



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

March 1, 2010

Ms. Cynthia Villarreal-Reyna  
Section Chief, Agency Counsel  
Legal & Regulatory Affairs Division  
Texas Department of Insurance  
P.O. Box 149104  
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OR2010-03002

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# 371613 (TDI No. 98893).

The Texas Department of Insurance (the "department") received a request for information relating to the closed case files of two named individuals.<sup>1</sup> You state the department has released some of the responsive information. You state the department is withholding portions of the submitted information subject to sections 552.130, 552.136, and 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).<sup>2</sup> You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code and privileged under

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<sup>1</sup>We note the department asked for and received clarification regarding this request. *See* Gov't Code § 552.222(b) (providing that if request for information is unclear, governmental body may ask requestor to clarify the request); *see also* Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed).

<sup>2</sup>Our office recently issued Open Records Decision No. 684, a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a credit card number, debit card number, charge card number, insurance policy number, and bank account and routing numbers under section 552.136 of the Government Code; a Texas driver's license number and a Texas license plate number under section 552.130 of the Government Code; and an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

Rule 192.5 of the Texas Rules of Civil Procedure and Rule 503 of Texas Rules of Evidence.<sup>3</sup> Furthermore, you state that release of portions of the submitted information may implicate the proprietary interest of third parties whose information has been requested. You inform us that you have notified Riggs, Aleshire & Ray, North American Company for Life/Health Insurance (“North American”), and the Texas State Securities Board (the “securities board”) of their right to submit arguments to this office as to why their submitted information should not be released. *See* Gov’t Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received correspondence from North American stating that it adopts the department’s arguments for its submitted information. We have also received comments from the securities board. We have considered the submitted arguments and reviewed the submitted information.<sup>4</sup>

Initially, the securities board informs us that some of its submitted documents are non-responsive. Upon review, we agree this information, which we have marked, is not responsive to the request. The department need not release non-responsive information in response to this request, and this ruling will not address that information.

Next, we note the department did not submit the responsive information it obtained from the securities board within the 15-business-day deadline prescribed by section 552.301(e) of the Government Code. *See* Gov’t Code §552.301(e)(1)(D) (requiring governmental body to submit within 15 business days of a request for public information a copy of the information requested, or representative samples of the information if a voluminous amount of information was requested). A governmental body’s failure to comply with the requirements of section 552.301 results in the legal presumption that the information is public and must be released. *Id.* §552.302. In order to overcome the presumption that the requested information is public information, a governmental body must provide a compelling reason why the information should not be disclosed. *See Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.), *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Because third party interests and section 552.101 of the Government Code can provide compelling reasons to overcome this presumption, we will

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<sup>3</sup>Although you raise section 552.101 of the Government Code in conjunction with Rule 192.5, we note that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). You also claim that portions of the requested information may be withheld under section 552.305 of the Government Code; however, this section is not an exception to disclosure, but a procedural provision permitting an interested third party to submit to the attorney general reasons why requested information should not be released. *See* Gov’t Code § 552.305. We further note that section 552.107 of the Government Code is the correct exception to raise for your claim of attorney-client privilege for the information you have submitted that is not subject to section 552.022(a) of the Government Code. *See* ORD 676.

<sup>4</sup>We note you have withdrawn the remaining exceptions you asserted in your initial correspondence with our office.

consider whether or not the responsive information pertaining to the securities board is excepted from disclosure under the Act.

We next note that 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, we have not received correspondence from Riggs, Aleshire & Ray explaining why its information should not be released. Thus, we have no basis for concluding that any portion of the submitted information pertaining to this firm constitutes proprietary information, and the department may not withhold any portion of its information on that basis. *See id.* § 552.305(b); *cf.* 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.

We also note that a portion of the submitted information, which we have marked, consists of completed reports subject to section 552.022(a)(1) of the Government Code.<sup>5</sup> Section 552.022(a)(1) provides for 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). Although you seek to withhold the information at issue under section 552.111 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally); 663 at 5 (1999) (section 552.111 may be waived). As such, section 552.111 does not qualify as "other law" that makes information confidential for the purposes of section 552.022. Therefore, the department may not withhold any portion of the information subject to 552.022(a)(1) under section 552.111 of the Government Code. However, the Texas Supreme Court has held that the Texas Rules of Civil Procedure and the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will, therefore, consider your arguments under Rule 192.5 of the Texas Rules of Civil Procedure and Rule 503 of the Texas Rules of Evidence for the information that is subject to section 552.022.

