



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 10, 2009

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

OR2009-16023

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# 359442.

The Texas Windstorm Insurance Association (the "association"), which you represent, received a request for 1) the name, sex, ethnicity, salary title, and dates of employment of all employees and officers of the association, 2) all of the association's contracts with adjusting companies and adjusters, 3) the name of each of the associations board members and the final record of voting at each board meeting, 4) working papers, research material, and information used to estimate the need for the expenditure of public funds by the association, 5) information pertaining to the association's central and field organizations, 6) information pertaining to the association's functions and policies, 7) the association's staff manuals and instructions, 8) the association's legal bills, 9) information pertaining to the requestor's client, 10) any IRS rulings or letter opinion that the association has requested or been the subject of, 11) all settlement agreements in which the association has been a party, and 12) all transcripts and recordings of trials in which the association was a party.¹ You state that the association does not have any information responsive to categories 5, 6, and 10 of the request.² You claim that the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.111, and 552.137 of the Government Code and privileged

¹You state and provide documentation that the association sought and received a clarification of the information requested. 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) (when 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).

²The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the submitted information.³ We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we address the requestor's assertion that the association "is not part of the State of Texas, a subdivision of the State of Texas, or governmental entity in any form, and is therefore, not subject to the [Act]." This office has previously addressed the issue of whether the association is a governmental body subject to the Act. In Open Records Letter Ruling No. 2009-15720 (2009), this office ruled that the association is a "governmental body" for purposes of the Act, as that term is defined in section 552.003(1)(A)(i). Gov't Code § 552.003(1)(A)(i) ("[Governmental body defined as] a board, commission, department, committee, institution, agency, or office that is within or created by the executive or legislative branch of state government and that is directed by one or more elected or appointed members[.]"). In Open Records Letter Ruling No. 2009-15720, we considered the several factors in making our determination that the association is subject to the Act. First, we noted the association was created by legislative act in 1971 to provide windstorm and hail coverage as an insurer of last resort.⁴ *See* Acts 1971, 62nd Leg., p. 843, ch. 100. The association's enabling statute is Chapter 2210 of the Insurance Code. Ins. Code § 2210. The board of directors of the association is composed of nine members, who are appointed by the Commissioner of Insurance (the "commissioner") in accordance with the requirements of section 2210.102 of the Insurance Code.⁵ *Id.* § 2210.102. Further, the board of directors of the association is "responsible and accountable to the commissioner." *Id.* § 2210.101. In addition, the commissioner "by rule shall adopt the plan of operation to provide Texas windstorm and hail insurance in a catastrophe area." *Id.* § 2210.151; 28 T.A.C. § 5.4001. Thus, the association was created by the legislative branch of government, its board of directors are appointed by the commissioner, the board of directors of the association is responsible and accountable to the commissioner, and it functions under a plan adopted by the commissioner.

Accordingly, on the basis of the above factors, we determined that the association is within the executive branch of the state, and is a governmental body for the purposes of section 552.003(1)(A)(i) of the Government Code. *See* Attorney General Opinion GA-0065 (2003) (finding the Texas Water Advisory Council to be within the executive branch of state

³We assume that 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 that those records contain substantially different types of information than that submitted to this office.

⁴We note that the association was originally the Texas Catastrophe Property Insurance Association.

⁵We note that, as of June 19, 2009, the commission has the duty to appoint the entirety of the board of the association. *See* Ins. Code § 552.102 as amended by Acts of May 21, 2007, 80th Leg., R.S., ch. 548 § 2.14; Act of June 2, 2009, 81st Leg., R.S., ch. 1408 § 18, sec. 2210, eff. June 19, 2009.

government, created by the legislative branch of government, and an entity consisting of thirteen members to be directed by one or more elected or appointed members, and therefore a governmental body for purposes of section 552.003(1)(A)(i) of the Government Code); *cf.* Attorney General Opinion DM-284 (1994) (finding that because governing body of Texas Title Insurance Guarantee Association and other associations (collectively the “associations”) were in whole or part appointed by State Board of Insurance and because the associations functioned under a plan of operation that must be approved by the commissioner, the associations were “within the executive. . . branch of the state,” as entities within the Department of Insurance; thus since the associations were “directed by one or more elected or appointed members,” the associations were governmental bodies for the purposes of the Open Meetings Act); *compare* Gov’t Code § 552.003(1)(A)(i) (defining “governmental body” for purposes of the Act) *with id.* § 551.001(3) (defining “governmental body” for purposes of the Open Meetings Act). Accordingly, as this office considers the association to be a “governmental body” for purposes of the Act, we will address the association’s arguments against disclosure of the submitted information.

Next, you state that some of the information responsive to category 7 of the request has been “previously furnished to the requestor in response to discovery in pending litigation, and we have so certified to the [requestor].” Based on this statement, we understand you to assert that you need not release the same information in response to the instant request that was previously released to the requestor through civil discovery. Section 552.232 provides as follows:

(a) A governmental body that determines that a requestor has made a request for information for which the governmental body has previously furnished copies to the requestor or made copies available to the requestor on payment of applicable charges under Subchapter F, shall respond to the request, in relation to the information for which copies have been already furnished or made available, in accordance with this section, except that:

(1) this section does not prohibit the governmental body from furnishing the information or making the information available to the requestor again in accordance with the request; and

(2) the governmental body is not required to comply with this section in relation to information that the governmental body simply furnishes or makes available to the requestor again in accordance with the request.

