



December 23, 1999

Mr. Craig H. Smith  
Deputy General Counsel  
Texas Workers' Compensation Commission  
Southfield Building, MS-4D  
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Austin, Texas 78704-7491

OR99-3750

Dear Mr. Smith:

You ask whether certain information is subject to required public disclosure under the Texas Public Information Act, (the "Act") chapter 552 of the Government Code. Your request was assigned ID# 129077.

The Texas Workers' Compensation Commission (the "Commission") received a request for various information concerning the preparation of proposed Commission rules. The Commission asserts that portions of the information requested are excepted from disclosure based on sections 552.101, 552.107(1), 552.110 and 552.111 of the Government Code.

Section 552.107(1) of the Government Code states that information is excepted from required public disclosure if

it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.

Although section 552.107(1) appears to except information within rule 1.05 of the Texas State Bar Disciplinary Rules of Professional Conduct, the rule cannot be applied as broadly as written to information that is requested under the Public Information Act. Open Records Decision No. 574 at 5; (1990). To prevent governmental bodies from circumventing the Public Information Act by transferring information to their attorneys, section 552.107(1) is limited to material within the attorney-client privilege for confidential communications; "unprivileged information" as defined by rule 1.05 is not excepted under section 552.107(1).

Open Records Decision Nos. 574 at 5; (1990) 462 at 13-14 (1987). Thus, this exception protects from disclosure only the essence of the confidential relationship between an attorney and client, that is, attorney advice and opinion, or client confidences. Open Records Decision No. 574 (1990). We agree that section 552.107(1) applies to portions of the submitted records and have marked the records accordingly.

Section 552.111 of the Government Code excepts from required public disclosure:

An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.

We note that the Commission failed to mark the portions of the records to which section 552.111 applies. Nevertheless, we agree that section 552.111 applies to the draft documents, that is, the information that the Commission has marked as drafts. We also agree that section 552.111 applies to certain other information in the records that appear on their face to consist of communications of advice, recommendation or opinions reflecting the Commission's policymaking process. Thus, based on section 552.111, the Commission may withhold from disclosure the draft documents and the information we have marked as covered by the exception.

The requestor seeks data files from the Commission's mainframe data bases, as well as the data bases themselves. You state that the data bases contain claim file information that is confidential under section 402.083 of the Labor Code. Information made confidential by law is excepted from require public disclosure under the Act. Gov't Code § 552.101. As we do not have the information before us, we are unable to determine whether section 402.083 of the Labor Code makes confidential the data base information. The Act does not require a governmental to compromise confidential information when responding to a request. *See* Gov't Code § 552.101, Open Records Decision No. 571 (1990).

You state that providing a copy of the mainframe data bases is not feasible and would result in substantial interference with the Commission's ongoing operations.<sup>1</sup> The requestor states that the Commission has in the past provided mainframe data bases of inpatient hospital bills. If the Commission determines that responding to the request will require programming or manipulation of data and that, as the Commission has stated, compliance with the request is not feasible or will result in substantial interference with its ongoing operations, section 552.231 of the Government Code requires the Commission to provide the requestor within 20 days of the date of receipt of the request a written statement of the conditions, including costs, for providing the information. *See* Open Records Decision No. 661 at 6-8 (1999). The

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<sup>1</sup>You also state that the data extracted from the data bases and used in the development of the proposed rule is available for review. However, the requestor indicates in correspondence to this office that printouts of data the Commission obtained in developing the rule are unacceptable.

Commission and the requestor can then reach an agreement as to the terms for the release of the information. Thus, we conclude that, in complying with the request for mainframe data bases, the Commission must follow the procedures set out in section 552.231.

You state that some of the information requested, the responses to a survey the Commission distributed to insurance carriers and health care providers concerning preauthorization, may be excepted from disclosure based on section 552.110. Section 552.110 excepts from disclosure a trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. Pursuant to section 552.305 of the Government Code, this office informed the third-parties of this request and of their obligation to claim the exceptions to disclosure they believe apply to the requested information, together with their arguments as to why they believe the claimed exceptions apply. This office received a response to our third-party notification from two parties, the Hartford Insurance Group ("Hartford") and the Texas Workers' Compensation Insurance Fund (the "Fund"). Hartford states that, "[a]ssuming that the only Hartford information [at issue] are the limited comments provided in May, 1999, nothing of a proprietary nature was included. . . . The Hartford will not take exception with the disclosure by your office of any information provided as comments on the . . . Commission's proposed 'Preauthorization Rule.'" Consequently, we conclude that Hartford's survey response is not excepted from disclosure based on section 552.110. As the other notified third parties did not respond to the notification, we also conclude that their survey responses are not excepted from disclosure based on section 552.110.

The Fund asserts that portions of its survey responses, information regarding the average cost of preauthorization requests to the Fund, methods the Fund uses in processing its preauthorization requests, and the type and number of preauthorization requests approved or denied in 1997, are excepted from disclosure based on section 552.101 of the Government Code in conjunction with section 2(b) of article 5.76-3 of the Insurance Code. Section 552.101 excepts from disclosure information that is deemed confidential by law, including information made confidential by statute. Section 2(b) reads in pertinent part as follows

The board may hold closed meetings to consider and refuse to release information relating to claims, rates, the fund's underwriting guidelines, and other information that would give advantage to competitors or bidders.

The Fund states that

release of this information would reveal procedures and methods critical to the Fund's operation and could be effectively used by the Fund's competitors to gain an advantage in the workers' compensation marketplace. . . . Releasing the requested information could thus provide an economic advantage to the Fund's competitors while also

diminishing the competitive position of the Fund. It is very unlikely that other insurers would release information concerning their claims costs or strategies to member of the public.

The Fund makes conclusory statements that its competitors could use the information to their advantage without explaining why these statements are true. Accordingly, we do not believe the Fund has shown the applicability of section 2(b) of article 5.76-3 of the Insurance Code. Consequently, the Commission must release the Fund's survey responses.

In conclusion, the Commission must release the requested information, unless it consists of a draft document or we have marked the information as excepted from disclosure.

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, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, 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 Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



Kay H. Hastings  
Assistant Attorney General  
Open Records Division

KHH/jc

Ref.: ID# 129077

Encl.: Marked documents

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