KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 10, 2015

Ms. Kathlyn Wilson
Director
Office of Agency Counsel
Legal Section MC 110-1C
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2015-06912

Dear Ms. Wilson:

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# 557782 (TDI #153442).

The Texas Department of Insurance (the "department") received a request for all files pertaining to a specified insurance agency and agent, including applications, licensing documents, disciplinary actions, renewals, and complaints. You state you have released some information to the requestor. You have redacted information pursuant to sections 552.130(c) and 552.147(b) of the Government Code.[1] You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.136, and 552.137 of the Government Code.[2] Additionally, you state release of the submitted

[1] Section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsection 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). Section 552.147(b) of the Government Code 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. *See id.* § 552.147(b).

[2] We understand you to raise sections 552.136 and 552.137 of the GovernmentCode based on your markings.

information may implicate the proprietary interests of Forensic Analysts, Inc. ("Forensic") and Whittington von Sternberg, Attorneys at Law ("Whittington"). Accordingly, you state you notified the third parties of the request for information and of their right to submit arguments to this office as to why the information at issue should not be released. *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 received comments from Whittington. We have considered the submitted arguments and reviewed the submitted information.

Initially, you acknowledge, and we agree, the department failed to request a ruling or submit the responsive information within the statutory time periods prescribed by section 552.301 of the Government Code. *See* Gov't Code § 552.301(b), (e). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Generally, a governmental body may demonstrate a compelling reason to withhold information by showing that the information is made confidential by another source of law or affects third party interests. Open Records Decision No. 150 at 2 (1977). Because sections 552.101, 552.136, and 552.137 of the Government Code and third party interests can provide compelling reasons to withhold information, we will consider the department's and Whittington's arguments. *See* Open Records Decision No. 676 at 12 (attorney-client privilege under Texas Rule of Evidence 503 constitutes compelling reason to withhold information under section 552.302 only if information's release would harm third party); *see also* ORD 150.

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 Forensic explaining why the submitted information should not be released. Therefore, we have no basis to conclude Forensic has a protected proprietary interest in the submitted information. *See id.* § 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, release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case information is trade secret), 542 at 3. Accordingly, the department may not

withhold the submitted information on the basis of any proprietary interest Forensic may have in the information.

Next, we note Whittington objects to disclosure of information the department has not submitted to this office for review. This ruling does not address information that was not submitted by the department and is limited to the information the department has submitted for our review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

Whittington claims some of the submitted information is protected by the attorney-client privilege. Texas Rule of Evidence 503(b)(1) provides as follows:

> 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 it is 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, Whittington must (1) show 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 the communication is confidential by explaining it was not intended to be disclosed to third persons and 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

Whittington asserts some of the submitted information constitutes privileged attorney-client communications between an attorney for Whittington and its client, Farmers Insurance, for the purpose of facilitating the rendition of professional legal services to its client. Upon review, we find Whittington has established the information at issue constitutes attorney-client communications under rule 503. However, as the information at issue was disclosed to the department, we must determine whether the attorney-client privilege has been waived in the instance. *See In re Monsanto Co.,* 998 S.W.2d 917, 930 (Tex. App.—Waco 1999, orig. proceeding) (finding that disclosure of information to third party waives attorney-client privilege); Open Records Decision No. 676 at 10-11 (where document has been voluntarily disclosed to opposing party, attorney-client privilege has generally been waived).

Texas Rule of Evidence 511 states a person waives the discovery privileges if he or she 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. v. Mcllhany*, 798 S.W.2d 550, 554 (Tex. 1990), 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 privilege was waived. In this instance, Whittington has failed to demonstrate how the department is a privileged party or why release to the department does not constitute a voluntary waiver for purposes of rule 511. Accordingly, we conclude in providing the information at issue to the department, Whittington voluntarily waived the attorney-client privilege for purposes of rule 511. *See id.; In re Bexar County Criminal Dist. Attorney's Office*, 224 S.W.3d 182 (Tex. 2007) (district attorney waived work product privilege for case file by disclosing file to private litigant pursuant to subpoena duces tecum without objection); *see also S.E.C. v. Brady*, 238 F.R.D. 429 (N.D.Tex. 2006) (attorney-client privilege waived by disclosure of documents to Federal Securities and Exchange Commission; noting Fifth Circuit has not adopted doctrine of selective waiver). Accordingly, the department may not withhold any of the information at issue under Texas Rule of Evidence 503.

Whittington also asserts some of the submitted information consists of attorney work product. Rule 192.5 of the Texas Rules of Civil Procedure encompasses the attorney work product privilege. 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* 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, Whittington must demonstrate 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 the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation there was a substantial chance litigation would ensue and (2) the party resisting discovery believed in good faith there was a substantial chance 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 the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney 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(e). *See Pittsburgh Corning Corp.*, 861 S.W.2d at 426.

As noted above, the submitted information was disclosed to the department. We note the attorney work product privilege can be waived if privileged information is voluntarily disclosed in a non-privileged context. *See Axelson*, 798 S.W.2d at 554; *Carmona v. State*, 947 S.W.2d 661, 663 (Tex. App.—Austin 1997, no writ); *Arkla, Inc. v. Harris*, 846 S.W.2d 623, 630 (Tex. App.—Houston [14th Dist] 1993, no writ); *State v. Peca*, 799 S.W.2d 426,431 (Tex. App.—El Paso 1990, no writ). Accordingly, the department may not withhold the submitted information at issue under Texas Rules 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. Section 552.101 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. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *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 generally intimate or embarrassing. *See generally* Open Records Decision Nos. 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). Upon review, we find portions of the submitted information satisfy the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the department must withhold the information you have marked, as well as the additional information we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.136 of the Government Code states "[n]otwithstanding any other provision of [the Act], 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); *see id.* § 552.136(a) (defining "access device"). This office has determined an insurance policy number is an access device for purposes of this exception. Thus, the department must withhold the insurance policy number we have marked in the remaining information under section 552.136 of the Government Code. However, we find you have failed to demonstrate how section 552.136 is applicable to the remaining information you have marked. Therefore, the department may not withhold any portion of the remaining information under section 552.136 of the Government Code.

Section 552.137 of the Government Code 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). The e-mail address at issue is not excluded by subsection (c). Upon review, we find the department must withhold the e-mail addresses you have marked, in addition to the e-mail address we have marked, under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their public disclosure.

In summary, the department must withhold the marked information under section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold the insurance policy number we have marked under section 552.136 of the Government Code and the marked e-mail addresses under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their public disclosure. 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

Abigail T. Adams

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Assistant Attorney General
Open Records Division

ATA/akg

Ref: ID# 557782

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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