



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 27, 2007

Ms. Cynthia Villarreal-Reyna
Texas Department of Insurance
Section Chief of the Agency Counsel Section
Legal Services Division, MC 110-1A
P. O. Box 149104
Austin, Texas 78714-9104

OR2007-02309

Dear Ms. Villarreal-Reyna:

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# 272147.

The Texas Department of Insurance (the "department") received a request for information relating to enforcement actions involving Contractor's Advantage, Inc. ("CAF"), Stellar Administration ("Stellar"), Contractor's Consortium ("CC"), Business Staffing, Inc. ("BSI"), Brown and Brown Insurance Services of Texas, Inc. ("Brown") and others included in SOAH Docket Nos. 454-04-4698, 454-04-7596H and Consent Order No. 04-0327. You state that you will provide some information to the requestor, but claim that parts of the requested information are excepted from disclosure under sections 552.101, 552.111, 552.130, 552.136, 552.137, and 552.147 of the Government Code and Texas Rule of Civil Procedure 192.5 and Texas Rule of Evidence 503.¹ You also state, and provide documentation showing, that you notified Great American Insurance Company ("GAIC"),

¹Although the department also claims that the submitted information may be excepted from disclosure under section 552.305, we note that section 552.305 is not an exception to disclosure; instead, it permits a governmental body to decline to release information for the purpose of requesting an attorney general decision if it body believes that a person's privacy or property interests may be involved. See Gov't Code § 552.305(a); Open Records Decision No. 542 at 1-3 (1990) (discussing statutory predecessor).

Brown, CAI, Stellar, CC, BSI, Transglobal Indemnity (“Transglobal”), Task Services (“Task”), Transglobal Mortgage (“TMortgage”), Hartford Insurance (“Hartford”), as well as named individuals, of the department’s receipt of the request for information and of their right to submit arguments to this office as to why the requested information should not be released to the requestor.² *See* Gov’t Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). *We have considered the submitted arguments and reviewed the submitted representative sample of information.*³ We have also considered comments submitted by the requestor. *See* Gov’t Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

You inform us that some of the requested information is the subject of the lawsuit filed with respect to Brown’s claims in Open Records Letter No. 2003-5694 (2003).⁴ Because this information is the subject of pending litigation, we will let the court decide the disposition of this information.⁵

You state that the department intends to withhold certain information pursuant to the previous determination of this office in Open Records Letter No. 2005-05223 (2005). In that decision, we determined that information acquired by the department relevant to an inquiry by the Insurance Fraud Unit and deemed confidential by the commissioner is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 701.151 of the Insurance Code. We therefore agree the department must withhold the information obtained during the course of the Fraud Unit’s investigations that are deemed confidential by the commissioner pursuant to the previous determination in Open Records Letter No. 2005-05223. *See* Open Records Decision No. 673 (2001).

You state that you will withhold certain enrollee information pursuant to a previous determination issued by this office. *See* Open Records Letter No. 2001-4777 (2001)

²You inform this office that after receiving notice pursuant to section 552.305, GAIC informed the department that it was the requestor of the information. You explain that, based on this fact, the department will release to GAIC the information previously withheld on grounds that it was protected as GAIC’s proprietary information.

³We 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.

⁴*Brown & Brown Ins. Serv. of Tex. v. Abbott*, No. GN303233 (353rd Dist. Ct., Travis County, Tex. Aug. 26, 2003).

⁵We note that this is consistent with our ruling in Open Records Letter No. 2004-6397 (2004).

(concluding that department could withhold the name, address, telephone number, birth date, social security number, and claim number of enrollees without requesting a ruling from this office); *see also* Open Records Decision No. 673 at 7-8 (2001) (listing elements of second type of previous determination under section 552.301(a)).

We note that the department has marked individuals' birth dates as being private. The issue of whether an individual's date of birth is private is currently before the Third Court of Appeals: *Greg Abbott, Attorney General of Texas v. State Bar of Texas*, No. 03-06-00592-CV, (Tex. App.—Austin Oct. 3, 2006). Accordingly, we do not address your arguments with regard to the birth dates that the department seeks to withhold. We will allow the court of appeals to determine whether that type of information must be released to the public.

