



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 11, 2009

Ms. Cynthia Villarreal-Reyna
Section Chief
Agency Counsel
Legal Services Division, MC 110-1A
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2009-08094

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# 344374 (TDI# 88826).

The Texas Department of Insurance (the "department") received a request for information relating to five case files. You inform us you are withholding information under section 701.151 of the Texas Insurance Code in accordance with a previous determination issued to the department in Open Records Letter No. 2005-05223 (2005). You also state you are withholding social security numbers pursuant to section 552.147 of the Government Code.¹ You claim 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 and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. In addition, you state the release of this information may implicate the proprietary rights of certain third parties. Accordingly, you inform us you notified the interested third parties of the request and of their rights to submit arguments to this office as

¹Section 552.147(b) 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.

to why the information should not be released.² See Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); 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 applicability of exception to disclosure in certain circumstances). We have considered your arguments and reviewed the submitted information.

Initially, you inform us that some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2008-01820 (2008). In that ruling, we ruled the department must withhold only the marked insurance policy numbers under section 552.136 of the Government Code and release the remaining information. Further, you state that you released some of the submitted information in response to the previous request for information. You now seek to withhold the submitted information in its entirety, including the information that was previously released in response to this earlier request for information. Section 552.007 provides that if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. See Gov't Code 552.007; Open Records Decision No. 518 at 3 (1989); see also Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the department may not now withhold the previously released information unless its release is expressly prohibited by law or the information is confidential by law. Although you seek to withhold the submitted information, including the information that was previously released, under sections 552.103, 552.107, and 552.111 of the Government Code, Texas Rule of Evidence 503, and Texas Rule of Civil Procedure 192.5, we note that these exceptions and privileges do not make information confidential under law or expressly prohibit its release for purposes of section 552.007. See Gov't Code § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 677 at 10 (2002) (claim of attorney work-product privilege under section 552.111 or Texas Rule of Civil Procedure 192.5 may be waived), 676 at 11-12 (2002) (claim of attorney-client privilege under section 552.107 or Texas Rule of Evidence 503 may be waived), 665 at n.5 (2000) (discretionary exceptions generally). Accordingly, because portions of the submitted information have already been released to members of the public in response to the request for information ruled upon in Open Records Letter 2008-01820, the department may not now withhold that information under section 552.103, section 552.107, or section 552.111 of the Government Code, Texas Rule of Evidence 503, or Texas Rule of Civil Procedure 192.5. You also claim sections 552.101, 552.130, 552.136, and 552.137 of the Government Code for the previously

²The third parties are as follows: Ideal Settlements; A&O Resource ("A&O"); Metlife; Lincoln Benefit Life Company ("Lincoln"); AXA Equitable Life Insurance Company ("AXA"); and Surplus Lines Stamping Office of Texas ("Surplus").

released information. These sections make information confidential by law. Thus, we will consider your arguments under these sections for any previously released information. We will also address all of the claimed exceptions for the information that was not previously released.

Next, we note some of the remaining information is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part the following:

(a) Without limiting the amount or kind of information that is public information under this chapter, 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; [and]

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (17). The submitted information includes a completed investigation and a completed report, which we have marked, that are subject to section 552.022(a)(1), and court-filed documents that are subject to section 552.022(a)(17). You seek to withhold this information under sections 552.101, 552.103, 552.107, 552.111, 552.136, and 552.137 of the Government Code, Texas Rule of Evidence 503, and Texas Rule of Civil Procedure 192.5. Sections 552.103, 552.107, and 552.111 are discretionary exceptions to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; *Dallas Morning News*, 4 S.W.3d 469, 475-76 (governmental body may waive section 552.103); *see also* ORD Nos. 676 at 10-11, 677 at 10, 665 at n.5. As such, sections 552.103, 552.107, and 552.111 are not other laws that make information expressly confidential for the purposes of section 552.022(a)(1) and section 552.022(a)(17). Therefore, the department may not withhold the information subject to section 552.022 under section 552.103, section 552.107, or section 552.111 of the Government Code. However, sections 552.101, 552.136, and 552.137 are other laws for purposes of section 552.022. Therefore, we will consider your arguments under these sections. Furthermore, the Texas Supreme Court has held that the Texas Rules of Evidence and 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 also consider whether the department may withhold any of the information subject to section 552.022 under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5.

