



July 19, 2000

Ms. Sara Shiplet Waitt
Senior Associate Commissioner
Legal Compliance, MC110-1A
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2000-2719

Dear Ms. Waitt:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 137196.

The Department of Insurance (the "department") received a request for

- (1) documents reflecting the names, addresses, and phone numbers of persons or entities who have made claims or complaints against State Farm Insurance, State Farm Fire Insurance Company under a Texas Dwelling Policy for damage to a foundation whose claims have been denied on the basis that there is no coverage for such claim under the Dwelling Policy;
- (2) documents reflecting the basis and purpose for the revisions to the Dwelling Policy and the Texas Homeowners Insurance Policy;
- (3) documents reflecting the names, employers, and business addresses and phone numbers of all persons who worked on or served on the committees or other groups that made these revisions to the Dwelling Policy and the Homeowners Policy referred to above;
- (4) all statements or directives from the Insurance Commission, the State Board of Insurance and/or the Department of Insurance regarding whether or not claims for foundation damage are covered under the Dwelling Policy and/or the Homeowners Policy; and,
- (5) documents reflecting whether or not insurance companies in Texas writing insurance pursuant to the Dwelling Policy are offering coverage for claims made for foundation damage.

You claim that information responsive to this request is excepted from public disclosure by sections 552.101, 552.103, 552.107 and 552.111 of the Government Code. You also relate that you have withheld information pursuant to section 552.305 of the Government Code. You contend that the release of the responsive information implicates the interest of a third party, “State Farm.” You have provided notice to representatives of this third party, as required by Government Code 552.305. Through its representatives, State Farm provided comment to this office, asserting that information responsive to item 1 of the request is excepted from disclosure by section 552.110 of the Government Code. You have provided a representative sample of the requested information.¹ We have reviewed the submitted information and considered your comments and those of the third party.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses the common law right to privacy. The common law right to privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of 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). Personal financial information concerning an individual is generally protected by the common law right of privacy. Open Records Decision Nos. 545 (1990), 523 (1989). You have bracketed information which would personally identify insurance policy claimants. We also note that this type of information is included on the document you identify as a “claim list.” This information is protected by the common law right of privacy. This information must be withheld under section 552.101 of the Government Code.

Section 552.103(a), the “litigation exception,” excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. To secure the protection of section 552.103(a), a governmental body has the burden of providing relevant facts and documents to show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.). Further, to be excepted under section 552.103, the information must relate to litigation that is pending or reasonably anticipated on the date that the information was requested. Gov't Code § 552.103(c).

¹We 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.

You relate that your enforcement section currently has a case “pending” which relates to the requested information. However, the submitted materials do not indicate that a law suit has been filed where the department is a party. You do not identify the style of such a case, what court it is filed in, or the issues being litigated. You have supplied letters which indicate that lawsuits were filed by insured individuals against their insurer. However, the department is not a party in these suits. You have also supplied letters which indicate that you are investigating complaints 43437P, 43436, 43128, and 43437. These materials are labeled “Provided to Demonstrate Pending Litigation;” we assume therefore that they are included for purposes of instruction, and are not submitted as examples of responsive information. We also note that the potential adverse parties in these matters has had access to this information. Absent special circumstances, where the opposing party to the anticipated litigation has had access to the records at issue, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). These materials indicate that certain matters are under investigation. They do not indicate that suit has actually been filed. We conclude that you have not demonstrated that the responsive information is related to pending litigation.

To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture; the mere chance of litigation will not establish the litigation exception. Open Records Decision No. 452 at 4 (1986). As noted above, you have supplied materials which indicate that you are investigating certain matters. You have not represented that you intend to file suit related to any of these investigations. These letters are merely requests for information. We do not consider the compiling of information in itself to be a concrete step taken toward litigation. We therefore conclude that you have not demonstrated that the information responsive to this request is related to reasonably anticipated litigation. Therefore, no information may be withheld under section 552.103 of the Government Code.

You assert that “some of the requested information includes correspondence between attorney and client” which is protected from disclosure under section 552.107. Section 552.107 provides in relevant part that information is excepted from required public 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 Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.

Gov’t Code § 552.107(1). This office has determined that section 552.107(1) protects only client confidences and requests for legal advice communicated by a client to an attorney and legal advice or opinion rendered by an attorney to the client or to an associated attorney in the course of rendering legal services to the client. Open Records Decision No. 574 at 4-5

the course of rendering legal services to the client. Open Records Decision No. 574 at 4-5 (1990). In this case, you do not indicate what party in any of the submitted communications is an attorney. On their face, these communication do not appear to involve an attorney. The submitted materials for which you apparently assert this exception are between an “Insurance Specialist” and an “Associate Commissioner.” We conclude that you have not demonstrated that any of the responsive information is excepted under section 552.107 of the Government Code.

Section 552.111 of the Government Code excepts from disclosure “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 do not encompass internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. Open Records Decision No. 613 (1993); *see also City of Garland v. Dallas Morning News*, 969 S.W.2d 548 (Tex. App. -- Dallas 1998), *aff’d*, 2000 WL 21029 (Tex. 2000), *pet. filed*, (Feb. 01, 2000)(personnel communications not relating to agency’s policymaking not excepted from public disclosure pursuant to section 552.111). An agency’s policymaking functions do include, however, administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 (1995). In addition, section 552.111 does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. Open Records Decision No. 615 (1993). In this case, the memoranda submitted do not appear to concern a decision related to policymaking. Each communication involves the department’s determination as to whether an insurer’s denial of claims is actionable under existing policy. We conclude that you have not demonstrated that this information is excepted from disclosure by section 552.111 of the Government Code.

State Farm argues that information which identifies its customers is protected under section 552.110. Since we have determined that responsive information that personally identifies policy holders is protected by the common law right of privacy, and must be withheld under section 552.101, we do not address State Farm’s section 552.110 argument.

In conclusion, the responsive information which personally identifies insurance policy holders must be withheld. The remaining responsive information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,


Michael Jay Burns
Assistant Attorney General
Open Records Division

MJB/nc

Ref: ID# 137196

Encl Submitted documents

cc: Mr. Gary L. Lewis
George & Donaldson, L.L.P.
114 West 7th Street, Ste 1100
Austin, Texas 78701
(w/o enclosures)