The department acknowledges that some of the submitted information is subject to required public disclosure under section 552.022 of the Government Code, which provides in relevant part:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Id. § 552.022(a)(1). The submitted information consists of completed investigations. Therefore, as prescribed by section 552.022, the department must release the completed investigations unless they are confidential under other law. The department raises section 552.111 for some of this information, but section 552.111 is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *See* Open Records Decision Nos. 677 at 10 (attorney work product privilege may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.111 does not qualify as "other law" that makes information confidential for the purposes of section 552.022. Therefore, the department may not withhold any portion of the submitted information under section 552.111 of the Government Code.

However, the Texas Supreme Court has held that the Texas Rules of Evidence and Texas Rules of Civil Procedure are other laws within the meaning of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your arguments under rule 503 and rule 192.5 for the information subject to section 552.022. We note that although the department raises rule 503, it has not identified any information to which this exception is applicable. Therefore, we find that no part of the submitted information is excepted under this rule. The department also contends that part of the submitted

information, which it has identified, is protected by the attorney work product privilege. We will therefore consider your argument under rule 192.5 for the information subject to section 552.022.

For the purpose of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. *See* ORD 677 at 9-10. Rule 192.5 defines core work product as the work product of an attorney or an attorney's representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney's representative. *See* TEX. R. CIV. P. 192.5(a), (b)(1). A governmental body seeking to withhold information under this privilege bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. TEX. R. CIV. P. 192.5; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied 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 [created or obtained the information] for the purpose of preparing for such litigation. *Nat'l Tank Co. 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; ORD 677 at 7.

The department explains, and provides documentation showing, that the identified information pertains to closed litigation files which were originally opened to pursue administrative actions against entities and individuals for violations of the Texas Insurance Code. The cases are now closed and have "resulted in Commissioner Orders against the various parties in the litigation." You further explain that this information was prepared by the department's attorney or the attorney's representative and reveals their mental processes, conclusions, and legal theories. Based on your representations and our review of the information at issue, we agree that the information the department marked is protected core work product. Accordingly, we find that the department may withhold the information we have marked under rule 192.5 of the Texas Rules of Civil Procedure.

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. This section encompasses information made confidential by other statutes. Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of income, payments, tax withheld, deficiencies, overassessments or tax

payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return . . . or the determination of the existence, or possible existence, of liability . . . for any tax, . . . penalty, . . . , or offense[.]” See 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term “return information” expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer’s liability under title 26 of the United States Code. See *Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *aff’d in part*, 993 F.2d 1111 (4th Cir. 1993). The submitted information contains W-4 forms and information used to determine taxpayer liability. Accordingly, the department must withhold the confidential tax return information we have marked pursuant to federal law.

The submitted information also includes I-9 forms, which are governed by section 1324a of title 8 of the United States Code. This section provides that this form “may not be used for purposes other than for enforcement of this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5). Release of these documents under the Act would be “for purposes other than for enforcement” of the referenced federal statute. Accordingly, we conclude that the submitted I-9 forms and any attachments to the forms are confidential for purposes of section 552.101 of the Government Code and may only be released in compliance with the federal laws and regulations governing the employment verification system.

Section 552.101 encompasses section 402.083 of the Labor Code, which provides that “[i]nformation in or derived from a claim file regarding an employee is confidential and may not be disclosed by the division except as provided by this subtitle.” See Labor Code § 402.083. This office has interpreted section 402.083 to protect only that “information in or derived from a claim file that explicitly or implicitly discloses the identities of employees who file workers’ compensation claims.” Open Records Decision No. 619 at 6 (1993). Prior decisions of this office have found that information revealing the date of injury, as well as an injured employee’s name, beneficiary name, commission claim number, social security number, home telephone number, home address, and date of birth implicitly or explicitly identifies claimants and is therefore excepted from disclosure under section 552.101 in conjunction with section 402.083 of the Labor Code.⁶ Only in those cases where release of the employer’s identity would reveal the claimant’s identity may the identity of an employer be withheld. The department states that some of the requested information documents workers’ compensation claims and indicates that it is derived from claim files. You must release the information that was incorrectly marked as confidential under section 402.083. Based on your representation and our review, we find that the remaining information you have correctly marked and that which we have marked is confidential under section 402.083

