



June 15, 2001

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

OR2001-2564

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# 148469.

The Texas Department of Insurance (the "department") received a request for all files and documents regarding the department's investigation of Mark Strange and all the Administrative Services entities. You claim that the requested information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information and representative samples of information.²

Initially, we will address the submitted information that you claim is not subject to the Public Information Act (the "Act"). You explain that some of the requested information consists of records of an insurance company or records of a receivership estate created in accordance with article 21.28 of the Texas Insurance Code. Section 11 of article 21.28 provides in pertinent part:

(f) Open Records. Chapter 552, Government Code, *shall not apply to any records* of a receivership estate, or to the records of an insurance company prior to its receivership, held by the receiver or by a special deputy under this Article.

¹In your request for a decision, you also claimed section 552.103. In a letter dated April 23, 2001, you informed this office that you no longer sought to withhold any of the requested information under section 552.103 of the Government Code.

²In 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.

Ins. Code art. 21.28, § 11(f) (emphasis added). *See also* Open Records Decision No. 610 (1992) (insurer's books and records held by receiver appointed pursuant to article 21.28 of the Insurance Code are records of the judiciary and, as such, are excepted from provisions of the Open Records Act). Based on your representations and our review of the submitted information, we agree that the Act is not applicable to the information which you have identified as subject to article 21.28 of the Insurance Code. Therefore, you have no obligation under the Act to disclose this information and it may be withheld.³

Next, we address your claim that the identities of insured persons are excepted under section 552.101 in conjunction with article 21.07-6, section 14A of the Insurance Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by statute. Section 14A of article 21.07-6 provides:

- (a) Information that identifies an individual covered by a plan is confidential.
- (b) During the time the information described in Subsection (a) of this section is in an administrator's custody or control, the administrator shall take all reasonable precautions to prevent disclosure or use of the information for a purpose unrelated to administration of the plan.

Ins. Code art. 21.07-6, § 14A(a)-(b). We conclude that this provision applies only to information in the custody or control of an "administrator." *See* Ins. Code art. 21.07-6, § (1)(1) (defining "administrator"). You have not demonstrated that any of the submitted information is in the administrator's custody or control. Therefore, we conclude that you have failed to demonstrate the applicability of section 14A of article 21.07-6 of the Insurance Code to the submitted information. Accordingly, the identities of insured persons may not be withheld under article 21.07-6 of the Insurance Code.

You also contend that the identities of insured persons are protected under section 552.101 in conjunction with common law privacy. Section 552.101 of the Government Code also includes information protected by the common law right of privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The doctrine of common law privacy protects information that contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and the information must be of no legitimate concern to the public. *Id.* This office has found that some kinds of medical information indicating disabilities or specific illnesses are excepted from required public disclosure under common law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We have marked some medical information that you must withhold under section 552.101 in conjunction with common law privacy.

³Having found that this information is not subject to the Act, we need not address your other asserted exceptions for this information.

Further, this office has determined that some personal financial information is highly intimate or embarrassing and thus meets the first part of the *Industrial Foundation* test. Open Records Decision Nos. 545 (1990) (common law privacy protects personal financial information not relating to the financial transaction between an individual and a governmental body), 523 (1989) (common law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (common law privacy protects assets and income source information). In this instance, we find that you must withhold the personal financial information we have marked, such as policy numbers and premium amounts, under section 552.101 in conjunction with common law privacy. However, because the withholding of the financial and other medical information sufficiently protects the privacy interests of the insured persons, we do not believe that the department must also withhold the information that identifies these individuals. Therefore, we conclude that the identifying information of the insured persons is not excepted from disclosure by section 552.101 in conjunction with common law privacy and must be released.

You also claim that social security numbers in the submitted information are excepted from disclosure under section 552.101 in conjunction with federal law. Social security numbers may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* However, it is not apparent to us that the social security numbers were obtained or maintained by the department pursuant to any provision of law enacted on or after October 1, 1990. You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the department to obtain or maintain social security numbers. Therefore, we have no basis for concluding that the social security numbers at issue were obtained or maintained pursuant to such a statute and are, therefore, confidential under section 405(c)(2)(C)(viii)(I). We caution the department, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Gov't Code § 552.352. Prior to releasing the social security numbers, the department should ensure that these numbers were not obtained or maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.

You also argue that the social security numbers of applicants are excepted by section 552.101 in conjunction with section 51.251 of the Occupations Code. A note following section 51.251 of the Occupations Code provides the following:

[t]he social security number of an applicant for or holder of a license, certificate of registration, or other legal authorization issued by a licensing agency to practice in a specified occupation or profession that is provided to the licensing agency is confidential and is not subject to disclosure under the open records law.

Occupations Code § 51.251. Therefore, an applicant's or licensee's social security number that is provided to a licensing agency must be withheld under section 552.101 of the Government Code in conjunction with section 51.251 of the Occupations Code. You have marked to withhold the social security numbers of insurance agents as well as individuals who are applying for a certificate of authority. Assuming that these individuals are applicants for or holders of a license, certificate of registration, or other legal authorization issued by the department to practice in a specified occupation or profession, we agree that you must withhold these social security numbers under section 552.101 of the Government Code.

