



January 31, 2001

Ms. Sara Shiplet Waitt
Senior Associate Commissioner
Legal and Compliance Division, MC 110-1A
Texas Department of Insurance
P.O. Box 149104 -
Austin, Texas 78714-9104

OR2001-0381

Dear Ms. Waitt:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 143773.

The Texas Department of Insurance (the "department") received a request for information relating to a named insurance agent. You state that you will provide some of the responsive information to the requestor. However, you claim that the remaining information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first address your contention that some of the submitted information is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). Section 552.107(1) does not except purely factual information from disclosure. *Id.* Section 552.107(1) does not except from disclosure factual recounting of events or the documentation of calls made, meetings attended, and memos sent. *Id.* at 5. We agree that some of the information you seek to withhold under section 552.107 reflects client confidences or an attorney's legal advice or opinion. We have marked the information that may be withheld accordingly. However, you have not demonstrated how the remainder of the information you seek to withhold under section 552.107 constitutes a client confidence or attorney advice or opinion. Therefore, this information must be released.

You also assert that some of the submitted information is excepted under section 552.111 and the work product privilege. 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. Open Records Decision No. 647 at 4 (1996) (citing *National Tank v. Brotherton*, 851 S.W.2d 193, 200 (Tex. 1993)). The second requirement that must be met is that the work product "consists of or tends to reveal the thought processes of an attorney in the civil litigation process." Open Records Decision No. 647 at 4 (1996). Although the attorney work product privilege protects information that reveals the mental processes, conclusions, and legal theories of the attorney, it generally does not extend to facts obtained by the attorney. *See id.* (citing *Owens-Corning Fiberglass v. Caldwell*, 818 S.W.2d 749, 750 n.2 (Tex. 1991); *see also Leede Oil & Gas, Inc. v. McCorkle*, 789 S.W.2d 686 (Tex. App.-Houston [1st Dist.] 1990, no writ)(the attorney work product privilege does not protect memoranda prepared by an attorney that contain only a "neutral recital" of facts).

You indicate that the submitted documents relate to the department's involvement in a bankruptcy case as well as the department's potential revocation of the named agent's license due to the bankruptcy. Based on your arguments and our review of the records, we find that you have met the first prong of the work product privilege. Furthermore, some of this information clearly consists of an attorney's mental processes, conclusions, and legal theories, and may therefore be withheld under section 552.111. However, the remainder of the information consists of facts, not mental processes, conclusions, or legal theories; therefore, this information is not protected by section 552.111 and the work product privilege. Consequently, you must release this information.¹

In summary, you may withhold the marked client confidences and attorney advice or opinion in the submitted documents under section 552.107. Furthermore, you may withhold the marked attorney work product under section 552.111. However, the remainder of the information must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited

¹Because your remaining arguments under section 552.111 would not protect any information beyond that which we have already held to be exempted from disclosure under sections 552.107 and 552.111, we need not consider those arguments.

from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

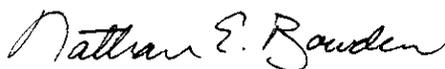
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/er

Ref: ID# 143773

Encl: Submitted documents

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