



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 23, 1998

Mr. Ryan Tredway
Staff Attorney
Legal and Compliance Division, MC110-1A
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714

OR98-2481

Dear Mr. Tredway:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 118940.

The Texas Department of Insurance (the "department") received a request for information relating to Allstate Insurance Company's ("Allstate") handling of motor vehicle accident claims. You contend that some of the requested information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. Although you do not take a position on whether the release of the requested information would implicate Allstate's proprietary interests, you raise section 552.305 of the Government Code on Allstate's behalf. We have considered the exception you claim and have reviewed the documents at issue.

We notified Allstate of the request for information, but did not receive a response. *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 that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). Because neither the department nor Allstate have argued that the release of the information at issue would harm Allstate's proprietary interests, we have no basis to conclude that the information is excepted from disclosure under section 552.110 of the Government Code. *See* Gov't Code § 552.110 (protects trade secrets and commercial and financial information from disclosure); Open Records Decision Nos. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive

injury would likely result from disclosure), 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). Thus, the department may not withhold any information from disclosure under section 552.110.

You claim that the department's internal case memorandum relating to Allstate is excepted from disclosure under section 552.111 of the Government Code as work product. A governmental body may withhold attorney work product from disclosure under section 552.111 if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the documents at issue were 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 or release 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. ORD 647 at 4. Based on your arguments and our review of the case memorandum, we find that you have established the applicability of both parts of the first prong of the work product test.

The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney's mental processes, conclusions and legal theories. Having reviewed your arguments and the case memorandum, we can easily conclude that most of the information in the memorandum reveals attorney mental impressions, conclusions and strategy. However, the memorandum also contains a recitation of the facts of the case. This office has stated that the work product privilege does not extend to "facts an attorney may acquire." See Open Records Decision No. 647 at 4 (1996) (citing *Owens-Corning Fiberglass v. Caldwell*, 818 S.W.2d 749, 750 n. 2 (Tex. 1991)). Moreover, the privilege does not protect memoranda prepared by an attorney that contain only a "neutral recital" of facts. See *Leede Oil & Gas, Inc. v. McCorkle*, 789 S.W.2d 686 (Tex. App.--Houston [1st Dist.] 1990, no writ). We have marked the portions of the memorandum that may be withheld under section 552.111 as work product. The remaining portions of the memorandum are factual and do not appear to reveal an attorney's mental processes, conclusions, strategies, or legal theories. See *Occidental Chemical Corp. v. Banales*, 907 S.W.2d 488, 490 (Tex. 1995). The factual portions of the memorandum are not excepted from disclosure under section 552.111 as work product.¹

¹We need not address the other exceptions you claimed for the internal case memorandum, because those other exceptions would offer no greater protection for the memorandum than the work product aspect of section 552.111. See Open Records Decision Nos. 615 (1993) (section 552.111 does not except purely factual information from disclosure), 574 (1990) (section 552.107 does not except purely factual information from disclosure).

Next, you contend that several internal memoranda are excepted from disclosure under section 552.111 because they relate to the department's policymaking functions. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. Section 552.111 does not, however, except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. ORD 615 at 4-5. We agree that the internal memoranda at issue consist of opinions and recommendations relating to the department's policymaking functions. Thus, the department may withhold the memoranda from disclosure under section 552.111. We have marked these documents accordingly.

Finally, you contend that portions of a consumer complaint letter are excepted from disclosure because of a right of privacy. We agree. Section 552.101 of the Government Code encompasses the common-law right to privacy.² The common-law right of privacy protects information when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). We have marked the information in the complaint that is protected by the common-law right to privacy. See Open Records Decision No. 600 (1992) (some personal financial information protected by common-law right to privacy). We do not believe that the remaining information in the complaint is excepted from disclosure.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

²Section 552.101 excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision.

KEH/ch

Ref: ID# 118940

Enclosures: Marked documents

cc: Mr. Brad Pistotnik
Pistotnik Law Offices, P.A.
2831 E. Central
Wichita, Kansas 67214
(w/o enclosures)