



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 4, 2010

Ms. Susan Denmon Banowsky
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2801 Via Fortuna, Suite 100
Austin, Texas 78746-7568

OR2010-01775

Dear Ms. Banowsky:

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# 369381.

The Texas Windstorm Insurance Association (the "association"), which you represent, received a request for the following information: 1) all correspondence between association management and members of the association's board between specified dates, 2) all records released or to be released in accordance with Open Records Letter No. 2009-16023 (2009), 3) all records released or to be released in accordance with Open Records Letter No. 2009-15720 (2009), and 4) all open records requests received by the association between specified dates. You state the association has released information responsive to the third and fourth items. You state the association has no information responsive to the second item.¹ You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.107, 552.111, 552.136, and 552.137 of the Government Code. We

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), 452 at 3 (1986), 362 at 2 (1983).

have considered the exceptions you claim and reviewed the submitted representative sample of information.²

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 assert Exhibit 1 is excepted from public disclosure under section 552.101 in conjunction with the Gramm-Leach-Bliley Act (the "GLB Act"). See 15 U.S.C. § 6801 *et seq.* The Federal Financial Modernization Act, also known as the GLB Act, became law in November 1999. The purpose of the GLB Act is to promote competition in the financial services industry. See H.R. Conf. Rep. No. 106-434, at 245 (1999), *reprinted in* 1999 U.S.C.C.A.N. 245, 245. Reflecting Congressional concern regarding the dissemination of consumers' personal financial information, the GLB Act provides certain privacy protections "to protect the security and confidentiality of [consumers'] nonpublic personal information." 15 U.S.C. § 6801(a). The statute defines nonpublic personal information ("NPI") as "personally identifiable financial information ["PIFI"] - (i) provided by a consumer to a financial institution; (ii) resulting from any transaction with the consumer or any service performed for the consumer; or (iii) otherwise obtained by the financial institution." *Id.* § 6809(4)(A). Federal Regulations define PIFI as

any information: (i) [a] consumer provides to [a regulated financial institution] to obtain a financial product or service . . . ; (ii) [a]bout a consumer resulting from any transaction involving a financial product or service between [a regulated financial institution] and a consumer; or (iii) [a regulated financial institution] otherwise obtain[s] about a consumer in connection with providing a financial product or service to that consumer.

16 C.F.R. § 313.3(o)(1). Sections 6802(a) and (b) of title 15 of the United States Code provide in pertinent part as follows:

(a) Notice requirements

Except as otherwise provided in this subchapter, a financial institution may not, directly or through any affiliate, disclose to a nonaffiliated third party any nonpublic personal information, unless such financial institution provides or has provided to the consumer a notice that complies with section 6803 of this title.

(b) Opt out

²We assume 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 those records contain substantially different types of information than that submitted to this office.

(1) In general

A financial institution may not disclose nonpublic personal information to a nonaffiliated third party unless--

(A) such financial institution clearly and conspicuously discloses to the consumer, in writing or in electronic form or other form permitted by the regulations prescribed under section 6804 of this title, that such information may be disclosed to such third party;

(B) the consumer is given the opportunity, before the time that such information is initially disclosed, to direct that such information not be disclosed to such third party; and

(C) the consumer is given an explanation of how the consumer can exercise that nondisclosure option.

15 U.S.C. § 6802(a), (b). "Nonaffiliated third party" is defined as "any entity that is not an affiliate of, or related by common ownership or affiliated by corporate control with, the financial institution, but does not include a joint employee of such institution." *Id.* § 6809(5). Additionally, section 22.14 of title 28 of the Texas Administrative Code provides as follows:

(a) Conditions for disclosure. Except as otherwise authorized in this subchapter, a covered entity may not, directly or through any affiliate, disclose any nonpublic personal financial information about a consumer to a nonaffiliated third party unless:

(1) the covered entity has provided to the consumer an initial notice as required under § 22.8 of this title (relating to Initial Privacy Notice);

(2) the covered entity has provided to the consumer an opt out notice as required in § 22.11 of this title (relating to Form of Opt Out Notice to Consumers and Opt Out Methods);

(3) the covered entity has given the consumer a reasonable opportunity, before it discloses the information to the nonaffiliated third party, to opt out of the disclosure; and

(4) the consumer does not opt out.

