act does not require a governmental body to release information that did not exist when it received a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983). You state the commission will release information responsive to part three of the request. You state that the commission is withholding records responsive to parts two and five of the request pursuant to the previous determination issued to the commission in Open

Records Letter No. 2004-8876 (2004), which authorizes the commission to withhold all information and materials compiled by the commission's Office of Inspector General (the "OIG") in connection with OIG investigations pursuant to section 531.1021(g) of the Government Code, without the necessity of requesting an attorney general decision. Although you take no position on whether the information responsive to part four of the request is excepted from disclosure, you state the release of this information may implicate the interests of the CMS. You inform us, and provide documentation demonstrating, the commission notified the CMS of the request for information and the CMS's right to submit comments to this office stating why the requested information should not be released. *See* Gov't Code § 552.304 (providing that an interested third party may submit comments stating why information should or should not be released). We have received comments from the CMS. We have reviewed the submitted comments and submitted representative sample of information.¹

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. In its submitted comments, the CMS claims that portions of the information at issue are confidential under sections 552(b)(2), 552(b)(5), and 552(b)(6) of title 5 of the United States Code, the Freedom of Information Act ("FOIA"). We note, however, that FOIA is applicable to information held by an agency of the federal government. In this instance, the information at issue consists of communications between the commission and the CMS that are maintained by the commission, which is subject to the state laws of Texas. *See* Attorney General Opinion MW-95 (1979) (FOIA exceptions apply to federal agencies, not to state agencies); Open Records Decision Nos. 496 (1988), 124 (1976); *see also Davidson v. Georgia*, 622 F.2d 895, 897 (5th Cir. 1980) (state governments are not subject to FOIA); Open Records Decision No. 561 at 7 n.3 (1990) (noting that federal authorities may apply confidentiality principles found in FOIA differently from way in which such principles are applied under Texas open records law). Furthermore, this office has stated in numerous opinions that information in the possession of a governmental body of the State of Texas is not confidential or excepted from disclosure merely because the same information is or would be confidential in the hands of a federal agency. *See, e.g.,* Attorney General Opinion MW-95 (1979) (neither FOIA nor federal Privacy Act of 1974 applies to records held by state or local governmental bodies in Texas); ORD 124 (fact that information held by federal agency is excepted by FOIA does not necessarily mean that same information is excepted under the Act when held by Texas governmental body). Accordingly, the commission may not withhold the information at issue under section 552.101 of the

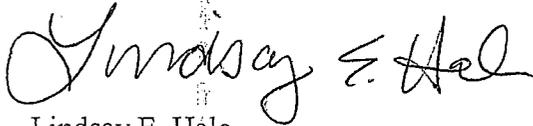
¹This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Government Code in conjunction with FOIA. As no further exceptions are raised, the information at issue must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/em

Ref: ID# 403119

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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