



August 26, 2002

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

OR2002-4759

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# 167632.

The Texas Department of Insurance (the "department") received a request for sixteen categories of information regarding prompt pay issues, House Bill 1862, and various Health Maintenance Organizations. You state that some of the responsive information will be released to the requestor. You claim, however, that the submitted information is excepted from disclosure under sections 552.103, 552.106, 552.107, 552.111 and 552.137 of the Government Code. Furthermore, you state, and provide documentation showing, that you have notified PacifiCare of Texas ("PacifiCare"), a third party whose proprietary interests may be implicated by the request, of the request for information. *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 Public Information Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See Open Records Decision Nos. 499 (1988), 497 (1988)*. This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

You inform this office that the requested information includes communications between department employees and the Governor's Office (the "governor"), the Office of the Attorney General (the "OAG"), and/or members of the Texas Legislature (the "legislature"). You indicate that the disclosure of information to the governor, the OAG, and/or the legislature was not a release under the Public Information Act (the "Act"), but rather was an intergovernmental transfer of the information. This office has concluded that information may be transferred between governmental bodies that are subject to the Act without waiving exceptions to the public disclosure of that information or affecting its confidentiality. *See* Attorney General Opinion JM-590 (1986); Open Records Decision Nos. 655 (1997), 567 (1990), 561 (1990), 516 (1989). These decisions are based on the well-settled policy of this state that governmental agencies should cooperate with each other in the interest of the efficient and economical administration of their statutory duties. *See* Open Records Decision No. 516 (1989). Thus, the release of information by one agency to another agency is not a release to the public for the purposes of section 552.007 of the Government Code, which prohibits the selective disclosure of information, or for those of section 552.352, which provides criminal penalties for the release of information that is considered to be confidential. *Id.* Further, a governmental body that provides information at the request of an individual member, agency, or committee of the legislature does not waive exceptions to public disclosure of that information. Gov't Code § 552.008(b). Thus, we will address the applicability of your claimed exceptions.

You state that the requested information includes information related to the examination of entities regulated by the department and that the department is relying on Open Records Letter No. 99-1264 (1999) as a previous determination to withhold this information. Further, you have marked information within the submitted documents that identifies enrollees in a particular health insurance plan to indicate that the department is relying on Open Records Letter No. 2001-4777 (2001) to withhold such information. Open Records Letter Nos. 99-1264 and 2001-4777 are the second type of previous determination addressed in Open Records Decision No. 673, which pertains to clearly delineated categories of information and requires all of the following criteria be met:

- (1) the requested records or information at issue fall within a specific, clearly delineated category of information about which this office has previously rendered a decision;
- (2) the previous decision is applicable to the particular governmental body or type of governmental body from which the information is requested;
- (3) the previous decision concludes that the specific, clearly delineated category of information is or is not excepted from disclosure under the Act;

(4) the elements of law, fact, and circumstances are met to support the previous decision's conclusion that the requested records or information at issue is or is not excepted from required disclosure; and²

(5) the previous decision explicitly provides that the governmental body or bodies to which the decision applies may withhold the information without the necessity of again seeking a decision from this office.

Open Records Decision No. 673 at 7-8 (2001). Thus, the department may rely on Open Records Letter No. 99-1264 as a previous determination with regard to information related to the examination of entities regulated by the department, and on Open Records Letter No. 2001-4777 as a previous determination with regard to information that identifies enrollees in a particular health insurance plan.

You also claim that Pacificare of Texas, Inc. ("Pacificare") may have a proprietary interest in some of 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) 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, Pacificare has not submitted to this office its reasons explaining why its information should not be released. Therefore, Pacificare has provided us with no basis to conclude that it has a protected proprietary interest in any of the submitted information. *See* Gov't Code § 552.110(b) (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); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

We will now address the exceptions you claim with respect to the submitted information. Section 552.103 of the Government Code provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

²Thus, in addition to the law remaining unchanged, the facts and circumstances must also have remained unchanged to the extent necessary for all of the requisite elements to be met. As with the first type of previous determination, a governmental body seeking to withhold requested information must make an initial finding that it in good faith reasonably believes the information is excepted from disclosure. With respect to previous determinations of the second type, a governmental body should request a decision from this office if it is unclear to the governmental body whether all of the elements on which the previous decision's conclusion was based have been met with respect to the requested records or information.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Héard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The department must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.³ Open Records Decision No. 555 (1990); see Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. See Open Records Decision No. 331 (1982).

