



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 29, 1996

Ms. Christine T. Rodriguez
Staff Attorney
Legal and Compliance, MC110-1A
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR96-0627

Dear Ms. Rodriguez:

Your predecessor asked whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. The request was assigned ID# 20063.

The Texas Department of Insurance (the "department") has received a request for certain information in its possession. Specifically, the requestor seeks:

copies of any and all documents within any and all files of the Texas Department of Insurance . . . that relate to me, any company that I own or have been associated with, and/or any license I have ever had or applied for . . . This request and authorization includes, but is not limited to, the following companies: MDPhysicians; Texas Medical Panhandle Group; Texas Medical Group; United Security Life Insurance Company; Multi-Flex Benefit Systems, Inc.

The department has submitted to us for review a representative sample of the requested information. The department claims that the requested information is excepted from required public disclosure under sections 552.101, 552.103, 552.107 and 552.111 of the Government Code.

Section 552.101 excepts from "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The department claims that some of the requested information is excepted from required public disclosure under section 552.101 in conjunction with section 5(a) of article 1.10D of the Insurance Code. Section 5(a) provides:

Any information or material acquired by the department that is relevant to an inquiry by the insurance fraud unit is not a public record for as long as the commissioner considers reasonably necessary to complete the investigation, protect the person under investigation from unwarranted injury, or serve the public interest. The information or material is not subject to a subpoena by another governmental entity, except a valid grand jury subpoena, until released for public inspection by the commissioner or, after notice and a hearing, a district court determines that the public interest and any investigation by the commissioner would not be jeopardized by obeying the subpoena.

The legislature's intent to except information or material relevant to an inquiry by the Insurance Fraud Unit from public disclosure under the Open Records Act is clear from the plain meaning of the statutory language. *See* Open Records Decision No. 608 (1992). The decision of the commissioner as to whether such material should remain confidential controls here. If the commissioner asserts that particular, identified records must remain confidential for any or all of the three statutory reasons given -- "to complete the investigation, protect the person under investigation from unwarranted injury, or serve the public interest" -- this office is not permitted by the statute to go behind that assertion. *Id.* Although the department did not mark any of the records as within this provision, the commissioner has asserted that some of the materials sought are relevant to an ongoing investigation by the insurance fraud unit. Such materials are therefore subject to the confidentiality provisions of article 1.10D of the Insurance Code and must be withheld. *See* Open Records Letter No. 95-1536 (1995).

You also claim that some of the requested information is excepted from required public disclosure under section 552.103 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. *See* Open Records Decision No. 551 (1990) at 4. The litigation exception may be applied to records relating to a contested case before an administrative agency subject to the Administrative Procedure Act (APA), chapter 2001 of the Government Code. *See* Open Records Decision No. 588 (1991) at 7. On the basis of the information submitted to us for review, we agree that, at the time this request was made, litigation was anticipated in this matter. Accordingly, we conclude that the department may withhold some of the requested information under section 552.103 of the Government Code.

In reaching this conclusion, however, we assume that the opposing party to the litigation has not had access to the records at issue. Absent special circumstances, once information has been obtained by all parties to the litigation, for example, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Finally,

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).¹

You also seek to withhold a memorandum dated June 21, 1991, from David M. Dillon, Director of Investigations, to Bill Harbeson, Deputy Commissioner of Legal Services, under section 552.107 of the Government Code. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 protects information that reveals client confidences to an attorney or that reveals the attorney's legal advice. We have examined the document and conclude that it may be withheld under section 552.107.²

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Records Division

LRD/rho

Ref. ID# 20063

Enclosures: Submitted documents

cc: Mr. David L. Botsford
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(w/o enclosures)

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

²Because we conclude that you may withhold the requested information under sections 552.101, 552.103 and 552.107, we do not address the department's arguments under section 552.111.