



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 12, 2009

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

OR2009-01922

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# 334770.

The Texas Department of Insurance (the "department") received a request for information pertaining to a specified department investigation, as well as information pertaining to two named individuals and five specified businesses. You state that some information has been released to the requestor. You state the department does not maintain any responsive info regarding the two named individuals and four of the five specified businesses.¹ You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.103, 552.130, 552.136, 552.137, and 552.147 of the Government Code and privileged under Rule 192.5 of the Texas Rules of Civil Procedure. We have considered your arguments and reviewed the submitted information.

You inform us that some of the submitted documents pertain to a completed investigation that is subject to section 552.022(a)(1) of the Government Code. This section 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 under "other law" or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). 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*, S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your argument under Rule 192.5 of the Texas Rules of Civil Procedure, as well

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

as your arguments under the claimed mandatory exceptions of the Act, regarding the submitted investigation file.

Rule 192.5 of the Texas Rules of Civil Procedure 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 (2002). 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 the documents you have marked under Rule 192.5 include notes, correspondence, and documents relating to a department investigation of unauthorized business of title insurance. You explain that these documents were created in anticipation of litigation against the subjects of this investigation. Based on your representations, we have marked information that contains mental impressions, opinions, conclusions, or legal theories of department attorneys or attorney's representatives under Rule 192.5. This information may be withheld as attorney work product. However, we find that the remaining information at issue is factual in nature and documents the completed investigation. The department has failed to demonstrate that this remaining information constitutes core work product subject to Rule 192.5, and it may not be withheld on this basis.

With regards to the remaining information within the investigation file, you have marked certain information you assert is subject to common-law privacy. 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. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has also found that personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. See Open Records Decision Nos. 600 (1992), 545 (1990). Although we agree that some of the personal financial information you have marked is intimate, we note that this information was gathered and used in a department investigation of a company that was engaging in the title insurance business without a license. Thus, we find there is a legitimate public interest in the financial information you have marked under common-law privacy. Furthermore, we find that the remaining information you marked under common-law privacy, including dates of birth, is not highly intimate or embarrassing. See *Tex. Comptroller of Public Accounts v. Attorney Gen. of Tex.*, 244 S.W.3d 629 (Tex. App.—2008, n.p.h.) ("We hold that date-of-birth information is not confidential[.]"); see also Open Records Decision No. 455 at 7 (1987) (birth dates, names, and addresses are not protected by privacy). Accordingly, none of the information you marked may be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.130 excepts from public 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). We agree that the department must withhold the Texas driver's license number you marked under section 552.130.

You also marked certain information within the submitted investigation file under section 552.136 of the Government Code. Section 552.136 provides 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." *Id.* § 552.136. We agree that the bank account and routing numbers you have marked must be withheld under section 552.136. However, you do not explain how the loan number you marked constitutes an access device number. Thus, this number may not be withheld under section 552.136. Accordingly, except where marked for release, the department must withhold the information you marked pursuant to section 552.136 of the Government Code.

You marked e-mail addresses under section 552.137 of the Government Code, which requires a governmental body to withhold the e-mail address of a member of the general

public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See id.* § 552.137(b). We note that section 552.137 does not apply to the general e-mail address of a business. The e-mail addresses you have marked are not a type specifically excluded by section 552.137(c). You do not inform us that the owner of these e-mail addresses affirmatively consented to their release. Therefore, we agree that the department must withhold most of the addresses it marked, as well as the additional addresses we marked, under section 552.137. However, you marked one business address that is not a private address of a member of the public for purposes of section 552.137. This e-mail address, which we marked to be released, may not be withheld under section 552.137.

Finally, you claim that the marked social security numbers within the submitted investigation file are excepted from disclosure under section 552.147 of the Government Code. Section 552.147 provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act. *Id.* § 552.147. We note, however, that one of the marked social security numbers belongs to a deceased individual. By its terms, section 552.147 is only applicable to the social security number of a living person. Therefore, the department may only withhold social security numbers pertaining to living individuals under section 552.147. As you raise no other exceptions regarding the submitted investigation file, the remaining information within this file must be released.

We now address your argument regarding the submitted correspondence between the department and the Office of the Attorney General, which you have marked under section 552.103 of the Government Code. Section 552.103 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.

...

(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.

Gov’t Code § 552.103(a), (c). 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 on the date the governmental body received the request, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard 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 satisfy both prongs of this test for information to be excepted under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). When the governmental body is the prospective plaintiff in litigation, the evidence of anticipated litigation must at least reflect that litigation involving a specific matter is "realistically contemplated." See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (investigatory file may be withheld if governmental body's attorney determines it should be withheld pursuant to Gov't Code § 552.103 and litigation is "reasonably likely to result").

You explain that although the underlying investigation has been completed, the department anticipates litigation regarding a dispute over the payment of restitution by the penalized party. You state, and provide documentation showing, that prior to the department's receipt of the present request for information, the department requested legal representation from the Office of the Attorney General regarding the collection of these delinquent restitution payments. Based on your representations and our review of the information at issue, we conclude that the department anticipated litigation on the date it received the present request for information. Furthermore, we find that the information you have marked relates to this post-investigation dispute over payment of restitution. Because this information relates to anticipated litigation, we agree the department may withhold the information you have marked under section 552.103 of the Government Code.

We note, and you acknowledge, that 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). Thus, information that has either been obtained from or provided to all other parties in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, from the submitted investigation file, the department may withhold the information we marked under Rule 192.5 of the Texas Rules of Civil Procedure. Except where marked for release, the department must withhold the information you marked, as well as the additional information we marked, under sections 552.130, 552.136, and 552.137 of the Government Code. The department may withhold social security numbers pertaining to living individuals under section 552.147 of the Government Code. Finally, the department may withhold the correspondence you marked under section 552.103 of the Government Code. The remaining information must be released to the requestor.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Reg Hargrove
Assistant Attorney General
Open Records Division

RJH/eeg

Ref: ID# 334770

Enc. Submitted documents

c: Requestor
(w/o enclosures)