



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 11, 1997

Ms. Christine T. Rodriguez
Staff Attorney
Legal and Compliance, MC 110-1A
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR97-1570

Dear Ms. Rodriguez:

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# 107170.

The Texas Department of Insurance (the "department") received a request for all documents relating to an investigation of Alpha Dental Programs, Inc. (the "company"). You advise that you are releasing some of the requested information to the requestor. You claim, however, that some of the requested information is excepted from disclosure as attorney work product and under sections 552.101, 552.107, 552.111, and 552.112 of the Government Code. We have considered the arguments that you raise and have reviewed the documents at issue.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You suggest that disclosure of the requested information would violate the applicants' common-law right to privacy. Information may be withheld under section 552.101 in conjunction with common-law privacy only if the information is highly intimate or embarrassing *and* it is of no legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

Generally, common-law privacy does not protect all medically related information. See Open Records Decision No. 478 (1987). Individual determinations are required. Open Records Decision No. 370 (1983). After reviewing the submitted information, we find no information provided to this office that is protected by the common-law right to privacy.

Section 552.101 also encompasses information protected by other statutes. You raise two statutes that may apply. After examining the documents, we do not believe that one of the statutes that you raise, article 4495b of Vernon's Texas Civil Statutes, protects any of the information at issue. The Medical Practice Act (the "MPA"), article 4495b of Vernon's Texas Civil Statutes, protects from disclosure "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." V.T.C.S. art. 4495b, § 5.08(b). The documents submitted to this office appear to consist of dental records that were not created or maintained by a physician, as defined by the MPA.

However, the other statute you raise, article 1.15, section 9, of the Insurance Code, protects a portion of the information within the requested records. Article 1.15, section 9, of the Insurance Code makes confidential the examination reports and related work papers obtained during the course of an examination of a carrier. Ins. Code art. 1.15, § 9, Open Records Decision No. 640 (1996). Assuming that the company is not in liquidation or receivership, the department must withhold the information which it claims falls within section 9 of article 1.15 under section 552.101 of the Government Code. Ins. Code art. 1.15, § 9; *see* Open Records Decision No. 640 (1996) at 3-4.¹

Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5-6. In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5.

We have examined the documents which you seek to withhold under section 552.111. Regarding the memorandum dated November 30, 1995, we find that portions of this document pertain to the policy functions of the department, while the remainder of the information contained in this document is purely factual. We have marked those portions of the document that may be withheld from required public disclosure under section 552.111. The remaining information in this memorandum must be released. Regarding the Consent Orders and the memorandum dated January 2, 1996, you assert

¹Because our ruling regarding the examination report documents is dispositive under article 1.15, section 9, of the Insurance Code, we need not address your claim that these documents are protected from disclosure by section 552.112 of the Government Code.

that these documents may be withheld from required public disclosure in their entirety under section 552.111 because they are drafts. We disagree. While it is true that a draft of a document *that has been released or is intended for release in final form* may qualify for exception under section 552.111 because the draft necessarily represents the advice, opinion, and recommendation of the drafter as to the form and content of the final document, *see* Open Records Decision No. 559 (1990) at 2, you do not indicate that these documents were ever released or intended for release. Moreover, as with any document to which the section 552.111 exception is claimed, purely factual matters, where severable from the draft, must be released. *Id.* Nevertheless, a large portion of these documents do contain advice, recommendations, and opinions reflecting the policymaking processes of the department and, therefore, may be withheld from required public disclosure. We have marked the documents to show which portions may be withheld. The remainder must be released to the requestor.

In addition, you claim that some of the information you have submitted for our review is protected from disclosure as “attorney work product” under section 552.111. The first requirement that must be met to consider information attorney work product is that the information must have been created for trial or in anticipation of litigation. There are two prongs to this requirement, each of which must be met. In order for this office to conclude that information was created in anticipation of litigation, we must be satisfied that

- a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and
- b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation.

See National Tank v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204. After reviewing the totality of the circumstances surrounding the department’s investigation, we believe that both prongs have been met with regard to the records which you claim are protected from disclosure as attorney work product pursuant to section 552.111.

The second requirement that must be met is that the work product “consists of or tends to reveal the thought processes of an attorney in the civil litigation process.” Open Records Decision No. 647 (1996) at 4. Although the attorney work product privilege protects information that reveals the mental processes, conclusions, and legal theories of the attorney, it generally does not extend to facts obtained by the attorney. *Id.* and authorities cited therein. We note, however, that in Open Records Decision No. 647 (1996), this office concluded that pursuant to the rationale set forth in *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458, 461 (Tex. 1993), a request for an attorney’s entire litigation file may be denied under section 552.111 of the Government

Code. Open Records Decision No. 647 (1996) at 5. In this instance, you have submitted to this office documents which you indicate constitute the department's entire litigation file created in anticipation of litigation. As the current open records request encompasses the department's entire litigation file, we conclude that the department may withhold these documents as attorney work product pursuant to section 552.111 of the Government Code.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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Vickie Prehoditch
Assistant Attorney General
Open Records Division

VDP/alg

Ref.: ID# 107170

Enclosures: Submitted/marked documents

cc: Mr. Jim Coglein
8787 Brae Acres Road, #816
Houston, Texas 77074
(w/o enclosures)

²As we believe the protection of section 552.107 is co-extensive with that of section 552.111 in this instance, we need not address your section 552.107 claim.