⁶The “commission” refers to the predecessor agency of the Texas Department of Insurance, Division of Workers’ Compensation, which was established under House Bill 7, 79th Legislature, R.S. (2005).

of the Labor Code and must be withheld pursuant to section 552.101 of the Government Code.

The department informs this office that some of the submitted documents were obtained from the Texas Department of Licensing and Regulation (“TDLR”).⁷ You raise section 91.014 of the Labor Code, which governs certain records now held by the department and provides in pertinent part as follows:

(a) An applicant for an original or renewal license must demonstrate a net worth as follows

. . . .

(d) A document submitted to establish net worth must show the net worth on a date not earlier than nine months before the date on which the application is submitted. A document submitted to establish net worth must be prepared or certified by an independent certified public accountant. Information submitted to or maintained by the department is subject to Chapter 552, Government Code, other than information related to:

- (1) identification of client companies;
- (2) net worth;
- (3) financial statements; or
- (4) federal tax returns.

Labor Code § 91.014. State agencies, including the department’s division of workers’ compensation, shall cooperate with TDLR to implement and enforce chapter 91. *Id.* § 91.003. We have reviewed the submitted records and conclude that the information we have marked is not subject to the Act and need not be released.

⁷It is the well-settled policy of this state that governmental bodies should cooperate with each other in the interest of the efficient and economical administration of their statutory duties. *Attorney General Opinion H-683 (1975)*. The Texas Public Information Act does not undercut that policy. *Id.* Confidential information may be transferred between state agencies without destroying its confidential character and without constituting a release to the public if the agency to which the information is transferred has authority to obtain the information. *Open Records Decision No. 516 (1989), 490 (1988)*. Consequently, confidential information may be “transferred between state agencies without violating its confidential character on the basis of a recognized need to maintain an unrestricted flow of information between state agencies.” *Attorney General Opinion H-683 at 4.*

Section 552.101 encompasses the Medical Practice Act (the "MPA), subtitle B of title 3 of the Occupations Code Section 159.002 of the MPA provides the following:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is *confidential and privileged* and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked information, in addition to the information you have marked, that may be released only in accordance with the MPA.

Lastly, section 552.101 encompasses common law privacy. Information is protected from disclosure under the common-law right to privacy if it (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. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). This office has found that, absent special circumstances, the names, addresses, and marital status of members of the public are not excepted from required public disclosure under common-law privacy. *See* Open Records Decision No. 455 (1987). In addition, prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See, e.g.*, Open Records Decision No. 600 (1992) (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body not excepted from disclosure). Whether the public has a legitimate interest in an individual's sources of income must be determined on a case-by-case basis. *See* Open Records Decision No. 373 at 4; *see also* Open Records Decision Nos. 600 (1992), 545 (1990). Upon review, we find that the department must withhold the information we have marked under common law privacy. No part of the remaining information that the department has marked may be withheld on this basis.

Section 552.130 of the Government Code excepts from disclosure information that "relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." *Id.* § 552.130. We note that some of the motor vehicle information marked confidential by the department is from other states and this information may not be withheld pursuant to

section 552.130. In accordance with section 552.130 of the Government Code, the department must withhold the Texas motor vehicle information it has marked and that which we have marked.

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. An access device number is one that may be used to “(1) obtain money, goods, services, or another thing of value; or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.” *Id.* The department has not explained how some of the information it marked may be used to obtain money, goods, services or another thing value, or to initiate a transfer of funds. Thus, the department must release the information for which it has not shown the applicability of section 552.136. The department must withhold the bank account numbers and insurance policy numbers that the department has correctly marked and that we have marked under section 552.136.

