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Texas Department of Health

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July 25, 2002

RQ-0585-JC

FILE # ML-42738-02
I.D. # 42738

The Honorable John Cornyn
Texas Attorney General
209 West 14th Street
Austin, Texas 78701

Re: Request for Opinion on the whether drug pricing information collected by the Texas Department of Health under the provisions of House Bill 915, Acts of the 77th Legislature, is subject to disclosure under the Public Information Act, and related questions.

Dear General Cornyn:

I respectfully request your opinion on the interpretation of a new law that effects the Texas Department of Health (TDH) and several other agencies.

Chapter 1003, Acts of the 77th Legislature, Regular Session, 2001, (House Bill 915) became effective on September 1, 2001. Section 1 of House Bill 915 created the Interagency Council on Pharmaceuticals Bulk Purchasing (the Council). The Council is composed of an officer or employee from designated state agencies who are appointed by the administrative head of the agency. TDH is one of the designated agencies. The member agencies are required to provide the staff for the Council.

Sections 2 and 3 of House Bill 915 also amended two sections of the Texas Food, Drug, and Cosmetic Act (Chapter 431, Health and Safety Code) to require drug manufacturers and drug wholesalers to report certain pricing information to TDH. TDH is required to report the information collected to the Council.

The questions we have are as follows:

1. Is the pricing information collected by TDH under the provisions of Chapter 431 of the Health and Safety Code as amended by House Bill 915 excepted from disclosure under the Public Information Act?

2. Is the pricing information received by the Council from TDH under the provisions of Chapter 431 of the Health and Safety Code as amended by House Bill 915 excepted from disclosure under the Public Information Act?

3. If a member of the Council shares pricing information received by the Council with his or her agency, is the pricing information at that agency excepted from disclosure under the Public Information Act?

4. Is the Council subject to the Open Meetings Act?

5. If the Council is subject to the Open Meetings Act, may the Council meet in executive session to discuss pricing information received from TDH?

The purpose of House Bill 915 as stated in the bill analysis to the enrolled version states:

...By coordinating the purchasing efforts of the agencies Texas can **negotiate lower prices** on drugs by purchasing in bulk. House Bill 915 creates the Interagency Council on Pharmaceuticals Bulk Purchasing (council) to provide pharmaceutical purchasing procedures and options for Texas state agencies and requires manufactures [sic] and wholesale distributors of pharmaceuticals in Texas to report purchase prices of drugs to the council. (emphasis added)

The fiscal note to the enrolled version of House Bill 915 also supports that the purpose of the bill was to save money for the state. It was estimated that over \$13 million would be saved through the biennium ending August 31, 2003.

House Bill 915 contains one provision relating to disclosure of pricing information. It is in Section 1 of House Bill 915 that enacts Chapter 110 of the Health and Safety Code, creating the Council:

Sec. 110.006(g). The council shall develop procedures under which the council may disclose information relating to the prices that manufacturers or wholesalers charge for pharmaceuticals by category of pharmaceutical. The council may not disclose information that identifies a specific manufacturer or wholesaler or the prices charged by a specific manufacturer or wholesaler for a specific pharmaceutical.

We believe this language is sufficient to except the information from disclosure by the Council under Section 552.101, Government Code. We also believe that this language is sufficient to protect this information from disclosure by TDH and any member agency of the Council after our review of the legislative history of House Bill 915.

As filed on January 24, 2001, House Bill 915 created the Council by adding Chapter 110 to the Health and Safety Code. It did not contain the nondisclosure provision or the manufacturer and wholesaler reporting requirements. At the April 11, 2001, hearing on House Bill 915 by the Public Health Committee of the Texas House of Representatives (the House), a committee substitute was adopted that added the manufacturer and wholesaler reporting requirements. However, the nondisclosure provision was not added until April 26, 2001, when the House adopted a floor amendment on the second reading of House Bill 915.¹ The bill subsequently went to conference committee, with the nondisclosure provision remaining intact. The addition of the nondisclosure provision was added to ensure that manufacturers and wholesalers could report sensitive pricing information to TDH to be shared with the Council's members for the sole benefit of the member state agencies to negotiate the lowest price. (See above, Bill Analysis, House Bill 915).

Since many of the Council's duties relate to reviewing confidential pricing information and developing interagency procedures, we do not believe it was intended to be subject to the Open Meetings Act. The Council has no express rule making authority, and its members are state officers or employees who are appointed by the agencies' chief administrative officers. Under Health and Safety Code, Section 110.004(g), "(s)ervice on the council is an additional duty of a member's office or employment."

We believe that the Council does not fit within the definition of a "governmental body" under Government Code, Section 551.001(3).² In the alternative, the business conducted by the Council does not fit within the definition of "meeting" under Government Code, Section 551.002(4). The duties of the Council listed in Health and Safety Code, Section 110.006 include developing internal procedures, investigation of cost-saving purchasing programs, and making recommendations on drug utilization to the member agencies. The Council has no express rule making authority. (See Bill Analysis, House Bill 915.)

If you find that the Council is subject to the Open Meetings Act and that the pricing information received by the Council under House Bill 915 is excepted from disclosure under the Public Information Act, we ask that you find that the Council may meet in executive session in order to discuss matters relating to the pricing information. If not, the Council would not be able to discuss the pricing information during an open meeting without disclosing the information to the public.

¹ Also of note is that Sections 2 and 3 of House Bill 915 originated as House Bill 417 and House Bill 416, respectively. Neither of these bills contained the nondisclosure provision.

² Cf. Op. Tex. Att'y Gen. Nos. JC-0060 (1999) and JC-0160 (1999)

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Interested agencies include the Texas Health and Human Services Commission, the Texas Department of Mental Health and Mental Retardation, the Employees Retirement System of Texas, the Teacher Retirement System of Texas, and the Correctional Managed Health Care Committee. A list of other interested parties is attached for your information.

Thank you for your attention and advice on these issues. If you have any questions, please contact Susan K. Steeg, General Counsel, at (512) 458-7236.

Sincerely,

A handwritten signature in black ink that reads "E. Sanchez M.D." in a cursive style.

Eduardo J. Sanchez, M.D., M.P.H.
Commissioner of Health