



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

April 11, 2006

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

OR2006-03619

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# 247292.

The Texas Department of Insurance (the "department") received a request for records of named agents and named insurance agencies. You state that you have released some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.107, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also reviewed comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note that the submitted information is subject to section 552.022 of the Government Code. Section 552.022 makes certain information public, unless it is expressly confidential under other law. *See* Gov't Code § 552.022(a). One category of public information under section 552.022 is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108." *Id.* § 552.022(a)(1). The submitted information is from closed case files of investigations and constitutes completed investigations made of, for, or by the department. Thus, this information is subject to section 552.022(a)(1) and must be released, unless it is confidential

under “other law” or is excepted from disclosure under section 552.108. Although the department claims that some of these documents are excepted from disclosure pursuant to sections 552.107 and 552.111 of the Government Code, we note that these exceptions are discretionary exceptions under the Act and, as such, do not constitute “other law” that makes information confidential.<sup>1</sup> Accordingly, we conclude that the department may not withhold any portion of these documents pursuant to sections 552.107 or 552.111 of the Government Code. We note, however, that 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.” *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will determine whether any portion of this information is confidential under Rule 503 of the Texas Rules of Evidence. *See Open Records Decision Nos. 676 at 6 (2002)* (appropriate law for a claim of attorney-client privilege for section 552.022 information is Texas Rule of Evidence 503). Furthermore, because information subject to section 552.022(a)(1) may be withheld as provided by section 552.108, we will address this assertion.

Rule 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client’s lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer’s representative;
- (C) by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

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<sup>1</sup>Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g., Open Records Decision Nos. 630 at 4 (1994)* (governmental body may waive attorney-client privilege, section 552.107(1)), *522 at 4 (1989)* (discretionary exceptions in general), *473 (1987)* (governmental body may waive section 552.111).

TEX. R. EVID. 503. A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *See id.* 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. *See* Open Records Decision No. 676 (2002). Upon a demonstration of all three factors, the entire communication is confidential under Rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 4527 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (Privilege attaches to complete communication, including factual information).

You advise this office that one document in Packet #1 consists of a communication among department attorneys, department employees, and the Commissioner of Insurance. You also advise this office that the documents in Packet #4 consist of communications between department attorneys. Additionally, you advise us that these communications were made for the purpose of rendering legal advice and the confidentiality of these communications has been maintained. Accordingly, we conclude that the department may withhold this information, which we have marked, pursuant to Rule 503 of the Texas Rules of Evidence.

We now turn to your argument under section 552.108 for the information in Packet #2. Section 552.108 states that information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from required public disclosure “if release of the information would interfere with the detection, investigation, or prosecution of crime.” Gov’t Code § 552.108(a)(1). Section 552.108 may be invoked by the proper custodian of information relating to an investigation or prosecution of criminal conduct. Open Records Decision No. 474 at 4-5 (1987). Where a non-law enforcement agency is in the custody of information that would otherwise qualify for exception under section 552.108 as information relating to the pending case of a law enforcement agency, the custodian of the records may withhold the information if it provides the attorney general with a demonstration that the information relates to the pending case and a representation from the law enforcement entity that it wishes to withhold the information. You assert that releasing the information at issue “could jeopardize any ongoing or future investigation, detection, or prosecution of [a named individual and insurance companies]” by the FBI. However, the FBI has informed this office that it has no objection to releasing the information at issue. Therefore, this information may not be withheld under section

552.108 on the basis of the FBI's law enforcement interests. As you raise no other exceptions for this information, it must be released to the requestor.

In summary, the department may withhold the information we have marked under Rule 503 of the Texas Rules of Evidence. The remaining 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).

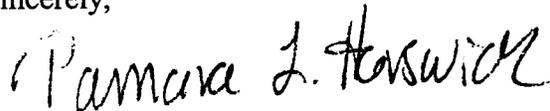
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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

A handwritten signature in black ink that reads "Tamara L. Harswick". The signature is written in a cursive, slightly slanted style.

Tamara L. Harswick  
Assistant Attorney General  
Open Records Division

TLH/sdk

Ref: ID# 247292

Enc. Submitted documents

c: Mr. Pete Slover  
The Dallas Morning News  
1005 Congress Avenue, Suite 290  
Austin, Texas 78701  
(w/o enclosures)