You also claim that the submitted information contains medical records which are excepted under section 552.101 of the Government Code. The Medical Practice Act ("MPA"), section 159.002(b) of the Occupations Code, provides the following:

A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

Occ. Code § 159.002(b). You also contend that the submitted information contains chiropractor records. Section 201.402(b) of the Occupations Code provides the following:

Records of the identity, diagnosis, evaluation, or treatment of a patient by a chiropractor that are created or maintained by a chiropractor are confidential and privileged and may not be disclosed except as provided by this subchapter.

Occ. Code § 201.402(b). The submitted information contains fee bills for medical services. These bills, however, do not reveal the identity, diagnosis, evaluation, or treatment of a patient, but merely reflect the cost of services. Therefore, we conclude that these records do not fall within sections 159.002(b) or 201.402(b) of the Occupations Code and may not be withheld.

The submitted information also contains dental records. Section 258.051 of the Occupations Code deals with dental records. Prior to the codification of the Occupations Code, provisions relating to dental records were located in article 4549-2 of the Revised Civil Statutes. The 76th Legislature, however, repealed article 4549-2 and adopted section 258.051 of the Occupations Code.⁴ Without reference to the repeal of article 4549-2, the 76th Legislature amended article 4549-2 of the Revised Civil Statutes.⁵ Because the repeal of a statute by a code does not affect an amendment of the statute by the same legislature which enacted the code, the amendment of article 4549-2 is preserved and given effect as part of the code provision. *See* Gov't Code § 311.031(c). Section 2(a) of article 4549-2 provides as follows:

⁴ *See* Act of May 13, 1999, 76th Leg., R.S., ch. 388, 1999 Tex. Gen. Laws 1431.

⁵ *See* Act of May 28, 1999, 76th Leg., R.S., ch. 1330, § 1, 1999 Tex. Gen. Laws, 4533.

The following information is privileged and may not be disclosed except as provided by this article:

(1) a communication between a dentist and a patient that relates to a professional service provided by the dentist; and

(2) a dental record.

V.T.C.S. art. 4549-2 § 2(a)(1)-(2).⁶ A “dental record” means dental information about a patient that is created or maintained by a dentist and relates to the history or treatment of the patient. V.T.C.S. art. 4549-2 § 1(2)(A)-(B). We agree that most of the information you have marked is information created or maintained by a dentist which relates to the history or treatment of the patient. We have marked the information that you must withhold under section 552.101 of the Government Code in conjunction with section 2(a) of article 4549-2 of the Revised Civil Statutes. However, the remaining information does not appear to have been created or maintained by a dentist and, therefore, may not be withheld under article 4549-2 and must be released.

You also claim that a service agreement between the administrator and an insurer or plan sponsor is excepted under section 552.101 in conjunction with section 11 of article 21.07-6 of the Insurance Code. Section 11 provides in pertinent part:

(a) An administrator may provide services only pursuant to a written agreement with an insurer or plan sponsor.

(b) The administrator and the insurer, plan, or plan sponsor shall retain a copy of the written agreement as part of their official records for the term of the agreement, and on written request of the commissioner [of insurance], the administrator shall make the written agreement available for inspection by the commissioner or his designated representative.

(c) Information obtained by the commissioner or the commissioner’s designated representative from the written agreement is confidential and may not be made available to the public. The information may be examined by employees of the board and the commissioner in carrying out functions under this article.

Ins. Code art. 21.07-6, § 11(a)-(c). Therefore, we agree that the department must withhold the service agreement under section 552.101 of the Government Code in conjunction with section 11 of article 21.07-6 of the Insurance Code.

⁶The text of article 4549-2 can be found following section 258.051 of the Occupations Code.

You also claim that some of the submitted information is excepted under sections 552.107 and 552.111 of the Government Code. Section 552.107(1) excepts information that an attorney of a political subdivision cannot disclose because of a duty to the client. 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. Open Records Decision No. 574 at 5 (1990). 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 the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." Tex. R. Evid. 503(a)(5). When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. ORD 574 at 3. In addition, purely factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.*

You explain that the submitted information contains communications between department attorneys and staff members who are authorized to obtain legal advice and to act upon that advice and client confidences and legal advice provided to department employees. After reviewing the submitted information, we conclude that the submitted communications reveal client confidences or contain legal advice and, therefore, are protected section 552.107(1). We have marked the information which you may withhold under section 552.107(1). Having found this information excepted under section 552.107, we need not address your arguments under section 552.111 for this same information. However, we must address the applicability of section 552.111 to one document.

Section 552.111 excepts from required public disclosure interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ); Open Records Decision No. 615 at 5 (1993). The purpose of this section is "to protect from public

under article 4549-2 of the Revised Civil Statutes. We also agree that you must withhold the service agreement pursuant to article 21.07-6 of the Insurance Code. Further, you may withhold the information we have marked under section 552.107 of the Government Code. You must also withhold any social security numbers that were obtained or are maintained pursuant to a provision of law enacted on or after October 1, 1990. You must release the remaining submitted information.

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).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

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,



Jennifer H. Bialek
Assistant Attorney General
Open Records Division

JHB/sdk

Ref: ID# 148469

Enc: Submitted documents

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