OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

December 5, 2002

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

OR2002-6938

Dear Ms. Villareal-Reyna:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 173194.

The Texas Department of Insurance (the "department") received two requests for the following information concerning prompt pay consent orders entered into by the department and two named insurance carriers:

> a. a copy of the prompt payment consent order entered into by and between the Texas Department of Insurance and [each carrier].
>
> b. investigation files and related intra-agency memoranda containing advice, opinions, findings or recommendations about the prompt payment consent order entered into by and between the Texas Department of Insurance and [each carrier].
>
> b. [sic] any and all other examination and investigation information obtained from or disclosed by [each carrier] to the Texas Department of Insurance in the course of its examination or investigation into prompt payment violations by [each carrier], including, but not limited to, information obtained from or disclosed by [each carrier] which formed the basis for the . . . consent order.
>
> c. all non-confidential complaint information, in database formet, lodged against [each carrier] between August 1, 2000 and March 31, 2002 relating

to Unsatisfactory Settlements/Offers (D31) and Delays-Claim Handling (D35).

You state that you will provide some information to the requestor and inform us that you are withholding certain enrollee information as well as examination reports, work papers, and related information in accordance with previous determinations of this office. *See* Open Records Letter Nos. 2001-4777 (2001) (concluding that department could withhold certain identifying information of enrollees in health plans without requesting ruling from this office), 99-1264 (1999) (concluding that department could rely on Open Records Decision No. 640 (1996) as previous determination to withhold work papers used in examination of insurance carrier). You claim that the information you have submitted for our review is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.137 of the Government Code. Pursuant to section 552.305 of the Government Code, you have also notified Cigna Healthcare ("Cigna") and Unicare Life & Health Insurance ("Unicare"), third parties whose proprietary interests may be implicated by the request. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have considered the claimed exceptions and reviewed the submitted information.[1]

We note that the department's administrative investigations are completed. The department states the "administrative action resulted in a consent order entered by the Commissioner of Insurance," and both cases are now closed. Section 552.022(a) of the Government Code enumerates categories of information that are public information and not excepted from required disclosure under chapter 552 of the Government Code unless they are expressly confidential under other law. One such category of expressly public information under section 552.022 is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108[.]" Gov't Code § 552.022(a)(1). The completed investigations must therefore be released under

[1]We assume that the 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 that those records contain substantially different types of information than that submitted to this office.

section 552.022 unless the information is expressly made confidential under other law. Section 552.107, which excepts information within the attorney-client privilege, and section 552.111, which excepts information within the attorney work product privilege, are discretionary exceptions under the Public Information Act and do not constitute "other law" for purposes of section 552.022. *See* Open Records Decision Nos. 676 at 5-6 (2002) (section 552.107 not "other law" for purposes of section 552.022), 677 at 8-9 (2002) (section 552.111 not "other law" for purposes of section 552.022). Thus, the department may not withhold the submitted information under section 552.107 or 552.111 of the Government Code.

However, the attorney work product privilege is also found in 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." *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Thus, we will determine whether the information is confidential under Rule 192.5. *See* ORD 677 at 9.

An attorney's core work product is confidential under Rule 192.5. Core work product is defined as the work product of an attorney or an attorney's representative developed in anticipation of litigation or for trial that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. 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 an attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *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 National 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 prong of the work product test requires the governmental body to show that the documents at issue contain the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. Tex. R. Civ. P. 192.5(b)(1). A document containing core work product information

that meets both prongs of the work product test is confidential under Rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in Rule 192.5(c). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.–Houston [14th Dist.] 1993, no writ).

After reviewing the department's arguments, we conclude that the department has shown that information in its litigation files was created in anticipation of litigation. As for the second prong of the work product test, the Texas Supreme Court has held that a request for an attorney's "entire file" was "too broad" and, citing *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993), held that "the decision as to what to include in [the file] necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case." *Curry v. Walker*, 873 S.W.2d 379, 380 (Tex. 1994). Because the requestor in this instance seeks all the information in particular files, we agree that complying with such a request would reveal the attorney's thought processes in litigating the cases. Having met both prongs of Rule 192.5, the department may withhold the requested litigation files as attorney work product. As our ruling on this issue is dispositive, we need not address your other arguments or the exceptions claimed by Cigna and Unicare.

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

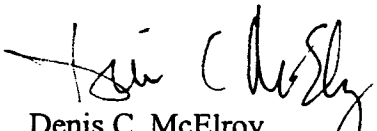
governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge 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).

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 Texas Building and Procurement Commission 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



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Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 173194

Enc. Submitted documents

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