ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 11, 2014

Mr. William Clay Harris
Staff Attorney
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2014-22527

Dear Mr. Harris:

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# 546438 (TDI No. 154912).

The Texas Department of Insurance (the "department") received a request for all information pertaining to complaints against the requestor. You state the department will release some of the requested information. You state 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).[1] You also state the department will withhold any information or material acquired by the department that relates to a fraud investigation under section 701.151 of the Texas Insurance Code.[2] We understand the department will redact

[1]Open Records Letter No. 2001-4777 authorized the department to withhold 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, under section 552.101 of the Government Code in conjunction with common-law privacy without the necessity of requesting an attorney general's decision.

[2]*See* Open Records Letter No. 2005-05223 (2005) (determining information acquired by the department that is relevant to an inquiry by the insurance fraud unit that the department's commissioner deems confidential is excepted from disclosure and need not be submitted to this office for review under section 552.301 of the Government Code); Open Records Decision No. 673 (2001) (listing elements of second type of previous determination under section 552.301(a) of the Government Code).

certain information pursuant to section 552.136(c) of the Government Code.[3] You claim the submitted information is excepted from disclosure under sections 552.101, 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 also state release of the submitted information may implicate the interests of Care Improvement Plus Insurance Company ("Care Improvement"). Accordingly, you notified this third party of the request for information and of its right to submit arguments stating why its information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have considered the submitted arguments and reviewed the submitted information.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) of the Government Code 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 Care Improvement explaining why the submitted information should not be released. Therefore, we have no basis to conclude Care Improvement has a protected proprietary interest 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. Accordingly, the department may not withhold the submitted information on the basis of any proprietary interest Care Improvement may have in the information.

You inform us the submitted information consists of information in closed enforcement case and investigation files. Thus, you acknowledge this information is subject to section 552.022(a)(1) of the Government Code. This section provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is excepted from disclosure under section 552.108 of the Government Code or made confidential under the Act or other law. Gov't Code § 552.022(a)(1). Although you assert the information at issue is excepted from disclosure under sections 552.107 and 552.111 of the Government Code, these sections are discretionary exceptions to disclosure that protect a governmental body's interest and do not make information confidential. *See* Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000)

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[3]Section 552.136(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.136(c).

(discretionary exceptions generally). Therefore, the department may not withhold the information at issue under section 552.107 or section 552.111. However, the Texas Supreme Court has held that the Texas Rules of Civil Procedure and Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 3636 (Tex. 2001). Accordingly we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503 and the attorney work product privilege under Texas Rule of Civil Procedure 192.5. Furthermore, as section 552.101 of the Government Code can provide a compelling reason against disclosure, we will consider the applicability of this exception to the information at issue.

Texas Rule of Evidence 503 enacts the attorney-client privilege. 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:
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> > (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
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> > (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).

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. 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. *Id.* 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 document 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); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege extends to entire communication, including factual information).

You explain portions of the submitted information consist of communications regarding the closed enforcement case and complaint investigations discussed between department staff and department enforcement attorneys. You state these communications were made for the purpose of facilitating the rendition of professional legal services to the department and they have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information we have marked. *Cf. Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (attorney's entire investigative report protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney for purpose of providing legal services and advice). Accordingly, we conclude the department may withhold the information we have marked under Texas Rule of Evidence 503.[4]

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 laws that make criminal history record information ("CHRI") confidential. CHRI generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI states obtain from the federal government or other states. Open Records Decision No. 565 at 7 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* at 10–12. Section 411.083 of the Government Code deems confidential CHRI the Department of Public Safety ("DPS") maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code.[5] *See* Gov't Code § 411.083. Section 411.106(a) authorizes the department to obtain CHRI; however, the department may release CHRI only in certain instances. *Id.* § 411.106(b). Similarly, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with chapter 411, subchapter F of the

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[4]As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

[5]Although you raise section 411.085 of the Government Code, that provision merely provides the penalties for the "Unauthorized Obtaining, Use, or Disclosure of Criminal History Record Information." Gov't Code § 411.085. Section 411.083 is applicable to the dissemination of CHRI.

Government Code. We note section 411.083 does not apply to active warrant information or other information relating to one's current involvement with the criminal justice system. *See id.* § 411.081(b) (police department allowed to disclose information pertaining to person's current involvement in the criminal justice system). Upon review, we find the information we have marked constitutes confidential CHRI. Accordingly, the department must withhold this information under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code and federal law. However, we find none of the remaining information at issue consists of CHRI for the purposes of chapter 411 of the Government Code. Accordingly, the department may not withhold any of the remaining information under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code 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. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision No. 600 (1992) (personal financial information includes choice of a particular insurance carrier). However, we note the public has a legitimate interest in knowing the details of a crime. *See Lowe v. Hearst Communications, Inc.*, 487 F.3d 246, 250 (5th Cir. 2007) (noting a "legitimate public interest in facts tending to support an allegation of criminal activity" (citing *Cinel v. Connick*, 15 F.3d 1338, 1345-46 (1994)). Upon review, we find none of the remaining information to be highly intimate or embarrassing and not of legitimate public concern. Accordingly, the department may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

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). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses at issue are not within the scope of section 552.137(c). Accordingly, the department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their release.

In summary, the department may withhold the information we have marked under Texas Rule of Evidence 503. The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code and federal law. The department must withhold the e-mail addresses we

have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their release. The department must release the remaining information.[6]

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

Megan G. Holloway
Assistant Attorney General
Open Records Division

MGH/cbz

Ref: ID# 546438

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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[6]We note the requestor has a special right of access to some of the information being released in this instance. *See* Gov't Code § 552.023(a) (governmental body may not deny access to person to whom information relates, or that party's representative, solely on grounds that information is considered confidential by privacy principles).