For the purposes 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 (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

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<sup>5</sup>You acknowledge that the submitted Requests For Dispositions are subject to section 552.022(a)(1) of the Government Code.

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. *See id.*; 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 at issue pertains to a closed litigation file. You represent, and the documents reflect, that this information was prepared by department enforcement attorneys and their representatives and reveals their mental processes, conclusions, and legal theories. Based on your representations and our review, we agree that the information we have marked is protected core work product. Accordingly, the department may withhold the information we have marked under Texas Rule of Civil Procedure 192.5.<sup>6</sup>

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

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<sup>6</sup>As our ruling is dispositive, we do not address your other arguments against disclosure for this information.

(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 represent that a portion of the submitted information consists of confidential communications between enforcement attorneys and department employees made in furtherance of the rendition of legal services. Based on your representations and our review of the information at issue, we determine that the department may withhold the information we have marked on the basis of the attorney-client privilege under Texas Rule of Evidence 503.<sup>7</sup>

We now turn to the arguments regarding the information not subject to section 552.022. 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, including 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

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<sup>7</sup>As our ruling is dispositive, we do not address your other arguments for this information.

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 inform this office that a portion of the submitted information consists of investigative materials obtained from the securities board. Both the department and the securities board claim these documents are confidential pursuant to article 581-28. Upon review of the documents obtained from the securities board, we agree the department must withhold this information 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 doctrine of common-law privacy. Common-law privacy protects information if it (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. See *Industrial Found. v. Texas 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. See *id.* at 681-82. This office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. See Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). This office also has found that personal financial information unrelated to a transaction with a governmental body is generally excepted from required public disclosure under common-law privacy. See Open Records Decision Nos. 600 (1992) (personal financial choices concerning insurance are generally confidential), 545 (1990) (common-law privacy protects personal financial information not relating to the financial transaction between an individual and a governmental body), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (common-law privacy protects assets and income source information). Thus, we conclude that the decision to purchase annuities is a private, financial decision that is protected by common-law privacy. As such, the annuitant's identifying information must be withheld to protect the individual's privacy. Therefore, we find the department must withhold some of the information you have marked, as well as the information we have marked, under section 552.101 of the

Government Code in conjunction with common-law privacy. We also have marked personal medical information pertaining to an individual who is not an annuitant that is confidential under common-law privacy. Accordingly, the department must withhold this information under section 552.101. However, we find that none of the remaining information you have marked is identifying or is otherwise highly intimate or embarrassing and of no legitimate public interest. Consequently, the department may not withhold this information, which we have marked for release, on the basis of common-law privacy.<sup>8</sup>

You contend the e-mails you have marked consist of privileged attorney-client communications. When asserting the attorney-client privilege under section 552.107 of the Government Code, 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. You represent that the e-mails you have marked under section 552.107 consist of confidential communications between attorneys for and employees of the department that were made for the purpose of rendering professional legal advice. You have identified the parties to the communications. Based on these representations and our review, we agree that the e-mails at issue consist of privileged attorney-client communications. Therefore, the department may withhold the e-mails you have marked under section 552.107 of the Government Code.<sup>9</sup>

You indicate that portions of the remaining information are 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. *See* Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of materials that are subject to copyright protection 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).

In summary, the department may withhold the information we have marked under Rule 192.5 of the Texas Rules of Civil Procedure and Rule 503 of the Texas Rules of Evidence. The department must withhold the responsive information obtained from the securities board under section 552.101 of the Government Code in conjunction with article 581-28 of the Texas Securities Act. The department must withhold the information you have marked, as well as the information we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy. The department may withhold the e-mails you have marked under section 552.107 of the Government Code. The remaining information must

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<sup>8</sup>Our ruling on this information is dispositive of North American's argument.

<sup>9</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

be released; however, in releasing information that is subject to copyright, the department must comply with applicable copyright law.<sup>10</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, toll free, at (888) 672-6787.

Sincerely,



Pamela Wissemann  
Assistant Attorney General  
Open Records Division

PFW/cc

Ref: ID# 371613

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Mr. David Weaver  
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(w/o enclosures)

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<sup>10</sup>We note the remaining information contains social security numbers. 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. See Gov't Code § 552.147.

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