(b) The governmental body shall certify to the requestor that copies of all or part of the requested information, as applicable, were previously furnished to the requestor or made available to the requestor on payment of applicable charges under Subchapter F. The certification must include:

- (1) a description of the information for which copies have been previously furnished or made available to the requestor;
- (2) the date that the governmental body received the requestor's original request for that information;
- (3) the date that the governmental body previously furnished copies of or made available copies of the information to the requestor;
- (4) a certification that no subsequent additions, deletions, or corrections have been made to that information; and
- (5) the name, title, and signature of the officer for public information or the officer's agent making the certification.

(c) A charge may not be imposed for making and furnishing a certification required under Subsection (b).

(d) This section does not apply to information for which the governmental body has not previously furnished copies to the requestor or made copies available to the requestor on payment of applicable charges under Subchapter F. A request by the requestor for information for which copies have not previously been furnished or made available to the requestor, including information for which copies were not furnished or made available because the information was redacted from other information that was furnished or made available or because the information did not yet exist at the time of an earlier request, shall be treated in the same manner as any other request for information under this chapter.

Id. § 552.232. Thus, section 552.232 allows a governmental body to certify that records have previously been provided to a requestor, rather than make those same records available to the same requestor in response to subsequent requests. However, section 552.232 applies only where a requestor has made a previous request for information under the Act. In this instance, you inform us that the information was previously provided to the requestor in the course of civil discovery and not in response to a request made under the Act. Thus, we conclude that section 552.232 does not apply to the information that was previously released. Accordingly, to the extent you have submitted that information for our review, we will address your claimed exceptions to disclosure for this information. However, if you have not submitted such responsive information for our review, it must be released to the requestor at this time. *See id.* §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, you note and we agree that some of the submitted information is the same information that was the subject of a previous request for information, in response to which this office

issued Open Records Letter No. 2009-15720. Thus, with regard to the requested information that was previously requested and ruled on by this office, we conclude that the association may continue to withhold or release that information in accordance with Open Records Letter No. 2009-15720.⁶ *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the submitted information is not encompassed by that prior ruling, we will consider your submitted arguments.

Next, we note that some of the remaining information, located in Exhibits 1, 4, 6, 7, and 9, is subject to section 552.022 of the Government Code. Section 552.022(a) provides in part that:

(a) the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body;

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate;

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege; [and]

...

(17) information that is also in a public court record[.]

Gov't Code. § 552.022(a)(2), (5), (16), (17). In this instance, the submitted information includes employment information pertaining to employees of the association, information

⁶As our determination is dispositive, we need not address your arguments against the disclosure of Exhibits 2 and 8, which consist of information subject to the previous ruling.

pertaining to the need for the use of public funds from the catastrophe reserve trust fund,⁷ attorney fee bills of the association, and court-filed documents. Thus, the association must release the information we have marked pursuant to subsections 552.022(a)(2), 552.022(a)(5), 552.022(a)(16), and 552.022(a)(17), unless it is expressly confidential under other law. You assert that all of the information subject to section 552.022 is excepted under section 552.103 of the Government Code. Further, you claim that Exhibit 6, which consists of attorney fee bills subject to section 552.022(a)(16), is excepted under sections 552.107 and 552.111 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. However, sections 552.103, 552.107, and 552.111 are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 676 at 6 (2002) (section 552.107 is not other law for purposes of section 552.022), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Therefore, the association may not withhold the information we marked as subject to section 552.022 under section 552.103, section 552.107, or section 552.111 of the Government Code. However, the Texas Supreme Court has held that the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your arguments under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5 for the attorney fee bills in Exhibit 6 that are subject to section 552.022(a)(16). However, as no further exceptions are raised, the remaining information we have marked that is subject to section 552.022, must be released.⁸ We will, however, address your claims under sections 552.103, 552.107, and 552.111 for the remaining information not subject to section 552.022.⁹

Next, we address the association's privilege claims for the attorney fee bills in Exhibit 6, which we have marked as subject to section 552.022(a)(16). Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

⁷*See* Ins. Code § 2210.452(b) (money deposited in catastrophe reserve trust fund constitutes state funds until disbursed).

⁸As our determination is dispositive, we need not address your arguments against the disclosure of Exhibits 1, 4, 9 and the marked portions of Exhibit 7, which must be released.

⁹Although you also raise the attorney-client privilege under rule 503 of the Texas Rules of Evidence the attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure for portions the remaining information in Exhibit 7, we note sections 552.107 and 552.111 are the proper exceptions to raise for your privilege claims for this type of information in this instance. *See* Open Records Decision Nos. 677 (2002), 676 (1988).

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 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, 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). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). We note that the details in the submitted attorney fee bills may only be withheld if they are protected under the attorney-client privilege. *See* Open Records Decisions No. 589 (1991) (information in attorney fee bill excepted only to extent information reveals client confidences or attorney's legal advice).

