



OFFICE of the ATTORNEY GENERAL
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January 15, 2003

Ms. Cynthia Villarreal-Reyna
Section Chief
Legal and Compliance Division
Texas Department of Insurance
P. O. Box 149104
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OR2003-0313

Dear Ms. Villarreal-Reyna:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 175066.

The Texas Department of Insurance (the "department") received a request for information pertaining to seven specified individuals and business entities for a specified period of time. The requestor subsequently clarified that he was seeking all information regarding each entity noted in his original request, to include both closed and pending case files. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (stating that when governmental bodies are presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed). You state that the department is withholding responsive examination information concerning the entities involved pursuant to a previous determination issued by our office in Open Records Letter No. 99-1264 (1999). *See* Open Records Decision No. 673 at 7-8 (2001) (criteria of previous determination for information in specific, clearly delineated categories). You claim that the remaining requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.101, 552.103, 552.107, 552.111, 552.130, 552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we note that this office previously addressed a portion of the information that is requested in this instance in Open Records Letter No. 2002-5117 (2002). Specifically, we ruled in that decision that certain files that had been opened in the Enforcement Section of the department's Legal and Compliance Division could be withheld by the department based on section 552.103 of the Government Code. You do not inform our office, nor are we aware, of any changes with regard to the law, facts, and circumstances on which that ruling

was based. Accordingly, we conclude that the department may rely on our decision in Open Records Letter No. 2002-5117 (2002) with respect to the information requested in this instance. *See* Gov't Code § 552.301(f); *see also* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, the first type of previous determination exists where requested information is precisely the same information as was addressed in a prior attorney general ruling, the ruling is addressed to the same governmental body, and the ruling concludes that the information is or is not excepted from disclosure).

Next, we note that portions of the information at issue are subject to section 552.022 of the Government Code. Section 552.022 makes certain information public, unless it is expressly confidential under other law. *See* Gov't Code § 552.022(a). One category of 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 Section 552.108." Gov't Code § 552.022(a)(1). Another category subject to section 552.022 is "information that is also contained in a public court record[.]" Gov't Code § 552.022(a)(17). The submitted information which you marked as regarding "Robert Osmundsen" constitutes a completed investigation made of, for, or by the department that is subject to section 552.022(a)(1) and must be released, unless it is confidential under "other law" or is excepted from disclosure under section 552.108. The public court records that we have marked which are subject to section 552.022(a)(17) must be released, unless they are confidential under "other law." Although the department claims that these documents, or portions thereof, are excepted from disclosure pursuant to sections 552.103, 552.107, and 552.111 of the Government Code, we note that these exceptions are discretionary exceptions under the Public Information Act (the "Act") and, as such, do not constitute "other law" that makes information confidential.¹ Accordingly, we conclude that the department may not withhold any portion of these documents pursuant to sections 552.103, 552.107, or 552.111 of the Government Code. We note, however, that the Texas Supreme Court recently held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will determine whether any portion of this information is confidential under rule 503 of the Texas Rules of Evidence or rule 192.5 of the Texas Rules of Civil Procedure. *See* Open Records Decision Nos. 676 at 6 (2002) (appropriate law for a claim of attorney-client privilege for section 552.022 information is Texas Rule of Evidence 503), 677 at 9

¹ Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

(2002) (appropriate law for a claim of attorney work product privilege for section 552.022 information is Texas Rule of Civil Procedure 192.5).

An attorney's work product is confidential under rule 192.5. Work product is defined as:

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.

TEX. R. CIV. P. 192.5(a). 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. *See* Tex. R. Civ. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney work product from disclosure under rule 192.5, a governmental body must demonstrate that the material, communication, or mental impression was created for trial or in anticipation of litigation. *See id.* In order to show that the information at issue was created in anticipation of litigation, 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. Information that meets 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). In *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994), the Texas Supreme Court held that a request for a district attorney's "entire file" was "too broad" and, citing *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (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." 873 S.W.2d at 380.

Based on our review of your arguments and the section 552.022 information at issue, we conclude that the marked public court records constitute confidential attorney work product records that must be withheld under rule 192.5. We also conclude that the department must

withhold the submitted information which you marked as regarding “Robert Osmundsen” as core work product under rule 192.5 to the extent that such information constitutes the attorney’s litigation file on this matter, since the release of such information would necessarily reveal the attorney’s thought processes regarding this matter. *See id.* To the extent that this information does not constitute the attorney’s litigation file on this matter, we conclude that the department may not withhold the entirety of this information as core attorney work product under rule 192.5. However, we have marked portions of this information which we find to otherwise be protected from disclosure as core attorney work product pursuant to rule 192.5. Assuming that the remaining information which you marked as regarding “Robert Osmundsen” does not constitute the attorney’s litigation file in this matter, we address your other claims regarding this information.

