



Office of the Attorney General  
State of Texas

August 7, 1997

DAN MORALES  
ATTORNEY GENERAL

Ms. Mary Keller  
Senior Associate Commissioner  
Legal and Compliance  
Texas Department of Insurance  
P.O. Box 149104  
Austin, Texas 78714-9104

OR97-1773

Dear Ms. Keller:

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# 107618.

The Texas Department of Insurance (the "department") received a request for a variety of information regarding Metropolitan Life Insurance Company ("Metropolitan"). You assert that the information is excepted from disclosure pursuant to sections 552.107, 552.111 and 552.305 of the Government Code. We have considered your arguments and have reviewed the information submitted.

Initially, we note you have submitted to this office a letter dated December 21, 1993 from counsel for Metropolitan to the department which you have marked "Requested Information - Supplemental." You state this office previously ruled in OR95-1578 that this letter, among other information, is privileged and therefore either exempt or partially exempt from disclosure. We therefore conclude that the department must release this December 21, 1993 letter in accordance with this office's ruling in OR95-1578.

Since the property and privacy rights of a third party may be implicated by the release of the requested information here, this office notified Metropolitan of its opportunity to submit arguments for withholding the requested information. See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). Metropolitan has not provided any arguments from which we can conclude that the submitted information is excepted from disclosure as trade secrets or commercial or financial information. See Open Records Decision Nos. 639 (1996) at 4 (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure), 552 (1990) at 5 (party must establish prima facie case that information is trade secret), 542 (1990) at 3.

By letter to the department dated May 20, 1997, however, counsel for Metropolitan argues that a list of Metropolitan employees and their salaries, which was submitted to this office for review, is excepted from disclosure by a right of privacy. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses common-law and constitutional privacy. Common-law privacy excepts from disclosure private facts about an individual. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

Upon review of the submitted information marked "552.305 Proprietary/Property Interest" which contains the names and salaries of Metropolitan employees, we conclude the employee salaries are protected by a common-law right of privacy, and therefore must be withheld under section 552.101. *See* Open Records Decision No.373 (1983) (financial information relating to individual -- including sources of income, salary, mortgage payments, assets, medical and utility bills, social security and veterans benefits, retirement and state assistance benefits, and credit history -- ordinarily satisfies first requirement of common law privacy, in that it constitutes highly intimate or embarrassing facts about individual, such that public disclosure would be highly objectionable to person of ordinary sensibilities). The remaining information marked "552.305 Proprietary/Property Interest" must be released to the requestor.

Section 552.107 excepts information from disclosure if:

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 Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.

Gov't Code § 552.107. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *Id.* at 5. Section 552.107(1) does not protect purely factual information. *Id.* Upon review of the information you seek to withhold under the attorney-client privilege, we conclude that most of it may be withheld under section 552.107(1). We have marked this information for your convenience.

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 also note that where a document is a genuine preliminary draft that has been released or is intended for release in final form, the draft necessarily represents the advice, opinion, and recommendation of the draftee; release would reveal something of the deliberative process by indicating where additions and deletions were made. Therefore, the draft itself, including comments, underlining, deletions, and proofreading marks, is excepted by section 552.111, but not purely factual matters that are severable. When such factual matter is contained in the released final product, however, there is no need to release it from the draft. Open Records Decision No. 559 (1990). We have marked those portions of the documents that may be withheld from required public disclosure under section 552.111.

You also seek to withhold certain responsive information as attorney work product under section 552.111. This office recently issued Open Records Decision No. 647 (1996), holding that a governmental body may withhold information under section 552.111 of the Government Code as attorney work product if the governmental body can show (1) that the information was created for civil trial or in anticipation of civil litigation under the test articulated in *National Tank v. Brotherton*, 851 S.W.2d 193 (Tex. 1993), or after a civil lawsuit is filed, and (2) that the work product consists of or tends to reveal an attorney's "mental processes, conclusions, and legal theories." Open Records Decision No. 647 (1996) at 5. Here, you have not established that the documents you claim are excepted as attorney work product under section 552.111 were prepared in anticipation of litigation. As you have claimed no other exception for these documents, they must be released.

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,



Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/ch

Ref.: ID# 107618

Enclosures: Marked documents

cc: Mr. James J. Sullivan  
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(w/o enclosures)