You state, and provide documentation showing, that on the date of the department's receipt of the present request, the department was a party to two lawsuits styled *State of Texas and Jose Montemayor, Commissioner of Insurance of the State of Texas v. Pacificare of Texas, Inc.*, Cause No. GV-200718, and *Pacificare of Texas, Inc. v. The Texas Department of Insurance and the State of Texas*, Cause No. GN1-03906. You further state that Medical Select Management ("MSM") and Quantum Southwest Medical Associates ("Quantum") are currently in bankruptcy and that the department, through the Office of the Attorney General (the "OAG"), has filed an appearance in both bankruptcy proceedings. Based on these representations and our review of the submitted documents, we conclude that you have

³In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, see Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, see Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, see Open Records Decision No. 288 (1981).

shown that litigation was pending on the date the department received the present request for information. Furthermore, we conclude that the submitted information that you have indicated is subject to section 552.103 relates to the pending litigation. Based on your representation that all of the parties to these suits have not had access to the submitted information, we conclude that the department may withhold such information, which we have marked, under section 552.103 of the Government Code.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and the client's confidences made to the attorney. *See* Open Records Decision No. 574 (1990). Accordingly, these two classes of information are the only information contained in the records at issue that may be withheld pursuant to the attorney-client privilege. Upon review of the submitted documents, we conclude that much of the information that you claim is excepted under section 552.107 comes within the attorney-client privilege and is therefore excepted from disclosure under section 552.107(1). Thus, the department may withhold the information we have marked under section 552.107(1).

Section 552.111 of the Government Code 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. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.--Austin 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; Open Records Decision No. 615 at 4-5 (1993). The preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document.

Open Records Decision No. 559 at 2 (1990). You have marked the information that you claim is excepted under section 552.111. Upon careful review of your arguments and the submitted information, we agree that some of this information, which we have marked, may be withheld under section 552.111.

Section 552.111 also excepts from disclosure attorney 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. 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)(attorney work product privilege does not protect memoranda prepared by attorney that contain only "neutral recital" of facts). With respect to some of the information at issue here, you have satisfied the first prong of the work product test by demonstrating that the information relates to pending litigation. Furthermore, in some instances you have also met the second prong of the test by showing that the information tends to reveal an attorney's thought processes. Accordingly, we have marked the information that consists of attorney work product and may therefore be withheld under section 552.111.

Section 552.106 of the Government Code excepts from disclosure "[a] draft or working paper involved in the preparation of proposed legislation" and "[a]n internal bill analysis or working paper prepared by the governor's office for the purpose of evaluating proposed legislation." Section 552.106 ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. Open Records Decision No. 460 (1987). The purpose of section 552.106 is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body, and therefore, it does not except from disclosure purely factual information. *Id.* at 2. However, a comparison or analysis of factual information prepared to support proposed legislation is within the ambit of section 552.106. *Id.* A proposed budget constitutes a

recommendation by its very nature and may be withheld under section 552.106. *Id.* This office has also concluded that the drafts of municipal ordinances and resolutions which reflect policy judgments, recommendations, and proposals are excepted by section 552.106. Open Records Decision No. 248 (1980). We note that sections 552.111 and 552.106 are similar in that they both protect advice, opinion, and recommendation on policy matters in order to encourage frank discussion during the policymaking process. Open Records Decision No. 460 at 3 (1987). However, section 552.106 is narrower than section 552.111 in that it applies specifically to the legislative process. *Id.* Upon review of your arguments and the submitted information, we are unable to conclude that any of the submitted information is excepted under section 552.106.

Section 552.137 of the Government Code requires the department to withhold 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 has affirmatively consented to its release. You inform us that the members of the public whose e-mail addresses are at issue here have not consented to the release of their e-mail addresses. Accordingly, the department must withhold the e-mail addresses you have marked under section 552.137 of the Government Code. Further, we have marked additional e-mail addresses that must be withheld under section 552.137.

To summarize, we conclude that: (1) the department may rely on Open Records Letter No. 99-1264 as a previous determination with regard to information related to the examination of entities regulated by the department, and on Open Records Letter No. 2001-4777 as a previous determination with regard to information that identifies enrollees in a particular health insurance plan; (2) we have marked the information that the department may withhold under section 552.103; (3) we have marked the information that the department may withhold under section 552.107; (4) we have marked the information that consists of internal communications regarding policymaking that may be withheld under section 552.111; (5) we have marked the information that consists of attorney work product that may be withheld under section 552.111; and (6) we agree that the department must withhold the e-mail addresses you have marked, along with the additional e-mail addresses we have marked, under section 552.137. The remaining, unmarked 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 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 Department of Public 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



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Assistant Attorney General
Open Records Division

KAE/sdk

Ref: ID# 167632

Enc: Submitted documents

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