Rule 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(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 do the following: (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). *See 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 information subject to section 552.022 consists of confidential communications between department 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 the

information we have marked in the completed investigation and the completed report under rule 503.³

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* ORD 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). 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 explain that the remaining information you have marked under rule 192.5 in the completed investigation 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 determine that this information is protected core work product. Accordingly, we find the department may withhold the information we have marked in the completed investigation under rule 192.5.

³As our ruling for this information is dispositive, we need not address your remaining arguments against its disclosure.

We now address your argument under section 552.103 for the information that was not previously released and the information that is not subject to section 522.022. Section 552.103 provides in part the following:

(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 department 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 is pending or reasonably anticipated on the date the department received the request for information, and (2) the information at issue is related to that litigation. *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.); Open Records Decision No. 551 at 4 (1990). The department must meet both prongs of this test for information to be excepted under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). When the governmental body is the prospective plaintiff in litigation, the evidence of anticipated litigation must at least reflect that litigation involving a specific matter is "realistically contemplated." See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (investigatory file may be withheld if governmental body's attorney determines that it should be withheld pursuant to section 552.103 and that litigation is "reasonably likely to result"). For the purposes of section 552.103(a), this office considers a contested case under the Texas Administrative Procedure Act ("APA"), Government Code chapter 2001, to constitute "litigation." Open Records Decision No. 588 at 7 (1991) (construing statutory predecessor to the APA).

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 the information at issue is the subject of an ongoing investigation by the Enforcement Division of the department. You also state that once the

investigation is complete, the department may initiate litigation through administrative action as a result of the findings. You explain the information at issue is a critical component of the anticipated litigation. Based upon these representations, we conclude that the department reasonably anticipated litigation when it received the present request. You state the information at issue was gathered for each investigation. Thus, we also find the information at issue relates to the anticipated litigation. Thus, we conclude section 552.103 of the Government Code is generally applicable to the information not previously released and not subject to section 552.022.

However, 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). In this instance, it appears some of the information at issue was seen by the potential opposing party in each of the anticipated lawsuits. Thus, any documents contained in the investigation files that were seen by the potential opposing party to that lawsuit may not be withheld from the requestor under section 552.103. We will address, however, your remaining arguments for any information that was seen by the potential opposing party in each lawsuit. The department may withhold under section 552.103 the remaining information that was not previously released, is not subject to section 552.022, or has not been seen by the opposing party in each of these anticipated lawsuits.⁴

Next, to the extent the information you claim is excepted under section 552.107 or section 552.111 has been seen by the opposing party to the lawsuit, we will address your arguments under these exceptions. Section 552.107(1) of the Government Code 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. *See* ORD 676 at 6-7. The elements of the privilege under section 552.107 are the same as those for rule 503 outlined above. We note, however, to the extent the information at issue is not excepted under section 552.103, the opposing party to the anticipated lawsuit has seen it. Therefore, we find that any information that has been seen by the opposing party to the anticipated lawsuit does not consist of privileged attorney-client communications; thus, the department may not withhold any information seen by an opposing party under section 552.107.

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

⁴As our ruling for this information is dispositive, we need not address your remaining arguments against its disclosure.

at 360; Open Records Decision No. 677 at 4-8 (2002). 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 seeking to withhold information under the work product aspect of 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. *Id.*; ORD 677 at 6-8. The test to determine whether information was created or developed in anticipation of litigation is the same as that discussed above concerning Texas Rule of Civil Procedure 192.5.

As noted above, if the remaining information is not excepted under section 552.103, then it consists of information that was seen by the opposing party to litigation. We conclude that because the opposing party to litigation has seen the information at issue, the work product privilege under section 552.111 has been waived. Thus, the department may not withhold any of the information at issue under section 552.111.

