



October 22, 2001

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

OR2001-4777

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# 153694.

The Texas Department of Insurance (the "department") received a request for the following information concerning American Medical Security ("AMS") and United Wisconsin Life Insurance Company ("UWLIC"):

1. any complaints filed with the department since January 1, 1996, against AMS and/or UWLIC;
2. copies of any investigation performed by the department concerning AMS and UWLIC;
3. Any final Orders entered by the department against AMS and/or UWLIC;  
and
4. Any correspondence between the department and AMS and/or UWLIC.

You claim that the requested information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first address your claims 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." This section encompasses information protected by other statutes. 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). The submitted information contains medical records subject to the MPA. 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 the medical records that you have marked are subject to the MPA.

You assert that portions of the submitted information are excepted under section 552.101 in conjunction with common law privacy. This section encompasses common law privacy and excepts from public disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Personal information must be withheld from the public on the basis of common law privacy 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.

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, birth date, social security number, and claim number. We thus agree that most of the information you have marked as identifying must be withheld under common law privacy, and we have marked some additional information that must be withheld. However, we do not believe that the employer's name, policy number, or group number identifies the insured and, therefore, this information may not be withheld under section 552.101 in conjunction with common law privacy. Because in this instance this information is not otherwise excepted from disclosure, it must be released. We have marked the information that must be released.

You may rely on this ruling as a previous determination with regard to future requests for the identifying information of enrollees in health plans. *See* Gov't Code § 552.301(a). That is, in response to future requests, the department must withhold under common law privacy the name, address, telephone number, birth date, social security number, and claim number of an enrollee.<sup>1</sup> The department is not required to again seek a decision from this office in order to withhold from future requestors the information of enrollees in health plans that this decision concludes is identifying, as long as the elements of law, fact, and circumstances on which this ruling is based do not change so as to no longer support the findings set forth above. *See* Open Records Decision No. 673 at 7 (2001).

You further argue that a portion of the submitted information is protected as attorney work product under section 552.111 of the Government Code. Attorney work product is one aspect of section 552.111. Open Records Decision No. 647 (1996).

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. 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.* However, where a request is for an attorney's entire litigation file, the file may be excepted from disclosure in its entirety because the organization of the file necessarily reflects the attorney's thought processes concerning the litigation. Open Records Decision No. 647 at 5 (1996). But this principle does not extend to requests for specific documents. *Id.*

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<sup>1</sup>*But see* Gov't Code §552.023 (granting a special right of access for such information to the enrollee or enrollee's authorized representative).

You advise us that the information at issue is contained in a department litigation file, and in fact "encompasses an attorney's entire litigation file." You represent that this entire file is responsive to the request. You state that the litigation resulted in an Order of the Commissioner of Insurance, which has been released to the requestor. We agree that this document is subject to release because it is specifically requested. You further inform us that the litigation has ended and the file has been closed. The attorney work product aspect of section 552.111 may be asserted where the litigation has concluded. Open Records Decision No. 647 at 3 (1996). After reviewing the submitted information and considering your arguments, we conclude the information you have marked may be withheld under the attorney work product aspect of section 552.111.<sup>2</sup>

The submitted information also contains e-mail addresses obtained from the public. The Seventy-seventh Legislature recently added section 552.137 to chapter 552 of the Government Code. This new exception makes certain e-mail addresses confidential.<sup>3</sup> Senate Bill 694, as passed May 14, 2001, signed by the Governor May 26, 2001, and made effective immediately, provides in relevant part:

**Sec. 552.137. CONFIDENTIALITY OF CERTAIN E-MAIL ADDRESSES.**

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Act of May 14, 2001, 77th Leg., R.S., S.B. 694, § 1 (to be codified at Gov't Code § 552.137). You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The department must, therefore, withhold the marked e-mail addresses under section 552.137. The remainder of the submitted information must be released to the requestor.

To summarize, you may withhold a portion of the information that you have marked pursuant to common law privacy and section 552.101. We have marked some additional information

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<sup>2</sup>Because section 552.111 is dispositive, we need not address the applicability of your other claimed exceptions.

<sup>3</sup>House Bill 2589, which also makes certain e-mail addresses confidential, took effect on September 1, 2001. See Act of May 22, 2001, 77th Leg., R.S., H.B. 2589, § 5 (to be codified at Gov't Code § 552.136). The language of section 552.136, as added by House Bill 2589, is identical to that of section 552.137.

which is private and must be withheld, and we have identified the marked information that is subject to release. You may also withhold the portion of the submitted information that you have marked under section 552.111. Certain records, which you have marked, may only be released in accordance with the MPA. E-mail addresses of members of the public must be withheld from disclosure under 552.137. The remainder of the submitted information must be released to the requestor.

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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/seg

Ref: ID# 153694

Enc. Submitted documents

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(w/o enclosures)