



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 16, 2011

Ms. Cynthia Villarreal-Reyna
Director, Office of Agency Counsel
Legal Section
General Counsel Division
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2011-18572

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# 439186 (TDI No. 120543).

The Texas Department of Insurance (the "department") received a request for information from a specified time period concerning Conseco Life Insurance Company and Washington National Insurance Company, including information about LifeTrend policies issued by these companies. You state you will release some of the requested information. You further inform this office you will withhold information under sections 552.130, 552.136, and 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹

¹Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver's license numbers under section 552.130 of the Government Code, certain access device numbers under section 552.136 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. However, on September 1, 2011, the Texas legislature amended sections 552.130 and 552.136 to allow a governmental body to redact the information described in subsections 552.130(a)(1), 552.130(a)(3), and 552.136(b), without the necessity of seeking a decision from the attorney general. *See* Gov't Code §§ 552.130(c); 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e) or section 552.136(e). *See* Gov't Code §§ 552.130(d), (e); 552.136(d), (e)). Thus, the statutory amendments to sections 552.130 and 552.136 of the Government Code superceded Open Records Decision No. 684 on September 1, 2011. Therefore, a governmental body may only redact information subject to subsections 552.130(a)(1), 552.130(a)(3), or 552.136(b) in accordance with section 552.130 or section 552.136, not Open Records Decision No. 684.

You claim the remaining information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. You further state release of the remaining submitted information may implicate the proprietary interests of third parties. Accordingly, the department notified Conseco Services, LLC (“Conseco”), Corporation Service Company, Bankers Life And Casualty Company (“Bankers”), and John S. Denton (“Denton”) of the request for information and of their rights to submit arguments to this office as to why the information should not be released. *See Gov’t Code* § 52.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances. We have considered the submitted arguments and reviewed the submitted information.

Initially, you indicate the department will redact information that identifies enrollees in health plans under section 552.101 of the Government Code in conjunction with common-law privacy pursuant to the previous determination issued in Open Records Letter No. 2001-4777 (2001).² *See Gov’t Code* § 552.301(a); Open Records Decision No. 673 at 7-8 (2001) (listing elements of second type of previous determination under section 552.301(a)). However, we note the information at issue pertains to life insurance plans rather than health insurance plans. Accordingly, the previous determination in Open Records Letter No. 2001-4777 does not apply to the information at issue, and none of it may be withheld under that previous determination.

Conseco argues that you have submitted information that is not responsive to the instant request. The requestor seeks, in part, complaints filed by policyholders of LifeTrend Policies. Conseco argues that portions of the submitted information consist of complaints filed by individuals who were not LifeTrend policyholders. We note a governmental body must make a good-faith effort to relate a request to information that it holds. *See Open Records Decision No. 561 at 8-9 (1990) (construing statutory predecessor)*. Upon review of the information Conseco contends is not responsive, we note this information is responsive to the portion of the request seeking documents concerning any investigation of Conseco. Accordingly, we conclude the department has made a good-faith effort to relate this request to responsive information. Therefore, we will address the public availability of all of the information the department has submitted.

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 information relating to that party should be withheld from public disclosure. *See Gov’t Code* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Corporation Service Company, Bankers, or Denton explaining why any portion of the

²In Open Records Letter No. 2001-4777, we authorized the department to withhold under section 552.101 of the Government Code in conjunction with common-law privacy, information that identifies an enrollee in a health plan, including the enrollee’s name, address, telephone number, birth date, social security number, and claim number.

submitted information should not be released. Therefore, we have no basis to conclude these parties have protected proprietary interests in the submitted information. *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. Consequently, the department may not withhold any of the submitted information on the basis of any proprietary interest Corporation Service Company, Bankers, or Denton may have in the information.

You state, and we agree, that portions of the submitted information are subject to section 552.022 of the Government Code. 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 excepted from disclosure under section 552.108 of the Government Code or made confidential under the Act or other law. *See Gov’t Code* § 552.022(a)(1). Sections 552.107 and 552.111 are discretionary exceptions to disclosure that protect the governmental body’s interests and may be waived. *See Open Records Decision Nos.* 676 at 6 (section 552.107 is not other law for purposes of section 552.022), 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 663 at 5 (1999) (governmental body may waive section 552.111); *see also Open Records Decision No.* 522 (1989) (discretionary exceptions in general), 470 at 7 (1987) (governmental body may waive deliberative process privilege under statutory predecessor to section 552.111). As such, they are not other law that makes information confidential for the purposes of section 552.022; therefore, the department may not withhold any portion of the submitted information under either of those sections. However, the Texas Supreme Court has held the Texas Rules of Evidence and Texas Rules of Civil Procedure are “other law” that makes information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will therefore consider your arguments under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5 for the information at issue.

Texas Rule of Evidence 503(b)(1) provides the following:

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).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must do the following: (1) show 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 the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the information you have marked constitutes communications between department staff and attorneys for the department made in furtherance of the rendition of legal services. We understand these communications were made in confidence and have remained confidential. Upon review of your arguments and the submitted information, we agree the information at issue constitutes privileged attorney-client communications. Accordingly, the department may withhold the information you have marked under rule 503 of the Texas Rules of Evidence.³

We note portions of the remaining information are protected by common-law privacy. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”⁴ Gov’t Code § 552.101. This section encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication

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

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (19987), 480 (1987), 470 (1987).

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. 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), 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). The common-law right to privacy, however, is a personal right that lapses at death and, therefore, does not encompass information that relates to a deceased individual. *See Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref'd n.r.e.); Open Records Decision No. 272 at 1 (1981); Attorney General Opinions JM-229 at 3 (1984), H-917 at 2 (1976); Open Records Decision No. 272 at 1 (1981). We find the information we have marked is highly intimate or embarrassing and of no legitimate concern to the public. The department must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy.

The department states some of the remaining information is 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. Open Records Decision No. 180 at 3 (1977). However, a governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). 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.

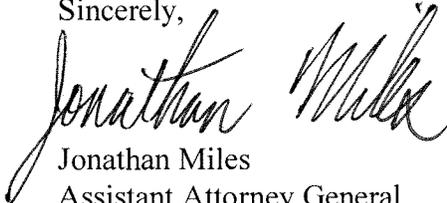
In summary, the department may withhold the information you have marked under rule 503 of the Texas Rules of Evidence. The department must withhold the information we have marked under common-law privacy in conjunction with section 552.101 of the Government Code. The department must release the remaining information, but any copyrighted information may only be released in accordance with copyright law.

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, toll free, at (888) 672-6787.

Sincerely,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/agn

Ref: ID# 439186

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Conseco Services LLC
Attn: Mr. Daniel Joseph Murphy
11825 North Pennsylvania Street
Carmel, Indiana 46032
(w/o enclosures)

Mr. Scott Richard Perry
Bankers Life and Casualty Company
600 West Chicago Avenue
Chicago, Illinois 60654-2800
(w/o enclosures)

Corporation Service Company
Attn: Bankers Life
and Casualty Company
211 East 7th Street, Suite 620
Austin, Texas 78701
(w/o enclosures)

Mr. John S. Denton
2600 Paramount H-3
Amarillo, Texas 79109
(w/o enclosures)