ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 17, 2005

Ms. Cynthia Villareal-Reyna
Section Chief- Agency Counsel
Legal & Compliance Division, MC 110-1A
Texas Department of Insurance
P. O. Box 149104
Austin, Texas 78714-9104

OR2005-09374

Dear Ms. Villarreal-Reyna:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 234442.

The Texas Department of Insurance (the "department") received a request for a copy of the requestor's license records, including complaints. You state that the department is releasing most of the requested information. You claim that some of the submitted information is excepted from disclosure under sections 552.101, 552.111, 552.136, and 552.137 of the Government Code.[1] We have considered the exceptions you claim and reviewed the submitted information.

As a preliminary matter, you acknowledge that a portion of the submitted information is subject to section 552.022 of the Government Code, which provides in relevant part:

> the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

[1]You have marked a portion of the submitted information that you state is not responsive to the request. Thus, this decision is not applicable to this information and you need not release it.

> (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). You inform us that the "Request for Disposition" is from a closed investigation. Thus, the department must release this information pursuant to section 552.022(a)(1) unless the information is confidential under other law or is excepted from disclosure under section 552.108 of the Government Code. While you contend that the information at issue is excepted from disclosure under section 552.111 of the Government Code, we note that section 552.111 is a discretionary exception that protects the governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022. *See* Open Records Decision No. 473 (1987) (governmental body may waive statutory predecessor to section 552.111); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the department may not withhold any of the information that is encompassed by section 552.022 under section 552.111 of the Government Code. You also claim, however, that the "Request for Disposition" is protected by the attorney work product privilege under Rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328, 337 (Tex. 2001). Thus, we will determine whether this information is confidential under Rule 192.5.

For the purpose of section 552.022(a), information is confidential under Rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. Open Records Decision No. 677 at 9-10 (2002). Core work product is defined as the work product of an attorney or an attorney's representative developed in anticipation of litigation or for trial that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. TEX. R. CIV. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under Rule 192.5, a governmental body must demonstrate that the material was 1) created for trial or in anticipation of litigation and 2) consists of an attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *Id.* The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) 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 2) 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 Nat'l Tank 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. The second prong of the work product test requires the governmental body to show that the documents at issue contain the attorney's or the attorney's representative's mental

impressions, opinions, conclusions, or legal theories. TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test is confidential under Rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in Rule 192.5(c). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). Having considered your arguments and representations and having reviewed the information at issue, we conclude that you have established that the "Request for Disposition" was created in anticipation of litigation and contains an attorney's mental impressions, opinions, conclusions, or legal theories. We therefore conclude that this information may be withheld pursuant to Rule 192.5.

We now address your arguments for the information not subject to section 552.022. You contend that portions of this 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, which 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).

This office has found that personal financial information is generally excepted from required public disclosure under common-law privacy. Open Records Decision Nos. 600 (1992) (personal financial choices concerning insurance are generally confidential), 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). Thus, we find that the decision to purchase annuities is a private, financial decision that is excepted from disclosure under common-law privacy pursuant to section 552.101 of the Government Code. Because the decision to purchase annuities is protected by common-law privacy, the department must redact the annuitants' identifying information. Identifying information includes the annuitants's name, address, policy and bank account numbers, and the beneficiary's name if the beneficiary's name or relationship with the insured reveals the identity of the insured. Thus, we agree with most of the department's markings on the submitted documents. You have failed, however, to establish that some of the information that you have marked identifies the annuitants. This information, which we have marked, must be released. Further, we have marked some additional information that must be withheld under section 552.101 in conjunction with common-law privacy.[2]

---

[2]Because our ruling is dispositive on this issue, we need not address your section 552.136 argument for this information.

Next, we address your claims under section 552.136 for the remaining submitted information. This section provides in relevant part:

> (a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:
>
> > (1) obtain money, goods, services, or another thing of value; or
> >
> > (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.
>
> (b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. The bank account numbers you have marked are excepted from disclosure pursuant to section 552.136.

Finally, section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public" but is instead the address of the individual as a government employee. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You inform us that no members of the public have affirmatively consented to the release of the e-mail addresses contained in the submitted materials. The department must withhold the e-mail addresses it has marked under section 552.137.

In summary, the section 552.022(a)(1) information you have marked may be withheld under Rule 192.5 of the Texas Rules of Civil Procedure. You must withhold the marked identifying information under section 552.101 in conjunction with common-law privacy, except as we have marked otherwise. The marked bank account numbers must be withheld under section 552.136. The department must withhold the marked e-mail addresses pursuant to section 552.137. The remaining submitted information must be released to the requestor.

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).

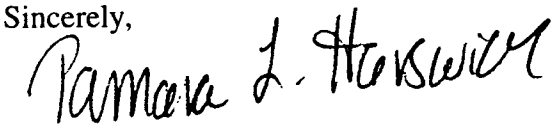
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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); *Texas 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 Office of the Attorney General 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,



Tamara L. Harswick
Assistant Attorney General
Open Records Division

TLH/krl

Ref: ID# 234442

Enc. Submitted documents

c: Stacey L. Munderloh
6613 Village Springs Drive
Plano, TX 75024
(w/o enclosures)