



ATTORNEY GENERAL OF TEXAS
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November 22, 2010

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OR2010-17600

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 requests were assigned ID#s 402028 and 403513. We have combined these files and will consider the issues presented in this single ruling assigned ID# 402028.

The Texas Windstorm Insurance Association ("TWIA"), which you represent, received five requests for information relating to settlements of claims arising out of Hurricane Ike.¹ You state that TWIA has no information responsive to items three, five, and six of the fourth and fifth requests.² You claim that the rest of the requested information is excepted from disclosure under sections 552.101, 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. You

¹We note that TWIA received clarifications of the fourth and fifth requests. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

²We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

also believe these requests for information may implicate the interests of third parties.³ You inform us that the interested parties were notified of these requests and of their right to submit arguments to this office as to why the requested information should not be released.⁴ We received correspondence from Bush Lewis PLLC (“Lewis”) and an attorney for the Mostyn Law Firm (“Mostyn”). We also received comments from an attorney for one of the requestors.⁵ We have considered all of the submitted arguments and reviewed the submitted representative sample of information.⁶

We initially note that the first requestor indicates he does not seek access to “any confidential information relating to any individual or corporate policyholder, such as names, personal addresses, social security numbers, or other such personally identifiable information.” Similarly, the second requestor does not seek “confidential information that would identify the plaintiffs associated with the settlement” or “confidential information pertaining to mediation in these cases.” Likewise, the third, fourth, and fifth requestors do not seek

³You inform us the third parties concerned are the Amaro Law Firm; the Barton Law Firm; Benckenstein, Novell & Nathan; Brent Coon & Associates; Bruno & Bruno L.L.P.; The Buzbee Law Firm; Clark, Burnett, Love & Lee GP; Clint Brasher, Attorney at Law; Law Offices of A. Craig Eiland, P.C.; The Sheena Law Firm; Arguello, Hope & Associates, PLLC; Beausoleil Law Group; Bettison, Doyle, Apffel & Guarino, PC; Law Office of Brian Mazola, PLLC; Bush Lewis PLLC; The Ciofalo Law Firm, PLLC; Clay Dugas and Associates; Gravely & Pearson, LLP; Daniel Joseph Fay; David C. Holmes, Attorney at Law; David Starnes, Attorney at Law; Dean Law Firm; Douglas A. McAninch, P.C.; Durrett Law Firm; Eric Paul Edwardson, Attorney at Law; Faubus & Scarborough; Griffin and Matthews; Lamb Law Firm; Loree, Hernandez and Lipscomb; A. Mark Faggard, Attorney at Law PC; Davilla Law Firm; Dies & Parkhurst, LLP; Doyle & Raizner; E. Hart Green, Weller, Green, Troups & Terrell; Fairchild, Price, Haley & Smith, LLP; Gauthier, Haughtaling & Williams; Law Office of Jim Zadeh; Lindsay & Morgan, PLLC; Lundy, Lundy, Soileau & South, L.L.P.; Martin L. Mayo & Associates, PC; McPherson, Hughs, Bradley, Wimberley, Steel & Chatelain LLP; Middagh Law Group, PLLC; Mostyn Law Firm; Provost Umphrey Law Firm; Reich & Binstock, LLP; Rick Carrasco; Ryan Douglas White, PLLC; Speights Law Firm; Ted Hirtz; Terry W. Wood PC; Merlin Law Group, PA; Monk Law Firm; Oldenettle & McCabe; Reud, Morgan & Quinn, LLP; Richard J. Plezia & Associates; Rocky Lawdermilk, Attorney at Law; Snider & Byrd, LLP; John K. Spiller, Strasburger & Price; Terry & Thweatt, P.C.; Thornhill, Shrader & Burdette, PLLC; The Voss Law Firm, P.C.; Weller, Green, Troups & Terrell, L.L.P.; Wauson – Probus; and The Wenholz Law Firm; Jason Ray; Joseph M. Nixon.

⁴See Gov’t Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov’t Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

⁵See Gov’t Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

⁶You state that the submitted documents are a representative sample of attorney-client communications, attorney work product, and mediation submissions that are responsive to item one of the fourth and fifth requests. This letter ruling assumes that the submitted documents are truly representative of the responsive attorney-client communications, attorney work product, and mediation submissions as a whole. This ruling neither reaches nor authorizes TWIA to withhold any information that is substantially different from the submitted information. See Gov’t Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

“personal tax information, social security numbers, home addresses, or names of insureds or claimants unless that information is part of or has already been disclosed in a public record.” Thus, because the requestors excluded those types of information, they are not responsive to the respective requests. This decision does not address the public availability of information that is not responsive to the requests, and TWIA need not release such information in responding to the requests.

Next, we address Lewis’s assertion that TWIA is not a governmental body subject to the Act. *See* Gov’t Code § 552.003(1) (defining “governmental body for purposes of the Act). In Open Records Letter No. 2009-15720 (2009), we determined that TWIA is within the executive branch of the state and is a governmental body for the purposes of section 552.003. We are unaware of any change in the law, facts, and circumstances on which Open Records Letter No. 2009-15720 was based. Thus, we will adhere to our determination in the prior ruling that TWIA is a governmental body subject to the Act. *See* Gov’t Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under Gov’t Code § 552.301(a)).

