



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 23, 2008

Mr. Robert Giddings  
Assistant General Counsel  
Texas Department of Banking  
2601 North Lamar Boulevard  
Austin, Texas 78705-4294

OR2008-14508

Dear Mr. Giddings:

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# 325702.

The Texas Department of Banking (the "department") received a request for information related to a specified investigation and Order No. 2008-001. You state that some responsive information has been released to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, 552.115, 552.130, 552.136, 552.137, and 552.147 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.<sup>2</sup> We have also considered

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<sup>1</sup>Although you raise section 552.101 of the Government Code in conjunction with Texas Rules of Evidence 408 and 503 and Texas Rule of Civil Procedure 192.5, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). In addition, because the information for which you claim these provisions is not subject to section 552.022 of the Government Code, the information is properly addressed here under section 552.107, rather than rule 503, and under section 552.111 rather than rule 192.5. Open Records Decision Nos. 677 at 8-9 (2002), 676 at 3; *see also* Gov't Code § 552.022 (listing categories of information that are expressly public under the Act and must be released unless confidential under "other law").

<sup>2</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.

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).

First, we note the submitted information includes copies of Order No. 2008-001 from the Banking Commissioner (the "commissioner"). The final order contains findings of fact, conclusions of law, an order assessing a monetary penalty, and the signature of the commissioner. Section 2001.004 of the Government Code states a state agency shall make available for public inspection all final orders, decisions, and opinions. *Id.* § 2001.004. The Act's exceptions to required public disclosure are generally inapplicable to information that statutes other than the Act expressly make public. Open Records Decision No. 623 at 3 (1994). Furthermore, section 552.022(a)(12) of the Government Code makes public the final opinions and orders issued in the adjudication of cases. Gov't Code § 552.022(a)(12). Thus, the department must release Order No. 2008-001.

You claim that a portion of the submitted information is excepted from public disclosure under section 552.107(1) of the Government Code, which protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. ORD 676 at 6-7. First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.*, meaning it was "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).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire

communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You have marked the information that the department asserts is privileged. We agree that the department has demonstrated that some of the information at issue, which we have marked, consists of privileged attorney-client communications that the department may withhold under section 552.107 of the Government Code. We note, however, that the attorney representing the opposing party in the settlement negotiations has either created or had access to the remaining information you seek to withhold as privileged. Therefore, we find that you have not demonstrated that the remaining information consists of privileged attorney-client communications. Therefore, the department may not withhold any portion of the remaining information under section 552.107 of the Government Code.

You also appear to claim the attorney work product privilege for some of the submitted information. Section 552.111 encompasses the attorney work product privilege found at rule 192.5 of the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 192.5; *City of Garland*, 22 S.W.3d at 360; ORD 677 at 4-8. Rule 192.5 defines attorney work product as consisting of

- (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.

TEX. R. CIV. P. 192.5. A governmental body that seeks to withhold information on the basis of the attorney work product privilege under section 552.111 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. *See id.*; ORD 677 at 6-8. In order for this office to conclude that information was created 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.

As noted above, the records at issue consist of information that was provided by the attorney for the opposing party in settlement negotiations or that the opposing party has had access to. We conclude that because the opposing party to litigation has had access to the information at issue, the work product privilege under section 552.111 has been waived. Thus, the department may not withhold any of the submitted information on the basis of the attorney work product privilege under section 552.111 of the Government Code.

You seek to withhold the submitted death certificates under section 552.115 of the Government Code. Section 552.115(a) provides that "[a] birth or death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official is excepted from the requirements of Section 552.021[.]" Gov't Code § 552.115(a). Section 552.115 only applies to information maintained by the bureau of vital statistics or local registration official, and not to information held by the department. *See Open Records Decision No. 338 (1982)*. Therefore, none of the submitted information may be withheld under section 552.115.

Section 552.101 of the Government Code excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Section 154.055 of the Finance Code provides:

(a) Information relating to the financial condition of a seller obtained by the department directly or indirectly, through examination or otherwise, other than published statements, is confidential.

(b) The files and records of the department relating to the financial condition of a seller are confidential.

