



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 4, 1994

Ms. Alesia L. Sanchez
Legal Assistant
Legal Services, 110-1A
Texas Department of Insurance
P. O. Box 149104
Austin, Texas 78714-9104

OR94-432

Dear Ms. Sanchez:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 20534.

The Texas Department of Insurance (the "department") received a request for "any and all complaints filed against the [Roger Brent Potter Agency] from the date of initial licensing" You say the department will release any closed or resolved complaints to the requestor. You enclosed several documents concerning the Roger Brent Potter Agency as representative samples of the information the department considers to be excepted from required public disclosure. You assert that the department may withhold this information based on sections 552.103(a), 552.107(1), and 552.111 of the Government Code.

We note that the information you enclosed does not include a "complaint filed against" the named agency.¹ Since the requestor seeks "complaints filed against the [Roger Brent Potter Agency,]" it is not clear that the requestor is seeking the information you enclosed. We nevertheless will rule on whether the department may withhold the information you enclosed.

You have marked portions of the records you enclosed as information excepted from required public disclosure pursuant to section 552.103(a) of the Government Code. To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 551 (1990).

¹The information you enclosed makes reference to a complaint from a certain attorney, but does not include a copy of that complaint. As you raise no exception to the release of that complaint, we assume the department will make available to the requestor a copy of the referenced complaint.

You say the department is investigating the Roger Brent Insurance Agency for alleged violations of state insurance laws. You say the department anticipates that the investigation will culminate in an administrative contested case with Mr. Potter as a party. The department has sent Mr. Potter a "Notice of Intention to Institute Disciplinary Action." Furthermore, you inform us that the attorney handling this matter has determined that the requested information is directly related to the anticipated litigation. In this instance, we conclude that you have made the requisite showing that the requested information relates to reasonably anticipated litigation for purposes of section 552.103(a).

However, we note that the opposing party to the anticipated litigation has previously had access to many of the records you enclosed; absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). We have marked the documents accordingly.²

You assert section 552.107(1) of the Government Code exempts portions of one document you enclosed. This document is from Marilyn J. Schrader, Technician in the Agents License Section to David Dillion, Acting Director of the Legal Services Support Group. You say "some of the requested information includes legal advice and opinions, which are attorney-client communications and are exempt" under section 552.107(1).

Section 552.107(1) of the Government Code exempts information from public disclosure if:

- (1) it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas.

Section 552.107(1) applies to "privileged information" under Rule 1.05 of the State Bar Rules. *See* Open Records Decision No. 574 (1990). Rule 1.05 defines "privileged information" as information of a client protected by the lawyer-client privilege of Rule 503 of the Texas Rules of Civil Evidence or Rule 503 of the Texas Rules of Criminal Evidence or Rule 501 of the Federal Rules of Evidence. TEX. DISCIPLINARY R. PROF. CONDUCT 1.05(a) (1991), *reprinted in* GOV'T CODE, tit. 2, subtit. G app. (STATE BAR RULES art X, §9). Under Rule 503(b) of the Texas Rules of Civil Evidence and Rule 503(b) of the Texas Rules of Criminal Evidence, "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client." A "confidential communication" is a communication "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of

²We also note that the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. Tex. R. Civ. Evid. 503(a)(5).

Section 552.107(1) generally applies to two distinct communications: 1. confidential client communications; and 2. communications of legal advice or opinion. *See* Open Records Decision No. 574 (1990). The exception does not apply to factual communications between attorneys, unless the communication contains a client confidence. *See id.*

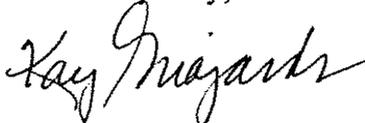
We assume that because of his position as the Acting Director of the Legal Services Support Group, Mr. David Dillion is an attorney. However, we do not make the same assumption about Ms. Schrader, the technician in the Agents License Section.

Section 552.107(1) protects communications made between people other than just the attorney and his or her client. The exception may apply if the communication is made between the client's lawyer and the lawyer's representative. *See* Tex. R. Civ. Evid. 503(b)(2).³ However, here the content of the communication renders section 552.107(1) inapplicable; the memorandum contains factual information, and contains no legal advice or opinion. We therefore conclude that the department may not withhold the memorandum at issue based on section 552.107(1).

Section 552.111 permits a governmental body to withhold from required public disclosure internal communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body. Open Records Decision No. 615 (1993). We agree that this exception applies to two documents. We need not consider the applicability of section 552.111 to the other enclosed documents, as we have determined that those documents may be withheld based on section 552.103 of the Government Code.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Kay H. Guajardo
Assistant Attorney General
Open Government Section

³A lawyer's representative is "one employed by the lawyer to assist the lawyer in rendition of professional legal services." Tex. R. Civ. Evid. 503(a)(4)(i).

KHG/JET/rho

Ref.: ID# 20534

Enclosures: Marked documents

cc: Ms. Jane Grider
Investigations & Process Service
1915 West Clay Street
Houston, Texas 77019
(w/o enclosures)