



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 15, 2009

Ms. Sara Shiplet Waitt  
Section Chief, Agency Counsel  
Texas Department of Insurance  
Legal & Regulatory Affairs Division, MC 110-1A  
P.O. Box 149104  
Austin, Texas 78714-9104

OR2009-04983

Dear Ms. Sara Shiplet Waitt:

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# 340142 (TDI # 86877).

The Texas Department of Insurance (the "department") received a request for information relating to a specified file number. You state you have provided some of the requested information to the requestor. You claim that the remaining information is excepted from disclosure under sections 552.101 and 552.137 of the Government Code, and privileged under Texas Rule of Civil Procedure 192.5 and Texas Rule of Evidence 503. In addition, you state that the release of some of the requested information may implicate the proprietary interests of Dimont & Associates ("Dimont") and State Farm Fire & Casualty Company ("State Farm"). Accordingly, you state that you have notified the third parties of the request and of their opportunity to submit comments 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) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain the applicability of exception to disclose under Act in certain circumstances).* We have considered the exceptions you claim and reviewed the submitted information.

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

requested information relating to it should be withheld from disclosure. See Gov't Code § 552.305(d)(2)(B). As of the date of this letter, neither Dimont nor State Farm have submitted to this office any reasons explaining why the submitted information should not be released. We thus have no basis for concluding that any portion of the submitted information constitutes proprietary information of these companies, and the department may not withhold any portion of the submitted information on that basis. See *id.* § 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.

You inform us that the submitted information consists of a completed investigation made by the Enforcement Section of the department. This information is therefore subject to section 552.022(a)(1) of the Government Code, which provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). The Texas Supreme Court has held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider your arguments under rule 192.5 of the Texas Rules of Civil Procedure and Texas Rule of Evidence 503. Also, because sections 552.101 and 552.137 of the Government Code are "other law" for the purpose of section 552.022, we will consider the applicability of these exceptions to the submitted information.

For the purpose of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. See Open Records Decision No. 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. TEX. R. CIV. P. 192.5; 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.

You explain that the information you have marked pertains to a litigation file that was opened to prepare for administrative action against an insurance company. You state that the case to which this information pertains is closed, and explain that the information at issue was prepared by department enforcement attorneys and reveals their mental processes, conclusions, and legal theories. Based on your representations and our review of the information at issue, we agree that the information we have marked is protected core work product. Accordingly, we find that the department may withhold the information we have marked under Texas Rule of Civil Procedure 192.5. However, the remaining document you seek to withhold under Texas Rule of Civil Procedure 192.5 has been seen by the opposing party. Thus, the department has waived its privilege under Rule 192.5 and may not withhold any of the remaining information on that basis. *See* Tex. R. Evid. 511 (stating that a person waives a discovery privilege if he voluntarily discloses the privileged information).

Rule 503 of the Texas Rules of Evidence encompasses the attorney-client privilege and 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.

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 state that a portion of the remaining information consists of confidential communications between enforcement attorneys and department employees that were made for the purpose of facilitating the rendering of professional legal services to the department. Based on your representations and our review, we conclude that you may withhold most of the information that you have marked under Texas Rule of Evidence 503. We find, however, that you have not demonstrated that the marked "Individual Information Inquiry" form and the marked June 26, 2007 e-mail with an opposing party constitute confidential communications between privileged parties. Further you have failed to identify the parties to the two remaining communications, which we have marked for release. *See Open Records Decision No. 676 at 8* (governmental body must inform this office of identities and capacities

of individuals to whom each communication at issue has been made; this office cannot necessarily assume that communication was made only among categories of individuals identified in rule 503); *see generally* Open Records Decision No. 150 (1977) (stating that predecessor to the Act places burden on governmental body to establish why and how exception applies to requested information); *Strong v. State*, 773 S.W.2d 543, 552 (Tex. Crim. App. 1989) (burden of establishing attorney-client privilege is on party asserting it). Therefore, we conclude that none of the remaining information, which we have marked for release, may be withheld under Texas Rule of Evidence 503.

You have marked information in the remaining documents under section 59.001 of the Occupations Code. Section 552.101 exempts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses section 59.001 of the Occupations Code, which provides as follows:

The social security number of an applicant for or holder of a license, certificate of registration, or other legal authorization issued by a licensing agency to practice in a specific occupation or profession that is provided to the licensing agency is confidential and not subject to disclosure under Chapter 552, Government Code.

Occ. Code § 59.001. You indicate that the social security numbers contained in the remaining information were obtained in connection with the issuance of an occupational or professional license. Based on this representation, we conclude that the social security numbers you have marked are confidential under section 59.001 of the Occupations Code. However, you have failed to demonstrate how any of the remaining information you have marked consists of social security numbers that were obtained in connection with the issuance of an occupational or professional license. Thus, with the exception of the information we have marked for release, the department must withhold the social security numbers you have marked under section 552.101 of the Government Code in conjunction with section 59.001 of the Occupations Code.

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 established. *Id.* at 681-82. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. A compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U. S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Moreover, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. Therefore, the department must withhold the information we have marked under section 552.101 in conjunction with common-law privacy.

Finally, you assert that some of the remaining information is excepted under section 552.137 of the Government Code. Section 552.137 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). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, we agree that the department must withhold the e-mail addresses you have marked in the remaining information under section 552.137.

You claim portions of the submitted information 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).

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In summary, the department may withhold the information we have marked under Texas Rule of Civil Procedure 192.5. Except for the information we have marked for release, the department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 59.001 of the Occupations Code. The department must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. The department must withhold the information you have marked under section 552.137 of the Government Code. The remaining information must be released, but any copyrighted information may only be released in accordance with copyright law.<sup>1</sup>

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](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,



Christina Alvarado  
Assistant Attorney General  
Open Records Division

CA/rl

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<sup>1</sup>We note the remaining information contains a social security number. 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.

Ref: ID# 340142

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)