



September 18, 2001

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

OR2001-4182

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# 152133.

The Texas Department of Insurance (the "department") received a request for complaints against Unum Life Insurance Company of America ("Unum") and the complete investigation file regarding disability claims. You state that you have released some of the responsive information. However, you claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. You also indicate that the request may implicate the proprietary rights of Unum. Consequently, you notified Unum of the request for information pursuant to section 552.305 of the Government Code. In turn, Unum has submitted arguments to this office contending that portions of the requested information are excepted from disclosure under section 552.110 of the Government Code. Furthermore, we note that the requestor has submitted arguments to this office. Gov't Code § 552.304. We have considered all of the submitted arguments and reviewed the submitted information.<sup>1</sup>

We begin by addressing the requestor's argument that the department failed to meet its deadlines for requesting a decision from this office under section 552.301(b) of the Government Code. Subsections 552.301(a) and (b) provide:

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<sup>1</sup>You indicate that a portion of the submitted information containing medical records consists of a representative sample. We assume that the "representative sample" of medical records submitted to this office is truly representative of the medical 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.

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

If a governmental body fails to meet its ten-business-day deadline under section 552.301(b), the requested information is presumed to be public under section 552.302 of the Government Code and must be released unless there is a compelling reason for withholding the information. Gov't Code §§ 552.301(b), .302. The department indicates it received the request for information on June 29, 2001. The department further indicates that it observed the Independence Day holiday on July 4, 2001. Therefore, the ten-business day deadline for requesting a decision from this office was July 16, 2001, the date on which the department submitted its request for a ruling to this office. The department admits that it did not raise section 552.305 of the Government Code until after the ten-day deadline had already passed. However, under section 552.301(b), a governmental body is only required to ask for a decision and state the exceptions that it believes apply to the information within ten-business days of the receipt of the request for information. Section 552.305 is not an exception to the disclosure of information; therefore, it is not required to be asserted within ten-business days of the receipt of the request under section 552.301.

A governmental body is required to notify interested third parties whose proprietary information may be subject to exception under section 552.101, 552.110, 552.113, or 552.131 within ten business days of the receipt of a request for information. Gov't Code § 552.305(d). However, a governmental body's failure to comply with this provision does not result in the presumption that the requested information is subject to required public disclosure under section 552.302. *See* Gov't Code §§ 552.301, .302, .305. In sum, while the department may not have timely notified Unum of the request for information under section 552.305, it adequately met the ten-day deadline under section 552.301(b). Therefore, none of the submitted information is presumed to be subject to public disclosure under section 552.302, and we will address all of the exceptions raised by the department and Unum.

First, we address the department's argument that some of the submitted information is subject to the Medical Practice Act (the "MPA"). Section 159.002 of the MPA provides:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) 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.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). We have further found that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or “[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician.” Open Records Decision No. 546 (1990).

The medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We agree that a portion of the information you have marked as medical records is subject to the MPA and, therefore, may be released only in accordance therewith. However, you do not indicate nor is it apparent that the remaining documents you contend are medical records consist of communications between a physician and a patient or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician. Thus, you may not withhold the remaining information under the MPA.

You also contend that some of the submitted information is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 provides that “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency is excepted from [required public disclosure].” You contend some of the submitted information is excepted from disclosure under the deliberative process and attorney work product privileges as incorporated into the Public Information Act (the “Act”) by section 552.111. The deliberative process privilege, as incorporated into the Act by section 552.111, protects from disclosure interagency and intra-agency communications consisting of advice, opinion, or recommendations on policymaking matters of a governmental body. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360

(Tex. 2000); Open Records Decision No. 615 at 5 (1993). An agency's policymaking functions 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. ORD 615 at 5-6. Additionally, the deliberative process privilege does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.--Austin 2001, no pet.); ORD 615 at 4-5. Although you contend that certain submitted e-mails are protected under the deliberative process privilege, you do not explain, nor is it apparent, how the information at issue relates to a policymaking decision of the department. Therefore, we find that information in question is not protected from disclosure under the deliberative process privilege as incorporated into the Act by section 552.111.

This office has also determined that the attorney work product privilege is incorporated into the Act by section 552.111. *See* Open Records Decision No. 647 (1996). A governmental body may withhold attorney work product from disclosure under section 552.111 if it demonstrates that the material was (1) created for trial or in anticipation of civil litigation, and (2) consists of or tends to reveal an attorney's mental processes, conclusions, and legal theories. *Id.* 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*, 851 S.W.2d at 207. 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.

