



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 24, 2005

Ms. Loretta R. DeHay  
General Counsel  
Texas Real Estate Commission  
P.O. Box 12188  
Austin, Texas 78711-2188

OR2005-02551

Dear Ms. DeHay:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 220652.

The Texas Real Estate Commission (the "commission") received a request for all applications or claims for payment made to the Real Estate Recovery Trust Account (the "trust account") since January 1, 2001. You state some of the requested information has been made available to the requestor, but claim that some of the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we note that the submitted information contains documents filed with the court. A document that has been filed with a court is expressly public under section 552.022 of the Government Code and may not be withheld unless confidential under other law. *See Gov't Code § 552.022(a)(17)*. Section 552.103 is a discretionary exception to disclosure under the Act, and does not constitute "other law" for purposes of section 552.022. *See Dallas Area*

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<sup>1</sup>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.

*Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general). Accordingly, we conclude that you may not withhold these documents, which we have marked, under section 552.103 of the Government Code.

You assert that the information in Exhibits A and B is excepted under section 552.103 of the Government Code. 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.

...

(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.

Gov't Code § 552.103(a), (c). The commission 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. *Univ. of Tex. Law Sch. v. Tex. 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 commission must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform us that the commission maintains the account trust, "which is used to pay civil judgments obtained by consumers against licensees if the consumer is unable to collect from the licensee." *See* Occ. Code ch. 1101. You also inform us that, to obtain payment from the trust, the consumer, who is the successful plaintiff in the underlying civil judgment against the licensee, must file an application pursuant to subchapter M of chapter 1101 of the Occupations Code in the court in which the original judgment was maintained. The licensee or commission may oppose that application under section 1101.608(c) and, if an application is opposed, you explain that "a hearing may be set for a judge to make a final determination on the application." Finally, you explain that the filing of the application initiates the litigation, and a final order directing payment concludes the litigation.

You assert that the remaining information in Exhibits A and B pertains to applications made to the trust account that have not been resolved and the court has not yet ordered payments. Based on your representations and our review of the information at issue, we conclude you have established that litigation was pending when the commission received the request for information. Furthermore, we find that the information at issue in Exhibits A and B is related to the pending proceedings for purposes of section 552.103. Therefore, the commission may withhold this information pursuant to section 552.103.<sup>2</sup>

We note, however, that once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

The commission asserts that some of the information in Exhibit C is excepted under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses section 58.001 of the Occupations Code, which provides that the "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 specific occupation or profession that is provided to the licensing agency is confidential and not subject to disclosure under Chapter 552, Government Code."<sup>3</sup> You assert that Exhibit C contains the social security numbers of licensees that were provided to the commission. To the extent the social security numbers that we have marked belong to licensees to the commission, such numbers are confidential under section 58.001 of the Occupations Code and the commission must withhold them under section 552.101 of the Government Code.

Section 552.101 also 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common law privacy but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental

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<sup>2</sup>Because we are able to resolve this under section 552.103, we do not address your other arguments for exception regarding Exhibits A and B.

<sup>3</sup>There are currently two different sections of the Occupations Code denominated as section 58.001. The section relating to "[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 specific occupation or profession" was renumbered from section 56.001 to section 58.001 in 2003. See Act of May 20, 2003, 78th Leg., R.S., ch. 1275, § 2(112), 2003 Tex. Gen. Laws 4140, 4146.

body. See Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). For example, information related to an individual's mortgage payments, assets, bills, and credit history is generally protected by the common law right to privacy. See Open Records Decision Nos. 545, 523 (1989); see also Open Records Decision No. 600 (finding personal financial information to include choice of particular insurance carrier). The submitted documents contain the personal financial information of an individual, and we do not believe that the public has a legitimate interest in it. See Open Records Decision Nos. 620 (1993), 600 (1992). Thus, we conclude that this information, which we have marked, is confidential under common law privacy, and the commission must withhold it pursuant to section 552.101.

Finally, the commission asserts that some of the remaining information in Exhibit C is excepted under section 552.111 of the Government Code, which 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." This section encompasses the attorney work product privilege found in Rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. Tex. R. Civ. P. 192.5; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed 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 [created or obtained the information] for the purpose of preparing for such litigation.

*Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). 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; ORD 677 at 7.

The commission asserts that the information it has marked under section 552.111 consists of attorney work product related to litigation involving an application to the trust account for funds. You further state that the information at issue includes "mental notes, notes to staff from the general counsel, and drafts of documents prepared in connection with pending litigation by the general counsel, assistant attorney general, and agency staff at the direction of the general counsel relating to the application file which they are a part." Based on these representations and our review of the information at issue, we conclude that the commission may withhold as attorney work product the information it has marked in Exhibit C under section 552.111 of the Government Code.

To conclude, the commission must release the marked court-filed documents pursuant to section 552.022, but it may withhold the remaining information in Exhibits A and B under section 552.103. It may also withhold the marked information in Exhibit C under section 552.111. It must withhold pursuant to section 552.101 of the Government Code the social security numbers marked under section 58.001 of the Occupations Code if such numbers belong to licensees, and the marked information that is confidential under common law privacy. The commission must release the remaining information at issue.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 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,

  
James L. Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/seg

Ref: ID# 220652

Enc. Submitted documents

c: Mr. Carl Pipoly  
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(w/o enclosures)