



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

May 4, 2009

Ms. Cynthia Villarreal-Reyna
Legal and Compliance
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2009-05921

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# 341732 (TDI# 87683).

The Texas Department of Insurance (the "department") received a request for three specified investigations. You claim that the requested 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, and privileged under Texas Rule of Civil Procedure 192.5 and Texas Rule of Evidence 503. We have considered the submitted arguments and reviewed the submitted information.

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[.]

Gov't Code § 552.022(a)(1), (12), (17). Case number 52600 consists of a completed department investigation, and the remaining submitted information contains 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, 552.107, and 552.111 for some of this information, but these are discretionary exceptions to disclosure that protect 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, 552.107, 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.

We first address your arguments with respect to the information subject to section 552.022. Texas Rule of Civil Procedure 192.5 encompasses the attorney work product privilege. For purposes of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent that the information implicates the core work product aspect of the work product privilege. *See Open Records Decision No. 677 at 9-10 (2002)*. 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)*. Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate that the

material was (1) created for trial or in anticipation of litigation when the governmental body received the request for information and (2) consists of an attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *Id.*

The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate 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 conducted the investigation for the purpose of preparing for such litigation. *See Nat'l Tank 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. The second prong of the work product test requires the governmental body to show that the documents at issue contain the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test is confidential under rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in rule 192.5(c). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state that the case to which the information you have marked is closed, and explain that the information at issue was prepared by the department's attorney or the attorney's representative in anticipation of litigation 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 192.5.¹ 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.

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 section 59.001 of the Occupations Code, which provides as follows:

¹As our ruling on this information is dispositive, we need not address your remaining arguments against disclosure of this information.

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 submitted 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 and must be withheld from disclosure under section 552.101 of the Government Code.

Section 552.101 also 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). After reviewing the submitted information, we find that portions of the information are confidential based on the common-law right to privacy. Accordingly, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.130 of the Government Code 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 note that section 552.130 of the Government Code does not apply to out-of-state motor vehicle information. Thus, the department may not withhold the out-of-state motor vehicle information you have marked under section 552.130, and it must be released.

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 information we have marked under section 552.136. However, you have not explained how the remaining numbers you have marked may be used to obtain money, goods, services, or anything of value, or initiate a transfer of funds. Therefore, we find that you have failed to explain how these numbers are subject to section 552.136. As you raise no other arguments regarding this information, it must be released to the requestor.

You have identified e-mail addresses within the submitted documents that you argue are subject to section 552.137 of the Government Code. This section 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 id.* § 552.137(a)-(c). The marked e-mail addresses are not the types specifically excluded by section 552.137(c). You state that the department has not received consent for the release of these e-mail addresses. Therefore, the department must withhold the e-mail addresses you have marked, in addition to the e-mail addresses we have marked, under section 552.137.

You assert that the information not subject to section 552.022, which pertains to two pending enforcement case files, 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). 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 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 information at issue is the subject of ongoing investigations by the Enforcement Division of the department. You state that once the investigations are 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 investigations 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). Accordingly, the department may not withhold any information that the opposing parties in the respective litigation have already seen or had access to. 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). Thus, the department may withhold the remaining information not subject to section 552.022, which we have marked, under section 552.103 of the Government Code.²

In summary, the department may withhold: 1) the information marked under section 552.103 of the Government Code; and 2) the information marked under rule 192.5 of the Texas Rules of Civil Procedure. The department must withhold: 1) the social security numbers you have marked under section 59.001 of the Occupations Code in conjunction with section 552.101 of the Government Code; 2) the information we have marked under section 552.101 in conjunction with common-law privacy; 3) the information we have marked under section 552.136 of the Government Code; and 4) the e-mail addresses you marked, in addition to the e-mail addresses we have marked, under section 552.137 of the Government Code. The remaining information must be released.

²Because our determination on this issue is dispositive, we need not address your remaining arguments against disclosure for this information.

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,



Paige Savoie
Assistant Attorney General
Open Records Division

PS/eeg

Ref: ID# 341732

Enc. Submitted documents

cc: Requestor
(w/o enclosures)