We will now address your remaining arguments under sections 552.101, 552.130, 552.136, and 552.137 for the information that was previously released, the information that is subject to section 552.022, and any information that has been seen by the opposing party in each of the anticipated lawsuits. 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. This section encompasses information protected by other statutes. You inform us that the department obtained some of the submitted documents at issue from the Texas State Securities Board (the "board"), and you contend this information is confidential pursuant to article 581-28 of the Texas Securities Act, V.T.C.S. arts. 581-1 to 581-43. Article 581-28 provides in pertinent part the following:

A. Investigations by Commissioner. The Commissioner shall conduct investigations as the Commissioner considers necessary to prevent or detect the violation of this Act or a Board rule or order. For this purpose, the Commissioner may require, by subpoena or summons issued by the Commissioner, the attendance and testimony of witnesses and the production of all records, whether maintained by electronic or other means, relating to any matter which the Commissioner has authority by this Act to consider or

investigate, and may sign subpoenas, administer oaths and affirmations, examine witnesses and receive evidence; provided, however, that all information of every kind and nature received in connection with an investigation and all internal notes, memoranda, reports, or communications made in connection with an investigation shall be treated as confidential by the Commissioner and shall not be disclosed to the public except under order of court for good cause shown . . .

B. Confidentiality of Certain Registration-Related and Other Materials. To the extent not already provided for by this Act, any intraagency or interagency notes, memoranda, reports, or other communications consisting of advice, analyses, opinions, or recommendations shall be treated as confidential by the Commissioner and shall not be disclosed to the public, except under order of court, for good cause shown. The Commissioner may, at the Commissioner's discretion, disclose any confidential information in the Commissioner's possession to any governmental or regulatory authority or association of governmental or regulatory authorities approved by Board rule or to any receiver appointed under Section 25-1 of this Act. The disclosure does not violate any other provision of this Act or Chapter 552, Government Code.

V.T.C.S., art. 581-28(A)-(B). You have provided our office with correspondence from the board that states the board obtained the information at issue during an investigation the board conducted pursuant to the Texas Securities Act. You state the department received the information at issue from the board. Accordingly, the department must withhold the information obtained from the board under section 552.101 of the Government Code in conjunction with article 581-28 of the Texas Securities Act.

Section 552.101 also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part the following:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b)-(c). Medical records must be released on the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) the reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Section 159.002(c) also

requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked information that constitutes medical records and that may only be released in accordance with the MPA.

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 satisfied. *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 protected by common-law privacy. See Open Records Decision Nos. 600 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history).

The submitted documents contain information pertaining to life insurance. Generally, we find that the decision to obtain life insurance is a private, financial decision that is excepted from disclosure under common-law privacy pursuant to section 552.101. In this instance, however, you inform us some of the insured parties are deceased. We note the right to privacy lapses at death. See *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. Civ. App. —Texarkana 1979, writ ref'd n.r.e.); Open Records Decision No. 272 at 1 (1981) (privacy rights lapse upon death). You do not identify which individuals are deceased. Therefore, to the extent the information relates to deceased individuals, those individuals' rights to privacy have lapsed, and the information relating to them may not be withheld on that basis. We note, however, the beneficiaries of the insurance policies have a separate right to privacy. Therefore, information that would reveal a beneficiary's identity is protected by common-law privacy.

Additionally, some portions of the information the department seeks to withhold under common-law privacy pertain to business entities. We note that common-law privacy protects the interests of individuals, not those of corporate and other business entities. See Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); see also *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (*Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990) (corporation has no right to privacy). Therefore, the department may not withhold any of the information pertaining to a business entity under section 552.101 in conjunction with common-law privacy.

We also note some of the information at issue pertains to the requestor. However, the requestor has a right of access to his own private information. Gov't Code § 552.023 (governmental body may not deny access to person or person's representative to whom information relates on grounds that information is considered confidential under privacy principles). Accordingly, the information pertaining to the requestor may not be withheld under section 552.101 in conjunction with common-law privacy. We also note that the requestor is the spouse of an individual to whom some of the private information pertains. Thus, if the requestor is acting as his spouse's authorized representative, then the requestor has a right of access to her private information pursuant to section 552.023 as well.

Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy, unless it pertains to a deceased individual or the requestor has a right of access to it pursuant to section 552.023.⁵ However, you have failed to demonstrate how any of the remaining information is either highly intimate or embarrassing and of no legitimate public interest. Accordingly, none of the remaining information may be withheld on the basis of common-law privacy.

You also state that portions of the remaining information are excepted from disclosure under section 552.130, which 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 [or] a motor vehicle title or registration issued by an agency of this state[.]" Gov't Code § 552.130. We note section 552.130 does not apply to out-of-state motor vehicle record and driver's license information. Accordingly, we have marked the Texas driver's license information the department must under section 552.130 of the Government Code.

