ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 18, 2008

Ms. Cynthia Villarreal-Reyna
Section Chief Agency Counsel
Legal and Compliance Division
Texas Deparmentt of Insurance
P.O. Box 149104, Mail Code 110-1A
Austin, Texas 78714- 9104

OR2008-08417

Dear Ms. Villarreal-Reyna:

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# 313257.

The Texas Department of Insurance (the "department") received a request for two specified complaints against Prudential Insurance Company. You state that you have released a portion of the requested information to the requestor. You also inform us that you will withhold some of the requested information in accordance with a previous determination issued by this office. *See* Open Records Letter No. 2001-4777 (2001) (concluding that department could withhold the names, addresses, telephone numbers, birth dates, social security numbers, and claim numbers of enrollees without requesting a ruling from this office); *see also* Open Records Decision No. 673 at 7-9 (2001) (delineating elements of second type of previous determination under section 552.301(a)). You claim that the submitted information is excepted from disclosure under sections 552.107, 552.111, and 552.136 of the Government Code, and privileged under Texas Rule of Civil Procedure 192.5 and Texas Rule of Evidence 503. We have considered the arguments you make and reviewed the submitted information.

As a preliminary matter, you acknowledge that the submitted information is subject to section 552.022 of the Government Code. Section 552.022 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[.]

Gov't Code § 552.022(a)(1). In this instance, the submitted information consists of a completed investigation made for or by the department. The department must release the completed investigation under section 552.022(a)(1) of the Government Code unless it is excepted from disclosure under section 552.108 of the Government Code or is expressly confidential under other law. Sections 552.107 and 552.111 of the Government Code are discretionary exceptions that protect a governmental body's interests and may be waived. As such, they are not other law that make information confidential for purposes of section 552.022. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 676 at 10-11 (2002) (attorney-client privilege under section 552.107 may be waived), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). Therefore, the submitted information may not be withheld on the basis of section 552.107 or section 552.111. However, the attorney-client privilege, which you raise for a portion of the submitted information, is also found in rule 503 of the Texas Rules of Evidence. In addition, you claim that a portion of the submitted information 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." *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); *see also* Open Records Decision No. 676 (2002). Accordingly, we will consider your arguments under Texas Rule of Evidence 503 and rule 192.5 of the Texas Rules of Civil Procedure. You assert that section 552.136 is applicable to portions of the submitted information. Because section 552.136 is a mandatory exception, we will address the applicability of section 552.136 to this information.

Texas Rule of Evidence 503(b)(1) provides as follows:

> 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. 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 state that a portion of the submitted information consists of communications between enforcement attorneys and department employees. Based on your representations and our review of the information at issue, we have marked the information that the department may withhold on the basis of the attorney-client privilege under Texas Rule of Evidence 503.[1]

Next, you state that the marked insurance policy numbers are excepted from disclosure under section 552.136 of the Government Code. Section 552.136 provides 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. Accordingly, the department must withhold the insurance policy numbers you have marked pursuant to section 552.136 of the Government Code.

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[1]As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

In summary, the department may withhold the information we have marked under Texas Rule of Evidence 503. The department must withhold the insurance policy numbers you have marked pursuant to section 552.136 of the Government Code. 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 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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).

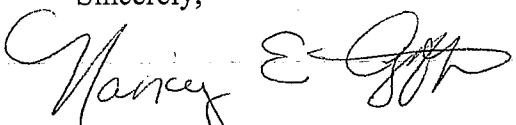
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



Nancy E. Griffiths
Assistant Attorney General
Open Records Division

NEG/jb

Ref: ID# 313257

Enc. Submitted documents

c: Mr. Jacob Foster
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San Francisco, California 94104
(w/o enclosures)