(c) The commissioner may disclose the information described by Subsection (a) or (b) to an agency, department, or instrumentality of this or another state or the United States if the commissioner considers disclosure to be in the best interest of the public and necessary or proper to enforce the laws of this or another state or the United States.

Fin. Code § 154.055. Upon review of the submitted information, we agree that the information we have marked is "information relating to the financial condition of a seller obtained by the department directly or indirectly, through examination or otherwise." Therefore, assuming that none of this information was obtained from published statements, we conclude you may withhold the marked information under section 552.101 in conjunction with section 154.055 of the Finance Code. However, we find that you have not

demonstrated that any of the remaining submitted information relates to the financial condition of the seller for purposes of section 154.055, and therefore none of the remaining submitted information may be withheld under section 552.101 on this basis.

You claim that some of the remaining information is excepted from disclosure under section 552.101 in conjunction with Texas Rule of Evidence 408. For information to be confidential under section 552.101, the provision of law must explicitly require confidentiality. A confidentiality requirement will not be inferred from a provision's structure. *See* Open Records Decision Nos. 658 at 4 (1998) (stating that statutory confidentiality provision must be express and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (stating that, as general rule, statutory confidentiality requires express language making information confidential), 465 at 4-5 (1987). Rule 408 of the Texas Rules of Evidence governs the admissibility of information developed through compromise negotiations. *See* Tex. R. Evid. 408. Because rule 408 does not explicitly provide that information is confidential, we find that the department may not withhold any information from the requestor under section 552.101 of the Government Code in conjunction with rule 408.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. 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. *See* Open Records Decision No. 545 (1990). Upon review, we find that the decision to obtain pre-funeral insurance and the designation of a beneficiary are private, financial decisions that are excepted from disclosure under common-law privacy pursuant to section 552.101 of the Government Code. Further, we find that there is not a legitimate public interest in the release of this information. However, the common-law right to privacy is a personal right that lapses at death, and therefore it does not encompass information that relates to a deceased individual. *See Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex.App.—Texarkana 1979, writ ref'd n.r.e.); Open Records Decision No. 272 at 1 (1981). Thus, the department must withhold identifying information of living insureds and beneficiaries under section 552.101 in conjunction with common-law privacy. The remaining submitted information is not private, and may not be withheld under section 552.101 on that basis.

Section 552.130 of the Government Code excepts from disclosure information that "relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]" Gov't Code § 552.130(a)(1). Although you assert that the remaining information contains information that is excepted under section 552.130, upon review, we find that the remaining information does not contain any information subject to section 552.130. Accordingly, none of the submitted information may be withheld 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.” *Id.* § 552.136. The department must withhold the insurance policy numbers and the account numbers you have marked under section 552.136 of the Government Code.

The remaining submitted information contains e-mail addresses subject to section 552.137 of the Government Code, which 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). 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. We have marked a representative sample of e-mail addresses that are not a type specifically excluded by section 552.137(c). You do not inform us that the relevant members of the public have consented to the release of these e-mail addresses. Therefore, the department must withhold the types of e-mail addresses we have marked under section 552.137 of the Government Code.

Section 552.147 of the Government Code states that “[t]he social security number of a living person is excepted from” required public disclosure under the Act. *Id.* § 552.147. Upon review, we agree that the department may withhold the social security numbers of living persons that you have marked under section 552.147 of the Government Code.<sup>3</sup>

Finally, we note that some of the materials at issue appear to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are protected by copyright. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of materials protected by copyright, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the department must withhold (1) the information relating to the financial condition of a seller that we have marked under section 552.101 of the Government Code in conjunction with section 154.055 of the Finance Code; (2) identifying information of living insureds and beneficiaries under section 552.101 in conjunction with common-law privacy; (3) insurance policy and account numbers you have marked under section 552.136 of the Government Code; and (4) the types of e-mail addresses we have marked under

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<sup>3</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. Gov’t Code § 552.147(b).

section 552.137 of the Government Code. The department may withhold (1) the information we have marked under section 552.107 of the Government Code, and (2) the social security numbers of living persons under section 552.147 of the Government Code. The remaining information must be released, but any copyrighted information may only be released in accordance with copyright law.

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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/jh

Ref: ID# 325702

Enc. Submitted documents

c: Ms. Cindy Smith  
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(w/o enclosures)