



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 28, 2007

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

OR2007-02374

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# 272534.

The Texas Department of Insurance (the "department") received a request for information involving Beacon Industries Worldwide, Inc., and two related entities (collectively "Beacon"). You inform us that some of the requested information has been released. You state that other responsive information will be withheld under a previous determination issued to the department in Open Records Letter No. 2005-05223 (2005). See Gov't Code § 552.301(a); Open Records Decision No. 673 (2001). You also state that the department will withhold social security numbers under section 552.147 of the Government Code.¹ You seek to withhold other responsive information under sections 552.101, 552.111, 552.130, and 552.137 of the Government Code and Texas Rule of Civil Procedure 192.5. You also believe that some of the responsive information may implicate the interests of Beacon. You notified Beacon of this request for information and of its right to submit arguments to this office as to why the requested information should not be released.² We have considered the exceptions you claim and have reviewed the information you submitted.

¹Section 552.147(a) provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. Gov't Code § 552.147(a). Section 552.147(b) authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

²See Govt. Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Govt. Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

We first note that an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to that party should not be released. *See* Govt. Code § 52.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from Beacon. Thus, Beacon has not demonstrated that any of the submitted information is either confidential or proprietary for the purposes of the Act. *See* Govt. Code §§ 552.101, .110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

We next note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is expressly confidential by law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). You state that some of the information at issue is part of a completed investigation made by the department. Although you claim the attorney work product privilege under section 552.111 of the Government Code with regard to that information, section 552.111 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under Govt. Code § 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.111 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the department may not withhold any of the information that is subject to section 552.022(a)(1) under section 552.111.

The Texas Supreme Court has held, however, that the Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney work product privilege is found at Texas Rule of Civil Procedure 192.5. Accordingly, we will address your assertion of the attorney work product privilege under rule 192.5. We also will address your claims under sections 552.101, 552.130, and 552.137 of the Government Code with regard to the other information at issue.

Texas Rule of Civil Procedure 192.5 encompasses the attorney work product privilege. For the purposes of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent that the information implicates the core work product aspect of the work product privilege. *See* Open Records Decision No. 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). Accordingly, in order to withhold attorney core work product from 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 the mental

impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *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 Nat'l 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 part of the work product test requires the governmental body to show that the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney's or an attorney's representative. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both parts of the work product test is confidential under rule 192.5, provided that the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state that the information that is subject to section 552.022 was created in anticipation of litigation. You inform us that the information in question contains the mental impressions, conclusions, and legal theories of attorneys for the department. Based on your representations, we have marked information that the department may withhold as core attorney work product under Texas Rule of Civil Procedure 192.5.

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. You raise section 552.101 in conjunction with common-law privacy. The common-law right to privacy protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses certain types of personal financial information. This office has determined that financial information that relates only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See Open Records Decision Nos. 600 at 9-12 (1992) (identifying public and private portions of certain state personnel records), 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction*

between individual and public body), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis).

You have marked the information that the department seeks to withhold under section 552.101. We conclude that some of that information, which we have marked, does not constitute personal financial information and is therefore not excepted from disclosure under section 552.101 in conjunction with common-law privacy. Otherwise, we agree that the information that you have marked is protected by common-law privacy and must be withheld under section 552.101. We have marked other personal financial information that the department must also withhold 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 or a motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130(a)(1)-(2). You have marked the information that the department seeks to withhold under section 552.130. We conclude that some of that information, which we have marked, is not protected by this exception. We otherwise agree that the department must withhold the information that you have marked under section 552.130. We have marked additional Texas driver's license and motor vehicle information that must also be withheld under this exception.

Section 552.137 of the Government Code states in part that "[e]xcept as otherwise provided by this section, 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." Gov't Code § 552.137(a). Section 552.137 excepts from public disclosure certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with a governmental body, unless the owner of the e-mail address has affirmatively consented to its public disclosure. *See id.* § 552.137(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees.

You have marked e-mail addresses that the department seeks to withhold under section 552.137. You state that the owners of these e-mail addresses have not consented to their public disclosure. Based on your representation, we agree that the marked e-mail addresses must be withheld under section 552.137. We note, however, that you also have marked information that is not protected by section 552.137 and may not be withheld under this exception. We have marked that information.

In summary: (1) the department may withhold the information that we have marked under Texas Rule of Civil Procedure 192.5; (2) the department must withhold the information that you have marked, as well as the additional information that we have marked, that is protected by common-law privacy under section 552.101 of the Government Code; (3) the department

must withhold the information that you have marked, as well as the Texas driver's license and motor vehicle information that we have marked, that is excepted from disclosure under section 552.130 of the Government Code; and (4) the department must withhold the information that you have marked that is excepted from disclosure under section 552.137 of the Government Code. The department must release the rest of the submitted information, including the information we have marked that is not protected by section 552.101, section 552.130, or section 552.137.

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).

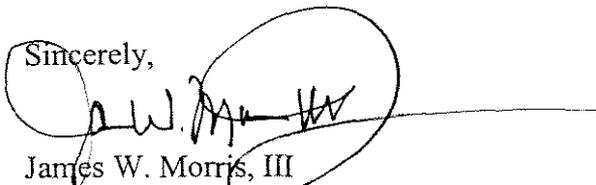
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,

A handwritten signature in black ink, appearing to read "J.W. Morris, III", is written over a circular stamp. A horizontal line extends to the right from the end of the signature.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/eb

Ref: ID# 272534

Enc: Submitted documents

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