



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 31, 2007

Ms. Sara Shiplet-Waite  
Senior Associate Commissioner  
Legal Services Division, Mail Code 110-1A  
Texas Department of Insurance  
P.O. Box 149104  
Austin, Texas 78714-9104

OR2007-14280

Dear Ms. Shiplet-Waite:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 293388.

The Texas Department of Insurance (the "department") received a request for information pertaining to four specified companies and three named individuals. You state that you will release some of the requested information. You inform us that, in accordance with a previous determination issued to the department, you will withhold any information or material acquired by the department that relates to a fraud investigation under section 701.151 of the Texas Insurance Code. *See* Open Records Letter No. 2005-05223 (2005) (determining information acquired by the department that is relevant to an inquiry by the insurance fraud unit that the commissioner deems confidential is excepted from disclosure and need not be submitted to this office for review under section 552.301 of the Government Code). You also inform us that you will withhold any responsive examination information in accordance with the previous determination issued to the department in Open Records Decision No. 640 (1996). *See* Open Records Decision No. 640 (1996) (providing that information obtained by department during course of examination is confidential by law), Open Records Letter No. 99-1264 (1999) (providing that department may rely on Open Records Decision No. 640 as previous determination). You seek to withhold the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, 552.130, 552.136, 552.137, and 552.147 of the Government Code and privileged under

Texas Rules of Civil Procedure 192.5 and Texas Rule of Evidence 503. In addition, you state that release of the submitted information may implicate the proprietary interests of National Alliance of Commercial Truckers, Inc. (“National”); Thomas G. Corless (“Corless”), and Charles Myers Insurance Agency (“Myers”). Accordingly, you notified these third parties of the department’s receipt of this request and of their right to submit arguments to this office as to why the requested information should not be released to the requestor. *See* Gov’t Code § 552.305 (d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered all of the submitted arguments and reviewed the submitted information.<sup>1</sup>

Initially, we note, and the department acknowledges, that some of the submitted information is subject to required public disclosure under 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) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108

...

(12) final opinions, including concurring and dissenting opinions, and orders issued in the adjudication of cases;

...

(17) information that is also contained in a public court record[.]

*Id.* § 552.022(a)(1), (12), (17). Some of the submitted information at issue consists of completed department investigations, final department orders, and documents filed in court. Therefore, as prescribed by section 552.022, the department must release this information unless it is confidential under other law. The department raises sections 552.103 and 552.111 for some of this information, but these are discretionary exceptions to disclosure

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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.

that protects the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103), Open Records Decision Nos. 677 at 10 (attorney work product privilege may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103 and 552.111 do not qualify as “other law” that make information confidential for the purposes of section 552.022. Therefore, the department may not withhold any portion of the information that is subject to section 552.022 under these exceptions. The Texas Supreme Court has held, however, that the Texas Rules of Evidence and the Texas Rules of Civil Procedure are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider whether the department may withhold any of the information that is subject to section 552.022 under Texas Rule of Evidence 503 or Texas Rule of Civil Procedure 192.5. Furthermore, because sections 552.101, 552.130, 552.136, and 552.137 of the Government Code are other law for purposes of section 552.022, we will consider your arguments under these exceptions. We will also consider your argument under section 552.103 for the information that is not subject to section 552.022.

You assert that the remaining information pertaining to two enforcement case files, case file number 50206 and the case file corresponding to docket number 454-06-1706C, is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides in part:

(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). A governmental body 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 on the date the governmental body receives the request for information, and (2) the information at issue is related to that litigation. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *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 governmental body must meet both prongs of this test for information to be excepted under section 552.103(a) of the Government Code.

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). When the governmental body is the prospective plaintiff in litigation, the evidence of anticipated litigation must at least reflect that litigation involving a specific matter is “realistically contemplated.” *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (investigatory file may be withheld if governmental body's attorney determines that it should be withheld pursuant to Gov't Code § 552.103 and that litigation is “reasonably likely to result”).

With respect to the remaining information in case file number 50206, you inform us and provide documentation showing, that the department has imposed an administrative penalty upon the opposing party and that the party has failed to pay that penalty. You also state that the department is currently attempting to collect that debt and has requested representation in the collection action from the Office of the Attorney General. Based on your representations and our review of the submitted information, we agree that litigation involving the department was reasonably anticipated on the date that it received this request for information. Furthermore, because the information at issue consists of the investigation and order underlying the administrative penalty, we agree that it is related to the anticipated litigation.

With respect to the remaining information corresponding to docket number 454-06-1706 C, you inform us that the department is currently party to a contested case before the State Office of Administrative Hearings. *See* Open Records Decision No. 588 (1991) (contested case under Administrative Procedure Act, Gov't Code ch. 2001, constitutes litigation for purposes of statutory predecessor to section 552.103). You state that the pending litigation is an enforcement action pertaining to the sale of unlicensed, uncertified insurance policies. Based on our review of your arguments and the information at issue, we find that the department has established that litigation was pending on the date that it received the present request for information. Furthermore, because the information at issue consists of the investigatory file pertaining to the claims at issue, we find that the department has demonstrated that the information at issue relates to the pending litigation. Thus, you have demonstrated the applicability of section 552.103 of the Government Code to the information pertaining to case file number 50206 and the information corresponding to docket number 454-06-1706C.