Section 552.136 states "[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. An access device number is one that may be used to (1) obtain money, goods, services, or another thing of value, or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument, and includes an account number. *Id.* § 552.136(a). This office has determined that insurance policy numbers constitute access device numbers for purposes of section 552.136. However, some of the information you have marked under this section pertains to the requestor. Section 552.136 protects privacy interests; thus, the requestor has a right of access to his section 552.136 information under section 552.023 of the Government Code. *Id.* § 552.023. Upon review, we find the department must withhold the insurance policy, bank account, and routing numbers we have marked in the remaining information under section 552.136 of the Government Code. You have failed to demonstrate, however, how any of the remaining information you have marked consists of access device numbers

⁵As our ruling for this information is dispositive, we need not address your remaining arguments against its disclosure.

used to obtain money, goods, services, or any item of value, or used to initiate the transfer of funds. *See id.* 552.136(a), 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies). Accordingly, none of the remaining information may be withheld under section 552.136 of the Government Code.

You state that the remaining information contains e-mail addresses. 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). Gov't Code § 552.137(a) - (c). The e-mail addresses you have marked are not of a type specifically excluded by section 552.137(c). Further, you represent that the owners of the email addresses at issue have not consented to their release. The department must withhold the e-mail addresses you have marked, as well as the e-mail addresses we have marked, under section 552.137 of the Government Code.

You note that some of the submitted materials 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 copyrighted. 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 copyrighted materials, 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).

Finally, an interested third party is allowed ten business days after the date of its receipt of a governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Ideal Settlements, A&O, Metlife, Lincoln, AXA, or Surplus explaining why any portion of the submitted information relating to them should not be released to the requestor. Thus, we have no basis to conclude that the release of any portion of the submitted information would implicate their proprietary interests, and none of it may be withheld on this basis. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence 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).

In summary, the department may withhold the information we have marked under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. The department must release the information that has been previously released, the remaining information that is subject to section 552.022, and any information that has been seen by the opposing party in each of the anticipated lawsuits in accordance with copyright law. However, in releasing

such information, the department must withhold (1) the information obtained from the board under section 552.101 of the Government Code in conjunction with article 581-28 of the Texas Securities Act, (2) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy, unless it pertains to a deceased individual or the requestor has a right of access to it pursuant to section 552.023, (3) the information we have marked under section 552.130, (4) the information we have marked under section 552.136 of the Government Code, and (5) the information marked under section 552.137 of the Government Code. The marked medical records may only be released in accordance with the MPA.⁶ The department may withhold the remaining information not seen by the by the opposing parties in the anticipated lawsuits under section 552.103 of the Government Code.

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,

Greg Henderson
Assistant Attorney General
Open Records Division

GH/rl

Ref: ID#344374

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁶We have marked a representative sample of documents to demonstrate what information must be withheld or released in accordance with this ruling from any document that has been seen by the opposing party in each lawsuit.

cc: Kim Yelkin
Gardere
Once American Center, Suite 3000
600 Congress Avenue
Austin, Texas 78701-2978
(w/o enclosures)

Michael Amato
Ideal Settlement
74 Brick Boulevard
Building 4, Unit 118
Brick, New Jersey 08723
(w/o enclosures)

Matthew Hennenman
Watt, Beckworth, Thompson & Henneman
Attorney for A&O Resource Management
711 Louisiana Street
South Tower, Suite 1800
Houston, Texas 77002
(w/o enclosures)

Dalen Keith
Surplus Lines Stamping Office of Texas
805 Las Cimas Parkway, Suite 150
Austin, Texas 78746
(w/o enclosures)

Paula Anderson
AXA Equitable Life Insurance Company
10840 Ballantyne Commons Parkway
Charlotte, North Carolina 28277
(w/o enclosures)

Lincoln Benefit Life Company
Erin Starlin
2940 South 84th Street
Lincoln, Nebraska 68506
(w/o enclosures)

Lincoln Benefit Life Company
CT Corporation
350 North Saint Paul Street
Dallas, Texas 75201
(w/o enclosures)

Metlife
Roselind Lopez
P.O. Box 321
Warwick, Rhode Island 02887-0321
(w/o enclosures)

David Weaver
State Securities Board
298 East 10th Street, 5th Floor
Austin, Texas 78701
(w/o enclosures)