



September 3, 2002

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

OR2002-4928

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# 168086.

The Texas Department of Insurance (the "department") received a request for

- 1) the investigation files and memoranda containing advice, findings, or recommendations pertaining to a November 1, 2001 consent order involving the department and Aetna Life Insurance Company, Aetna U.S. Healthcare, Inc., Aetna U.S. Healthcare of North Texas, Inc., and Prudential Health Care Plan, Inc. (the "insurers" or "Aetna");
- 2) information the department obtained from the insurers in examining or investigating prompt payment violations by the insurers; and
- 3) all non-confidential complaint information filed against any of the insurers between August 1, 2000 and March 31, 2002 "relating to Unsatisfactory Settlements/Offers (D31) and Delays-Claim Handling (D35)."

The department informs us that it has withheld the names, claim numbers, and social security numbers of enrollees in health plans and information obtained during the course of an examination in accordance with article 1.15 of the Insurance Code pursuant to two previous determinations, Open Records Letter Nos. 2001-4777 (2001) and 99-1264 (1999), respectively. *See* Open Records Decision No. 673 (2001). The department claims that the remaining requested information is excepted from public disclosure under sections 552.101, 552.107, 552.111, and 552.137 of the Government Code. The department further states that some of the submitted information implicates the insurers' proprietary interests and may be

excepted from public disclosure under section 552.110 of the Government Code. Accordingly, the department has notified the insurers of the request for information. 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 section 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). We have considered the exceptions you claim and reviewed the submitted sample of information.¹

We note that the department's administrative investigation is completed. The department states the "administrative action resulted in a consent order entered by the Commissioner of Insurance," and the case is now closed. Section 552.022(a) of the Government Code enumerates categories of information that are public information and not excepted from required disclosure under chapter 552 of the Government Code unless they are expressly confidential under other law. One such category of expressly public information under section 552.022 is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108[.]" Gov't Code § 552.022(a)(1). The completed investigation must therefore be released under section 552.022 unless the information is expressly made confidential under other law. Section 552.107, which excepts information within the attorney-client privilege, and section 552.111, which excepts information within the attorney work product privilege, are discretionary exceptions under the Public Information Act and do not constitute "other law" for purposes of section 552.022. *See* Open Records Decision Nos. 630 (1994) (section 552.107 is a discretionary exception), 473 (1987) (governmental body may waive section 552.111). Thus, the department may not withhold the submitted information under section 552.107 or 552.111 of the Government Code.

However, the attorney work product privilege is also found in Rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Thus, we will determine whether the information is confidential under Rule 192.5.

An attorney's core work product is confidential under Rule 192.5. Core work product is defined as the work product of an attorney or an attorney's representative developed in anticipation of litigation or for trial that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. Tex. R. Civ. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from

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.

disclosure under Rule 192.5, a governmental body must demonstrate that the material was 1) created for trial or in anticipation of litigation and 2) consists of an attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *Id.* The first prong of the work product test, which requires a governmental body to show that the information at issue was 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 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. *See National Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204. The second prong of the work product test requires the governmental body to show that the documents at issue contain the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. Tex. R. Civ. P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test is confidential under Rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in Rule 192.5(c). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

After reviewing the department's arguments, we conclude that the department has shown that information in its litigation file was created in anticipation of litigation. As for the second prong of the work product test, the Texas Supreme Court has held that a request for an attorney's "entire file" was "too broad" and, citing *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993), held that "the decision as to what to include in [the file] necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case." *Curry v. Walker*, 873 S.W.2d 379, 380. Because the requestor in this instance seeks all the information in a particular file, we agree that complying with such a request would reveal the attorney's thought processes in litigating the case. Having met both prongs of Rule 192.5, the department may withhold all of its litigation file as attorney work product.

Next, we consider whether the quarterly data that Aetna submitted to the department are excepted from public disclosure. The department asserts no exceptions for this information. On behalf of the insurers, Aetna asserts that section 552.110 excepts the information from public disclosure. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. The interested third party raising this exception must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive

injury would likely result from disclosure. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).² This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

After reviewing Aetna's arguments and the quarterly data, we conclude that the information is not a trade secret; therefore, the department may not withhold the information under

²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

section 552.110(a). However, we agree that Aetna has shown that a substantial competitive injury would likely result from disclosure of some of this information. We have marked the information that the department must withhold under section 552.110(b). Aetna has not shown how the release of the remaining information would result in substantial competitive injury. *See* Open Records Decision No. 319 (1982) (finding information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110 and that pricing proposals are entitled to protection only during bid submission process). The department may not withhold the remaining information under section 552.110(b).

Next, Aetna asserts that disclosure of numbers that identify claimants and providers “would violate the confidentiality and privacy requirements of the Health Insurance Portability and Accountability act of 1996 (“HIPAA”).” As we stated previously, the department is withholding claimants’ numbers pursuant to a previous determination, Open Records Letter No. 2001-4777. As for providers’ identifying numbers, Aetna does not specify a HIPAA provision that prohibits disclosure of such information nor are we aware of such a HIPAA provision. In fact, commentary to the proposed rule establishing standards for assignment of unique identification numbers to providers of health care services provides for the dissemination of these identifiers. The comments state: “To [improve the efficiency and effectiveness of the health care system,] we believe the identifier should not be proprietary; that is, it should be possible to communicate identifiers freely as needed.” 63 Fed. Reg. 25,329 (1998). The commentary further envisions that the public would have access to provider identifiers. *Id.* at 25,338; *see also id.* at 25,329 (unique physician identifier is in public domain). Hence, the department may not withhold the provider numbers under HIPAA.

The quarterly data do contain e-mail addresses obtained from the public that are subject to section 552.137 of the Government Code. The Seventy-seventh Legislature added section 552.137 to chapter 552 of the Government Code. This new exception makes certain e-mail addresses confidential.³ Section 552.137 provides:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

³House Bill 2589 also makes certain e-mail addresses confidential. *See* Act of May 22, 2001, 77th Leg., R.S., H.B. 2589, § 5 (codified at Gov’t Code § 552.136). The language of section 552.136, as added by House Bill 2589, is identical to that of section 552.137.

Gov't Code § 552.137. The department does not inform us that any member of the public has affirmatively consented to the release of the e-mail addresses contained in the submitted materials. The department must, therefore, withhold the e-mail addresses of members of the public under section 552.137.

Lastly, the information submitted by Aetna also contains bank account numbers. Section 552.136 of the Government Code states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov't Code § 552.136. The department must, therefore, withhold the marked bank account numbers under section 552.136.

In summary, the department may withhold its litigation file as attorney work product pursuant to Rule 192.5 of the Texas Rules of Civil Procedure. The department must withhold the Aetna information we have marked under section 552.110(b). Lastly, the department must withhold the bank account numbers under section 552.136 and the e-mail addresses under section 552.137. The department must release the remaining information.

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).

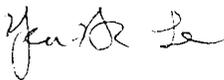
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Dept. 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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/sdk

Ref: ID# 168086

Enc. Marked documents

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