Rule 503(b)(1) provides:

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. A communication is “confidential” if 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. *See id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that 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 that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that

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, no writ). Based on our review of your arguments and the remaining information which you marked as regarding “Robert Osmundsen” which may be at issue, we find that rule 503 is applicable to some of this information. Accordingly, we conclude that the department must withhold the portions of this information, which we have marked, pursuant to rule 503 of the Texas Rules of Evidence. The department must release to the requestor the remaining submitted information which you marked as regarding “Robert Osmundsen.”

You claim that the remaining submitted information is excepted from disclosure pursuant to 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 section 552.103 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 that the government body receives the request and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *see also 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 meet both prongs of this test for information to be excepted under 552.103.

To establish that litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a

claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.² *See* Open Records Decision No. 555 (1990); *see* also Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

You state that Thomas G. Corless ("Corless") and Universal Insurance Exchange ("Universal") were placed under supervision on May 14, 2002 and April 14, 2002, respectively, in accordance with section 3 of article 21.28-A of the Insurance Code because it was determined that each was in a hazardous condition. We note that at the time that the department received this request for information both parties named above remained under this supervision.³ You also state that, as a result of their financial conditions, Corless and Universal were placed under further regulation on October 11, 2002 pursuant to article 1.32 of the Insurance Code and Commissioner's Order No. 02-1066 and 02-1068, respectively. You note that, near that particular time, case files were opened regarding both Corless and Universal in the Financial Counsel section of the department's Legal and Compliance Division and that the documents that were part of the supervision files pertaining to Corless and Universal are now part of those article 1.32 case files. Furthermore, you state that, as a result of the additional monitoring and administrative requirements of the two orders named above, it is the intent of the department to continue with this action and any subsequent administrative litigation in connection with this matter involving Corless and Universal. Based on our review of your representations and the remaining submitted information, we agree that litigation involving the department was both pending and reasonably anticipated at the time that it received this request for information regarding Corless and Universal. Furthermore, because the information you seek to withhold under

²In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

³ Pursuant to section 3 of article 21.28-A, the Commissioner of Insurance (the "Commissioner") generally may place an insurance company under supervision if it is in failing financial condition. *See* V.T.C.S. art. 21.28-A, § 3. The Commissioner may subsequently hold a hearing to determine whether "the insurance company has failed to comply with the lawful requirements of the Commissioner, it has not been rehabilitated, it is insolvent, or it is in such a condition as to render the continuance of its business hazardous to the public or to the holders of its policies or certificates of insurance," or whether the insurance company has "exceeded its power as defined in" article 21.28-A. *Id.* This hearing is governed, in part, by the Administrative Procedure Act. *See id.* art. 21.28-A, §§ 3, 3A. If the commissioner determines any one of the above listed facts to be true, it may appoint a conservator to the insurance company. *See id.* art. 21.28-A, §§ 3, 5.

section 552.103 relates to the supervision and financial situation of both Corless and Universal, we agree that the information relates to the pending and anticipated litigation. Accordingly, we conclude that the department may withhold the entirety of the remaining submitted information, which we have marked, pursuant to section 552.103 of the Government Code.⁴

Generally, however, once information has been obtained by all parties to the pending or anticipated litigation through discovery or otherwise, no section 552.103 interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties in such pending or anticipated litigation is not excepted from disclosure under section 552.103. We note that you represent that none of this information has been viewed by all parties to the pending and anticipated litigation. Further, the applicability of section 552.103 to this information ends once the pending litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the department may rely on our decision in Open Records Letter No. 2002-5117 (2002) with respect to responsive files that have been opened in the Enforcement Section of the department's Legal and Compliance Division. The department must withhold the marked public court records as attorney work product pursuant to rule 192.5 of the Texas Rules of Civil Procedure. The department must withhold the submitted information which you marked as regarding "Robert Osmundsen" as core work product under rule 192.5 to the extent that such information constitutes the attorney's litigation file on this matter. Otherwise, the department must withhold the information within these particular documents, which we have marked, pursuant to rule 192.5 and rule 503 of the Texas Rules of Evidence and release the remaining information in this set of documents to the requestor. In any event, the department may withhold the entirety of the remaining submitted information pursuant to section 552.103 of the Government Code.

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.

⁴ Because we base our ruling on the above-noted exceptions to disclosure, we need not address your remaining claims.

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).

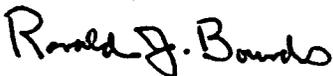
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 175066

Enc. Marked documents

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