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 at 4 (1996). 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.*

In support of your argument under the work product privilege, you indicate that the information you have marked as attorney work product discusses an administrative action taken by the department against Unum and reveals "the organizational tactics, mental processes, and conclusions used in developing the case against Unum." Based on your representations and our review of the submitted information, we agree that portions of the submitted information are excepted from disclosure under the attorney work product privilege and section 552.111. *See* Open Records Decision No. 588 at 7 (1991) (contested

cases under the APA are considered litigation under section 552.103). However, you do not explain, nor is it apparent, that some of the submitted information you seek to withhold under the attorney work product privilege was created either by or at the direction of an attorney. Therefore, this information is not protected under the attorney work product privilege. We have marked the information that may be withheld under section 552.111 of the Government Code.

Next, you argue that some of the submitted information is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his 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). Section 552.107(1) does not except purely factual information from disclosure. *Id.* Section 552.107(1) does not except from disclosure factual recounting of events or the documentation of calls made, meetings attended, and memos sent. *Id.* at 5. We agree that some of the information you have marked under section 552.107 constitutes client confidences and attorney advice and opinion. However, you have not adequately demonstrated some of the information you seek to withhold under section 552.107 either constitutes client confidences or attorney advice and opinion or was communicated between privileged parties. Therefore, this information is not protected under the attorney-client privilege. We have marked the information that you may withhold under section 552.107(1).

Unum contends in its brief that portions of the responsive information are protected from disclosure under section 552.110. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. With respect to the commercial and financial information prong of section 552.110, we note that the exception requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. Gov't Code § 552.110(b); *see* Open Records Decision No. 661 (1999). Unum contends that the submitted information from its Risk Management Reference Guide, Individual Disability Benefits Guide, STD Training Memos, and GL&H Short Term Disability Practices and Procedures Manual constitutes commercial information protected under section 552.110(b). Specifically, Unum argues that the release of this information would allow competitors to copy Unum's policies and procedures for training their employees and investigating and evaluating claims, thus causing Unum to lose its competitive advantage. Based on Unum's argument and our review of the submitted information, we agree that most of the information from Unum's Risk Management Reference Guide, Individual Disability Benefits Guide, STD Training Memos, and GL&H Short Term Disability Practices and Procedures Manual must be withheld from disclosure under section 552.110(b). We have marked two pages from the STD Training Memos that we conclude are not protected under section 552.110 and must be released.

Finally, you contend that portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the doctrine of common law privacy. Common law 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). This office has found that information identifying the enrollees in a particular health insurance plan is excepted from public disclosure because such information implicates the common law right of privacy of the enrollee. *See, e.g.*, Open Records Decision No. 600 at 9-12 (1992) (personal financial choices concerning insurance are generally confidential). The department must withhold the identifying information of enrollees in health plans pursuant to section 552.101 in conjunction with the common law right of privacy. Identifying information includes the insured's name, address, telephone number, and social security number, as well as names of the insured's family members. Identifying information does not include an individual's date of birth. Here, you have submitted information regarding multiple complaints. The information indicates that the complainants are insured under Unum health insurance policies. We therefore agree that you must withhold the identifying information of the complainants under section 552.101 of the Government Code in conjunction with common law privacy. You have marked some of the identifying information in the submitted documents. We have marked additional information that must be withheld under section 552.101.

In summary, you must withhold the marked medical records unless otherwise authorized to release the records under the MPA. Except for two pages marked for release, the information from Unum's Risk Management Reference Guide, Individual Disability Benefits Guide, STD Training Memos, and GL&H Short Term Disability Practices and Procedures Manual must be withheld from disclosure under section 552.110(b). You may withhold some of the submitted information, which we have marked, under section 552.111 and the attorney work product privilege. Additionally, you may withhold a portion of the submitted information, which we have also marked, under section 552.107. Finally, you must withhold the identities of the insureds under section 552.101 in conjunction with common law privacy. You must release the remainder of the 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); *Tex. Dep't of Pub. 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,



Nathan E. Bowden  
Assistant Attorney General  
Open Records Division

NEB/sdk

Ref: ID# 152133

Enc: Submitted documents

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