



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

December 19, 2008

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

OR2008-17300

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# 330973.

The Texas Department of Insurance (the "department") received a request for information regarding a specified investigation of a title company. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.137 of the Government Code, and privileged under Texas Rule of Civil Procedure 192.5 and Texas Rule of Evidence 503. We have considered your claims and reviewed the submitted information.

As a preliminary matter, you acknowledge that the submitted information is subject to section 552.022 of the Government Code. Section 552.022 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[.]

Gov't Code § 552.022(a)(1). In this instance, the submitted information pertains to a completed investigation made for or by the department. The department must release the completed investigation under section 552.022(a)(1) of the Government Code unless it is excepted from disclosure under section 552.108 of the Government Code or is expressly confidential under other law. Sections 552.107 and 552.111 of the Government Code are discretionary exceptions that protect a governmental body's interests and may be waived. As such, they are not other law that make information confidential for purposes of section 552.022. See Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 676 at 10-11 (2002) (attorney-client privilege under section 552.107 may be waived), 470 at 7 (1987) (statutory predecessor to section 552.111 may be waived). Therefore, the submitted information that is subject to 552.022 may not be withheld under sections 552.107 and 552.111. However, the attorney-client privilege, which you raise for a portion of the submitted information, is also found in rule 503 of the Texas Rules of Evidence. In addition, you claim that a portion of the submitted information is protected by the attorney work product privilege under 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." See *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); see also Open Records Decision No. 676 (2002). Accordingly, we will consider your arguments under rule 192.5 of the Texas Rules of Civil Procedure and Texas Rule of Evidence 503. Also, because sections 552.101 and 552.137 are "other law" for the purpose of section 552.022, we will consider the applicability of these exceptions to the submitted information.

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 that the information at issue pertains to a litigation file that was originally opened to pursue administrative actions against an insurance company for violations of the Texas Insurance Code. You state that the case to which this information pertains is closed, and explain that the information at issue was prepared by a department enforcement attorney and reveals his 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 has marked is protected core work product. Accordingly, we find that the department may withhold the information you have marked under Texas Rule of Civil Procedure 192.5.

Rule 503 of the Texas Rules of Evidence encompasses the attorney-client privilege and provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client’s lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer’s representative;

(C) by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that

the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state that a portion of the submitted information consists of communications between enforcement attorneys and department employees. Based on your representations and our review of the information at issue, we determine that the department may withhold the information you have marked on the basis of the attorney-client privilege under Texas Rule of Evidence 503.

Next, you assert that some of the remaining information is excepted under section 552.137 of the Government Code. 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* Gov’t Code § 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. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, we agree that the department must withhold the e-mail addresses you have marked in the remaining information under section 552.137.

Finally, you have marked information in the submitted documents under section 59.001 of the Occupations Code. Section 552.101 excepts from required public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses section 59.001 of the Occupations Code, which provides as follows:

The social security number of an applicant for or holder of a license, certificate of registration, or other legal authorization issued by a licensing agency to practice in a specific occupation or profession that is provided to the licensing agency is confidential and not subject to disclosure under Chapter 552, Government Code.

Occ. Code § 59.001. You indicate that the social security number contained in the submitted information was obtained in connection with the issuance of an occupational or professional license. Based on this representation, we conclude that the social security number you have

marked is confidential under section 59.001 of the Occupations Code and must be withheld from disclosure under section 552.101 of the Government Code.

In summary, the department may withhold the information you have marked under Texas Rule of Civil Procedure 192.5 and the information you have marked on the basis of the attorney client privilege under Texas Rule of Evidence 503. The department must withhold the information you have marked under section 552.137. The department must also withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 59.001 of the Occupations Code. The remaining information must be released to the requestor.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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 challenge 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,



Greg Henderson  
Assistant Attorney General  
Open Records Division

GH/cc

Ref: ID# 330973

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)