You have marked most of the descriptions in the submitted attorney fee bills in Exhibit 6 as privileged under rule 503. However, section 552.022(a)(16) of the Government Code provides that information "that is *in* a bill for attorney's fees" is not excepted from required disclosure unless it is confidential under other law or privileged under the attorney-client privilege. *See* Gov't Code § 552.022(a)(16) (emphasis added). This provision, by its express

language, does not permit the entirety of an attorney fee bill to be withheld. *See also* Open Records Decisions Nos. 676 (2002) (attorney fee bill cannot be withheld in entirety on basis it contains or is attorney-client communication pursuant to language in section 552.022(a)(16)); 589. Thus, the association may only withhold the entry descriptions you have marked to the extent they are protected by the attorney-client privilege.

You state that the information you have marked in the submitted attorney fee bills reflect communications made between employees of the association, counsel for the association, and its co-defendants made for the purpose of the rendition of professional legal services to the association. You inform us that the association has a joint defense agreement with these co-defendants concerning a matter of common interest. You state that these communications were not intended to be disclosed and that they have remained confidential. Upon review of the submitted attorney fee bills, we agree that some of the information at issue is protected by the attorney-client privilege. We note, however, that you have not specifically identified, by name, any of the privileged parties. We are unable to discern who the privileged parties are with the exception of the attorneys and law firm employees listed as providing legal services in the submitted fee bills and certain association employees we are able to identify from the submitted information. Additionally, some of the information you have marked documents communications with non-privileged parties, such as opposing counsel. Furthermore, while other marked entries indicate that certain documents were prepared, there is no indication that the information was actually communicated to a privileged party. Therefore, we find that the association has failed to demonstrate how the remaining information you have marked documents privileged attorney-client communications. Accordingly, the association may only withhold the information we have marked in the submitted attorney fee bills in Exhibit 6 pursuant to Texas Rule of Evidence 503.

Next, we address your arguments under Texas Rule of Civil Procedure 192.5 for the remaining information you marked in the submitted attorney fee bills. Rule 192.5 encompasses the attorney work product privilege. For purposes of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent that 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, a governmental body must demonstrate that 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 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 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 that the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney's 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(c). *See Pittsburgh Corning Corp.*, 861 S.W.2d at 427.

In this instance, you have not demonstrated that any of the remaining information in the submitted attorney fee bills consists of mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative that were created for trial or in anticipation of litigation. We therefore conclude that the association may not withhold any of the remaining information in Exhibit 6 under Texas Rule of Civil Procedure 192.5. As you raise no further exceptions to the disclosure of this information, it must be released.

Next, we note that Exhibit 3 consists of the minutes of the association's public board meetings. You assert that Exhibit 3 is subject to section 552.103 of the Government Code. We note that the minutes of a governmental entity's public meetings are specifically made public by section 551.022 of the Government Code. *See* Gov't Code § 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying on request to governmental body's chief administrative officer or officer's designee). As a general rule, the exceptions to disclosure found in the Act do not apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, Exhibit 3 must be released to the requestor pursuant to section 551.022 of the Government Code.

Next, we will address your argument under section 552.103 of the Government Code for the remaining information that is not subject to section 552.022. Section 552.103 provides in part:

(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). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, a governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

You inform us, provide documentation showing, and the requestor admits that the requestor is the attorney for the Plaintiff in pending litigation against the association. You state and the requestor also informs us that the remaining information relates to claims in the pending litigation regarding sovereign immunity and waiver of immunity. Based on your representations, the requestor's comments, and our review, we find you have demonstrated litigation was pending when the association received this request for information. Further, we find the remaining information not subject to section 552.022 consists of documents relating to the pending litigation. Thus, we conclude the association may withhold the remaining information not subject to section 552.022 under section 552.103 of the Government Code.¹⁰

However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). We note that it appears that some of the information at issue has been obtained from or provided to the other party in the litigation. Thus, to the extent any of the information at issue has either been obtained from or provided to the other party in the pending litigation, it is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer realistically anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, to the extent the association did not submit the information it previously released to the requestor as part of civil discovery to this office for review, such information must be released to the requestor at this time. With regard to the requested information that was previously requested and ruled on by this office, we conclude that the association must continue to withhold or release that information in accordance with Open Records Letter

¹⁰As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

No. 2009-15720. With the exception of Exhibit 6, the association must release the remaining information we have marked under section 552.022 of the Government Code. The association may withhold the information we have marked in the submitted attorney fee bills in Exhibit 6 under Texas Rule of Evidence 503. The remaining information in the attorney fee bills must be released. The association must release Exhibit 3 to the requestor pursuant to section 551.022 of the Government Code. To the extent the remaining information not subject to section 552.022 of the Government Code has not been obtained from or provided to the other party in the pending litigation, the association may withhold it under section 552.103 of the Government Code.

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,



Laura Ream Lemus
Assistant Attorney General
Open Records Division

LRL/jb

Ref: ID# 359422

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. James W. Oliver
Texas Windstorm Insurance Association
5700 South MoPac, Building E, #530
Austin, Texas 78749
(w/o enclosures)