



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 15, 2009

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

OR2009-00669

Dear Ms. Villareal-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# 332301 (TDI# 83767).

The Texas Department of Insurance (the "department") received a request for all information pertaining to a specified complaint. You state that you have released the information pertaining to the requestor. 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 claim that the remaining information is excepted from disclosure under sections 552.101, 552.103,

552.107, 552.111, 552.130, 552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

Section 552.103 of the Government Code provides in relevant part as follows:

(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). The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). 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 was pending or reasonably anticipated on the date that the governmental body received 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.); ORD 551 at 4. A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). This office has found that when a governmental body is conducting a regulatory investigation and seeks to withhold its

¹We 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.

investigatory file under section 552.103, the file may be withheld if the governmental body proves that litigation is "reasonably likely to result." *See* Attorney General Opinion MW-575 (1982).

You inform us that the department is charged with regulating the business of insurance in the state and insuring that the laws regarding insurance and insurance companies are executed. *See* Tex. Ins. Code § 31.002. You state that the submitted information is the subject of an ongoing investigation by the Enforcement Division of the department. You state that once the investigation is complete the department may initiate litigation through administrative action as a result of the findings. You explain that the submitted information is a critical component of the anticipated litigation. Based upon these representations, we conclude that the department reasonably anticipates litigation. We also find that the investigation antedated the request for information and the information relates to the anticipated litigation.

We note, however, that 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* ORD 551 at 4-5. If the opposing party has obtained or otherwise been given access to the information then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). A portion of the submitted information was provided to or obtained from the potential opposing party. Furthermore, it also appears that some of the submitted documents were provided by the potential opposing party to the department in response to correspondence from the department. Accordingly, any documents that were provided to or were obtained from the opposing party may not be withheld from the requestor under section 552.103. We will, however, address your remaining claims against the disclosure of this information. To the extent the remaining records were not obtained from or provided to the opposing party, these documents may be withheld under section 552.103.²

You claim that some of the remaining records contain information that is protected by common-law privacy. 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 the doctrine of common-law privacy. Common-law privacy 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

²The applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

office has found that certain personal financial decisions not relating to a financial transaction between an individual and a governmental body are generally intimate and embarrassing. *See* Open Records Decision No. 545 (1990). We find the insurance premiums and liability insurance limits you have marked in the remaining documents are intimate and embarrassing. We also find that there is no legitimate public interest in the disclosure of this information. Accordingly, we agree that the marked financial information must be withheld from the remaining records under section 552.101 in conjunction with common-law privacy.

Section 552.130 provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). We agree that the marked Texas license plate and vehicle identification numbers found in the remaining documents must be withheld under section 552.130.

The remaining documents also contain insurance policy numbers. Section 552.136(b) states that "[n]otwithstanding any other provision of [the Act], 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(b). This office has determined that insurance policy numbers are access device numbers for purposes of section 552.136. *See id.* § 552.136(a) (defining "access device"). Accordingly, the department must withhold the insurance policy numbers you have marked under section 552.136.

Section 552.137 of the Government Code 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). *Id.* § 552.137(a)-(c). The e-mail address in the remaining information is not specifically excluded by section 552.137(c). You inform us that the member of the public has not consented to the release of this e-mail address. Therefore, the department must withhold the e-mail address you have marked under section 552.137 of the Government Code.

In summary, to the extent the documents were not obtained from or provided to the opposing party, they may be withheld under section 552.103. To the extent the documents at issue were obtained from or provided to the opposing party, the department must withhold the personal financial information under section 552.101 in conjunction with common-law privacy, the license plate and vehicle identification numbers under section 552.130, the insurance policy numbers under section 552.136, and the e-mail address under section 552.137. As you have claimed no further exceptions to the disclosure of the remaining information, it must be released to the requestor.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Olivia A. Maceo
Assistant Attorney General
Open Records Division

OM/eeg

Ref: ID# 332301

Enc. Submitted documents

c: Requestor
(w/o enclosures)