We note, however, that all of the opposing parties in the respective litigation appear to have already seen or had access to some of the information at issue in the two case files. The purpose of section 552.103 is to enable a governmental body to protect its position in

litigation by forcing parties to obtain information that is related to litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). Thus, if all the opposing parties to the pending litigation have already seen or had access to information that relates to the litigation, through discovery or otherwise, there is no interest in now withholding such information under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, we have marked information that the department may withhold under section 552.103, provided that the opposing parties in the respective litigation have not already seen or had access to any of the marked information. We further note that the applicability of section 552.103 to this information ends once the related litigation concludes or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). Because our determination on this issue is dispositive, we need not address your arguments against disclosure under section 552.107 of the Government Code.

We now address your arguments with respect to the information subject to section 552.022. Texas Rule of Evidence 503 encompasses the attorney-client privilege and provides in part:

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.

TEX. R. EVID. 503(b)(1). 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. *Id.* 503(a)(5). Thus, 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. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You assert that a portion of the remaining information consists of confidential communications between identified department attorneys and department staff that were made for the purpose of facilitating the rendition of professional legal services to the department. Based on your representations and our review of the information in question, we find that the department has established that the information is protected by the attorney-client privilege. Thus, the department may withhold the information we have marked pursuant to Texas Rule of Evidence 503.

Next, you state that a portion of the information subject to section 552.022 is confidential under Texas Rule of Civil Procedure 192.5. For the purpose of section 552.022 of the Government Code, information is confidential under Texas Rule of Civil Procedure 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. *See* ORD 677 at 9-10. Rule 192.5 defines core work product as the work product of an attorney or an attorney's representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney's representative. *See* TEX. R. CIV. P. 192.5(a), (b)(1). A governmental body seeking to withhold information under this privilege 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. *Id.*; 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 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 [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 department explains, and has provided documentation showing, that the identified information pertains to litigation files that were originally opened to pursue administrative actions against entities and individuals for violations of the Texas Insurance Code. You state that the cases to which this information pertains are closed, and explain that the information at issue was prepared by the department's attorney or the attorney's representative and

reveals their mental processes, conclusions, and legal theories. Based on your representations and our review of the information at issue, we agree that some of the information the department has marked is protected core work product. Accordingly, we find that the department may withhold that information which we have marked under Texas Rule of Civil Procedure 192.5. However, we find that you have failed to explain how any portion of the remaining information at issue consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative created for trial or in anticipation of litigation. Thus, the department may not withhold any of the remaining information under rule 192.5.

Next, we address the exceptions you claim for the remaining information. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information made confidential by common-law privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate and embarrassing and of no legitimate public interest. *See* Open Records Decision No. 545 (1990). The information that you have marked constitutes financial information records. Further, in this instance we find that there is not a legitimate public interest in the marked information. Accordingly, you must withhold the marked personal financial information under section 552.101 in conjunction with common-law privacy.

Section 552.130 of the Government Code excepts from disclosure information relating to a Texas motor vehicle driver's license and information relating to a Texas motor vehicle title or registration. Gov't Code § 552.130. The department must withhold the Texas motor vehicle record information you have marked under section 552.130 of the Government Code. We have marked additional Texas motor vehicle record information that the department must also withhold on this basis.

Section 552.136 of the Government Code states that "[n]otwithstanding 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(b). The department must withhold the bank account, routing numbers, and insurance policy numbers marked under section 552.136 of the Government Code.

Section 552.137 of the Government Code requires a governmental body to withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See* Gov't Code § 552.137 (a)- (b). You do not inform us that the owners of the e-mail addresses have

affirmatively consented to release. Therefore, the department must withhold the e-mail addresses you have marked under section 552.137.

Section 552.147 of the Government Code provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act. *See* Gov’t Code § 552.147. Thus, the department may withhold the social security numbers you have marked under section 552.147.<sup>2</sup>

Finally, an interested third party is allowed ten business days after the date of its receipt of the governmental body’s notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov’t Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from National, Corless, or Myers explaining why any of the remaining information pertaining to those companies should not be released. We thus have no basis for concluding that any portion of this remaining information constitutes their proprietary information protected under section 552.110, and none of it may be withheld on that basis. *See* Gov’t Code § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

In summary, the department may withhold: 1) the information we have marked under section 552.103 of the Government Code; 2) the information we have marked under rule 503 of the Texas Rules of Evidence; 3) the information we have marked under rule 192.5 of the Texas Rules of Civil Procedure; and 4) the social security numbers marked under section 552.147. The department must withhold: 1) the financial information you have marked under section 552.101 in conjunction with common-law privacy; 2) the Texas motor vehicle record information you have marked under section 552.130; 3) the bank account, routing, and insurance policy numbers marked under section 552.136; and 4) the e-mail addresses you have marked under section 552.137. The remaining information must be released.

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

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<sup>2</sup>Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

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).

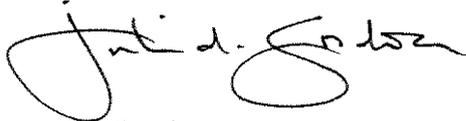
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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, appearing to read "Justin D. Gordon". The signature is fluid and cursive, with the first name "Justin" being the most prominent part.

Justin D. Gordon  
Assistant Attorney General  
Open Records Division

JDG/jh

Ref: ID# 293388

Enc. Submitted documents

c: Ms. Venessa J. Bragg  
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(w/o enclosures)