



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

December 23, 2002

Ms. Cynthia Villarreal-Reyna  
Section Chief  
Legal and Compliance Division  
Texas Department of Insurance  
P.O. Box 149104  
Austin, Texas 78714-9104

OR2002-7374

Dear Ms. Villarreal-Reyna:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 174180.

The Texas Department of Insurance (the "department") received a request for the following information:

all communications between the department and Gov. Perry's office and representatives of Farmers Insurance from Jan. 1, 2002 to the present [as well as] all communication between the department and attorney general's office regarding the state's action against Farmers Insurance, Farmers' reaction and settlement negotiations.

You state that the department will release to the requestor some of the requested information. You claim that portions of the requested information are excepted from disclosure under sections 552.101, 552.103, 552.107(1), 552.107(2), 552.111, and 552.137 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and Farmers' arguments, and reviewed

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<sup>1</sup>The department has withdrawn three claims it brought in its first correspondence to this office, sections 552.106, 552.136 and 552.305.

the submitted information.<sup>2</sup> *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 (19909) (determining that statutory predecessor to Gov't Code section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances).

We understand that the department is withholding portions of the requested information without seeking a decision from this office about the public availability of the information. Section 552.301 of the Government Code generally requires a governmental body to ask this office whether requested information is excepted from disclosure whenever a governmental body seeks to withhold requested information. However, section 552.301 permits a governmental body to withhold requested information without the necessity of asking this office whether information is excepted from required public disclosure where there exists a previous determination. Gov't Code § 552.301; *see* Open Records Decision No. 673 (2001). You inform us that, based on Open Records Decision No. 640 (1996), the department is withholding portions of the requested information the department obtained during the course of an examination of an insurance carrier. In Open Records Letter No. 99-1264 (1999), this office determined that the department may rely on Open Records Decision No. 640 as a previous determination ruling to withhold information covered by section 9 of article 1.15 of the Insurance Code. Section 9 makes confidential "[a] final or preliminary examination report, and any information obtained during the course of an examination" unless the carrier is in liquidation or receivership. Therefore, so long as there has been no change in the elements of law, fact and circumstances that supported the conclusion that Open Records Decision No. 640 can serve as a previous determination for information the department considers to be in the category of information covered by this statute, the department may continue to rely on Open Records Decision No. 640 as a previous determination. *See* Open Records Decision No. 673 at 7 (2001).

Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

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<sup>2</sup>You state that you have submitted to this office representative samples of the information at issue. In 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) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). 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.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing 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, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The department must meet both prongs of this test for information to be excepted under section 552.103(a).

The department argues that portions of the information at issue relate to the following pending litigation: *State of Texas & the Texas Commissioner of Insurance v. Farmers Group, Inc.*, No. GV202501, pending in the 353<sup>rd</sup> District Court in Travis County, Texas; *Farmers Insurance Exchange and Fire Insurance Exchange v. Jose Montemayor & Texas Department of Insurance*, No. GN203156, pending in the 353<sup>rd</sup> District Court in Travis County; and *In the Matter of Farmers Insurance Exchange and Fire Insurance Exchange*, No. 454-03-0193, pending in the State Office of Administrative Hearings. The department has established that litigation was pending at the time the department received the request for information. We have review the submitted information. We find that the information relates to the pending litigation. Consequently, we conclude that the department may withhold from disclosure the information at issue.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

The department asserts that portions of the information are excepted from disclosure based on section 552.107(2) of the Government Code. This provision protects information if "a court by order has prohibited the disclosure of the information." The department argues that it is prohibited by court order from disclosing portions of the submitted information, and explains that a Travis County district court has entered a protective order prohibiting the release of these documents in *Farmers Insurance Exchange and Fire Insurance Exchange*

*v. Jose Montemayor & Texas Department of Insurance*, No. GN203156, and *State of Texas & the Texas Commissioner of Insurance v. Farmers Group, Inc.*, No. GV202501 (353<sup>rd</sup> Dist. Ct., Travis County, Tex., Oct. 14, 2002). In the protective order, the court prohibited the department from disclosing the information in this instance:

1. All Classified Information produced or exchanged in the course of this litigation shall be used solely for the purpose of preparation and trial of this litigation and for no other purpose whatsoever, and shall not be disclosed to any person except in accordance with the terms hereof.

2. "Classified Information," as used herein, means any information of any type, kind or character which is designated as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") by any of the supplying or receiving parties, whether it be a document, information contained in a document, information revealed during a deposition, information revealed in an interrogatory answer or otherwise. . . .

....

4. Documents produced in this action may be designated by any party or parties as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes only") information by marking each page of the document(s) so designated with a stamp stating "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only").

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6.(a) "Confidential" information shall not be disclosed or made available by the receiving party to persons other than Qualified Persons. Information designated as "For Counsel Only" (or Attorneys' Eyes Only") shall be restricted in circulation to Qualified Persons described in Paragraphs 3(a) and (b) above.

Portions of the submitted information were produced or exchanged in the course of the litigation in which the court entered this order. Farmers has designated the documents as "Confidential." The requestor is not a qualified person as defined by the protective order. Lastly, the protective order states "[a]s far as the provisions of any protective orders entered in this action restrict the communication and use of the documents produced thereunder, such orders shall continue to be binding after the conclusion of this litigation." Thus, the department must withhold the information we have marked pursuant to section 552.107(2).

The department asserts that a small portion of the information is excepted from disclosure based on section 552.101 in conjunction with the common-law right to privacy.

Section 552.101 excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” 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 personal financial information not relating to a financial transaction between an individual and a governmental body is protected from disclosure based on the right to privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). We find that the information is private. Consequently, the department must withhold this information based on section 552.101 of the Government Code.

Section 552.111 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. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.--Austin 2001, no pet.). 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, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5.

After review of the information, we find that section 552.111 applies to portions of the information. We have marked the documents accordingly.

The submitted information also contains e-mail addresses obtained from the public. Section 552.137 makes certain e-mail addresses confidential.<sup>3</sup> Section 552.137 provides:

- (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.

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<sup>3</sup>House Bill 2589 also makes certain e-mail addresses confidential. *See* Act of May 22, 2001, 77th Leg., R.S., H.B. 2589, § 5 (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.

(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.

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 e-mail addresses of members of the public under section 552.137. We have marked the documents.

In summary, based on sections 552.103 and 552.111, the department may withhold the information we have marked. Based on sections 552.101, 552.107(2), and 552.137, the department must withhold the information we have marked.<sup>4</sup> The department must release the remaining information 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).

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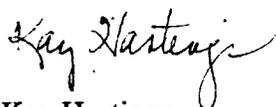
<sup>4</sup>In light of these conclusions, we need not address the department's other section 552.101 claim, its section 552.107(1) claim, or Farmer's arguments.

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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Kay Hastings  
Assistant Attorney General  
Open Records Division

KH/seg

Ref: ID# 174180

Enc: Submitted documents

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