28 T.A.C. § 22.14(a). Section 6809(3)(A) of title 15 of the United States Code defines financial institution as “any institution the business of which is engaging in financial activities as described in section 1843(k) of Title 12.” 15 U.S.C. § 6809(3)(A). Section 1843(k)(4)(b) of title 12 defines the following activity as financial in nature: “Insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability, or death, or providing and issuing annuities, and acting as principal, agent, or broker for purposes of the foregoing, in any State.” 12 U.S.C. § 1843(k)(4)(B). You explain the association is a pool of all property and casualty insurance companies authorized to write coverage in Texas, and its purpose is to provide Texas citizens in certain areas access to adequate wind and hail coverage when it is not available in the insurance marketplace, and to pay insureds’ claims when losses occur. We agree the association is a financial institution for purposes of the GLB Act. We understand the association is regulated by the Texas Department of Insurance. We also understand the requestor is a nonaffiliated third party. See 15 U.S.C. § 6809(5). You seek to withhold e-mails and attachments in Exhibit 1 under the GLB Act and chapter 22 of title 28 of the Texas Administrative Code. These e-mails and attachments contain claim amounts, claim numbers, policy numbers, and claimants’ names and contact information. You state the above categories of information were provided to the association for the purpose of obtaining insurance, and are also information resulting from transactions with insureds or services performed for insureds by the association, a regulated financial institution. See 15 U.S.C. § 6809(4)(A), 16 C.F.R. § 313.3(o)(1). You do not indicate the association provided opt out notices to the insureds. Because the names and contact information were provided to the association by the insureds in order to obtain a service, this information falls under the definition of PIFI. See, generally, *Individual Reference Services Group, Inc. v. Federal Trade Commission*, 145 F. Supp.2d 6, 26-31 (D.D.C. 2001) (discussing language, structure, and history of GLB Act to determine whether certain information meets definition of PIFI). Furthermore, the policy numbers are also PIFI because they are personal identifiers similar to account numbers. See 28 T.A.C. § 22.2(23). Based on your representations and our review, we determine the association is prohibited by section 6802(a) and (b) of title 15 of the United States Code and section 22.14(a) of title 28 of the Texas Administrative Code from releasing the policy numbers and claimants’ names and contact information, which we have marked; this information must be withheld from disclosure under section 552.101 in conjunction with the GLB Act.³ Because the claim amounts, claim numbers, and the remaining text of the e-mails and attachments in Exhibit 1 do not personally identify the consumers here, this information does not constitute PIFI. Therefore, the claim amounts and claim numbers, and the remaining text of the e-mails and attachments in Exhibit 1, may not be withheld under section 552.101 in conjunction with the GLB Act.

³As our ruling is dispositive, we need not address your argument against disclosure of the insurance policy numbers in Exhibit 1 under section 552.136 of the Government Code.

Section 552.136 of the Government Code states “[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(b). Section 552.136(a) defines “access device” as “a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to ... obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument.” *Id.* § 552.136(a). You have not explained, and we cannot discern, how the claim numbers in Exhibit 1 are access device numbers for purposes of section 552.136. Therefore, the association may not withhold the claim numbers under section 552.136.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that (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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. You assert the claim amounts in Exhibit 1 are excepted from disclosure as personal financial information under section 552.101 in conjunction with common-law privacy. This office has determined in certain instances that an individual has a privacy interest in information that reveals that person’s personal financial decisions to the general public. *See generally* Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). In this instance, however, the claimants’ names and contact information are being withheld under section 552.101 in conjunction with the GLB Act. Thus, the claim amounts alone do not reveal the personal financial decisions of any specific individual, and any privacy interest those individuals may have in their financial information has already been protected. Accordingly, the claim amounts in Exhibit 1 may not be withheld on the basis of common-law privacy.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel,

such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "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). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the e-mails in Exhibit 3 are communications between the association's outside legal counsel and association officials and employees. You state the communications were made to enable the association's outside legal counsel to advise the association regarding legal issues affecting the association's operation. You state the confidentiality of the communications has been maintained. Therefore, based on your representations and our review of the information at issue, the association may withhold the e-mails in Exhibit 3 under section 552.107 as privileged attorney-client communications.

You assert the information in Exhibit 4 is excepted from disclosure under the deliberative process privilege encompassed by section 552.111. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A

governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. See Open Records Decision No. 631 at 3 (1995). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5.

You state the e-mails in Exhibit 4 are internal communications reflecting deliberations among association personnel regarding funding for loss coverage, which you state is an important policymaking function of the association. We agree some of the information in Exhibit 4, which we have marked, constitutes advice, opinions, recommendations, or other material reflecting the policymaking processes of the association. However, you have not demonstrated how the remaining information at issue, which is purely factual information, consists of advice, opinions, or recommendations about a policymaking decision. Therefore, the association may not withhold the remaining information in Exhibit 4 under section 552.111.

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). Gov't Code § 552.137(a)-(c). The e-mail addresses we have marked in Exhibits 1, 2, and 4 are not specifically excluded by section 552.137(c). Therefore, unless the individuals at issue consent to release of their e-mail addresses, the association must withhold the e-mail addresses we have marked in Exhibits 1, 2, and 4 under section 552.137.

In summary, the association must withhold the information we have marked in Exhibit 1 under section 552.101 in conjunction with the GLB Act. The association may withhold the submitted e-mails in Exhibit 3 under section 552.107. The association may withhold the information we have marked in Exhibit 4 under section 552.111. The association must withhold the e-mail addresses we have marked in Exhibits 1, 2, and 4 under section 552.137. The remaining information must be released.

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, toll free, at (888) 672-6787.

Sincerely,



Jessica Eales
Assistant Attorney General
Open Records Division

JCE/eeg

Ref: ID# 369381

Enc. Submitted documents

c: Requestor
(w/o enclosures)