Section 552.137 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 id.* § 552.137(a)-(c). Section 552.137 does not apply to a government employee’s work e-mail address because such an address is not that of the employee as a “member of the public,” but is instead the address of the individual as a government employee. Section 552.137 also does not apply to the general e-mail of a business. The department must release the government employee e-mail addresses incorrectly marked under section 552.137. The department must withhold the e-mail addresses that it has correctly marked and those that we have marked pursuant to section 552.137 unless the department receives consent for their release.

Section 552.147 of the Government Code provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act. *See Gov’t Code* § 552.147. Thus, the department must withhold the social security numbers it has marked and that we have marked under section 552.147.

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, we have not received comments from Brown, CAI, Stellar, CC, BSI, Transglobal, Task, and TMortgage explaining why the requested information should not be released. We thus have no basis for concluding that any portion of the requested information constitutes their proprietary information protected under section 552.110, and none of it may be withheld on that basis. *See Gov’t Code* § 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 (1990). We note that Hartford has responded to the 552.305 notice and argues that information it specifically identifies is excepted from disclosure under rule 192.5 of the Texas Rules of Civil Procedure.

Rule 192.5 of the Texas Rules of Civil Procedure protects material prepared or mental impression developed in anticipation of litigation or for trial by or for a party or a party's representative. *See* Tex. R. Civ. P. 192.5. Hartford argues that the information it identifies is excepted from disclosure because it constitutes work product under rule 192.5. Further, Hartford states that it did not waive the protections provided by the work product rule in producing the information at issue to the department. In support of this argument Hartford relies solely on cases addressing the federal work product rule. However, these federal cases are not applicable to the information at issue, which is governed by the Texas discovery rules. Texas Rule of Evidence 511 states a person waives the discovery privileges if he voluntarily discloses the privileged information unless such disclosure itself is privileged. TEX. R. EVID. 511. *See Jordan v. Fourth Supreme Judicial Dist.*, 701 S.W.2d 644, 649 (Tex. 1986). In *Axelson, Inc.*, the court held because privileged information was disclosed to the Federal Bureau of Investigation, the Internal Revenue Service, and the *Wall Street Journal*, the attorney-client and work product privileges were waived. *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 554 (Tex. 1990). Hartford informs this office that it voluntarily disclosed its otherwise privileged information to the department and it has not explained that this disclosure itself is privileged. This resulted in the waiver of the attorney work product privilege pursuant to rule 511. Therefore, the department may not withhold the information at issue under rule 192.5 of the Texas Rules of Civil Procedure.

In summary, we decline to rule on the requested information that is subject to pending litigation. The department must withhold the requested information subject to previous determinations addressed in Open Records Letter Nos. 2001-04777 and 2005-05223. The department may withhold the information we have marked under rule 192.5 of the Rules of Civil Procedure. The department must withhold the confidential tax return information and I-9 forms that we have marked under federal law in conjunction with section 552.101 of the Government Code. The department must withhold the information it correctly marked and that we marked under sections 91.014 and 402.083 of the Labor Code in conjunction with section 552.101. We have marked information in addition to that marked by the department that may only be released in accordance with the MPA. The department must withhold the information that we have marked under common law privacy in conjunction with section 552.101. The department must withhold the Texas motor vehicle information, bank account and insurance policy numbers, and e-mail addresses that it has correctly marked, and those that we have marked, pursuant to sections 552.130, 552.136, and 552.137, respectively.

The department must withhold the social security numbers that it has marked and that we have marked. The remaining 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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).

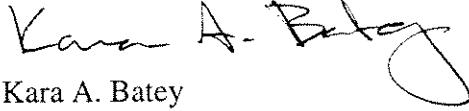
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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 Office of the Attorney General 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,



Kara A. Batey
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Open Records Division

KAB/krl

Ref: ID# 272147

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