Lewis also asserts that “[his] clients and [TWIA] signed agreements of mutual confidentiality in their settlements.” We note that information is not confidential under the Act simply because a party anticipates or requests that information be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act by agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information did not satisfy requirements of statutory predecessor to Gov’t Code § 552.110). Consequently, the requested information must be released unless it comes within an exception to public disclosure, notwithstanding any expectation or agreement to the contrary.

We next note that the requested information falls within the scope of section 552.022(a) of the Government Code, which provides that several categories of information are subject to required public disclosure unless they are made expressly confidential under “other law.” *See* Gov’t Code § 552.022(a)(1) (completed report, audit, evaluation, or investigation made of, for, or by governmental body), (3) (information in account, voucher, or contract relating to receipt or expenditure of public or other funds by governmental body), (5) (all working papers, research material, and information used to estimate need for or expenditure of public funds or taxes by governmental body, on completion of estimate), (16) (information in bill for attorney’s fees that is not privileged under attorney-client privilege), (17) (information also contained in public court record), and (18) settlement agreement to which governmental body is party). Therefore, the requested information must be released pursuant to section 552.022, unless the information is expressly confidential under other law. *See id.* § 552.022(a). Sections 552.107(1) and 552.111 of the Government Code, which TWIA

claims, are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See id.* § 552.007; Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under Gov't Code § 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.107(1) and 552.111 are not other law that makes information confidential for the purposes of section 552.022. Therefore, TWIA may not withhold any of the requested information under sections 552.107(1) or 552.111. The Texas Supreme Court has held, however, that the Texas Rules of Evidence and Texas Rules of Civil Procedure are "other law" that makes information confidential for the purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege, as encompassed by section 552.107(1), also is found at Texas Rule of Evidence 503, and the attorney work product privilege, as encompassed by section 552.111, also is found at Texas Rule of Civil Procedure 192.5. Accordingly, we will consider TWIA's assertions of the attorney-client and attorney work product privileges under rules 503 and 192.5 for the submitted information, which TWIA states is responsive to the fourth and fifth requests.⁷ As section 552.101 of the Government Code also constitutes "other law" for purposes of section 552.022, we also will consider TWIA's arguments for the submitted information under this exception.

TWIA claims Texas Rule of Evidence 503 for the submitted pre-mediation reports. Rule 503 enacts the attorney-client privilege and provides in part:

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;

⁷We note that the fourth and fifth requests are specifically confined to information encompassed by section 552.022(a).

(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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

TWIA contends that the submitted pre-mediation reports are privileged attorney-client communications. TWIA states that the reports are communications from TWIA’s outside attorneys to TWIA and were prepared in order to advise TWIA regarding the defense of pending litigation. TWIA also states that the reports were not intended to be and have not been disclosed to anyone other than TWIA’s own representatives and attorneys. Based on TWIA’s representations and our review of the information at issue, we conclude that TWIA may withhold the pre-mediation reports under Texas Rule of Evidence 503.⁸

TWIA invokes section 552.101 of the Government Code for the submitted mediation reports. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information other statutes make confidential. Section 154.073 of the Civil Practice and Remedies Code provides in part:

(a) [A] communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure,

⁸As we are able to make this determination, we need not consider TWIA’s other claims for the pre-mediation reports.

whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

Civ. Prac. & Rem. Code § 154.073(a). In Open Records Decision No. 658 (1998), this office found that communications during the formal settlement process were intended to be confidential. *See* Open Records Decision No. 658 at 4; *see also* Gov't Code § 2009.054(c). TWIA contends that the mediation reports are confidential under section 154.073. TWIA states that the reports are "confidential mediation submissions, prepared by TWIA's litigation counsel for mediation purposes, that were submitted to the mediator on a confidential basis and have not been disclosed to anyone other than TWIA, its counsel, and the mediator." Based on TWIA's representations and our review of the information at issue, we conclude the mediation reports are excepted from disclosure under section 552.101 of the Government Code in conjunction with section 154.073(a) of the Civil Practice and Remedies Code.⁹

With regard to the rest of the requested information, we note that TWIA did not comply with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. *See* Gov't Code § 552.301(a). Section 552.301(e) requires a governmental body to submit to this office, not later than the fifteenth business day after the date of its receipt of the request, the specific information that the governmental body seeks to withhold or representative samples if the information is voluminous. *See id.* § 552.301(e)(1)(D). Section 552.302 of the Government Code provides that if a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *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). In this instance, TWIA did not submit any of the remaining requested information or representative samples of the information to this office. Therefore, the information that TWIA failed to submit is presumed to be public under section 552.302. This statutory presumption can generally be overcome when the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982).

We note that an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 of the Government Code to submit a basis for withholding requested information from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, only Lewis and Mostyn have submitted

⁹As we are able to make this determination, we need not address TWIA's other claims for the mediation reports.

arguments. We address Lewis and Mostyn's legal arguments below. However, none of the other notified third parties have submitted legal briefing and therefore have not demonstrated that any of the remaining requested information is confidential or proprietary for the purposes of the Act. *See id.* §§ 552.101, .110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999). Thus, none of the remaining requested information may be withheld on the basis of any third parties' interests in that information.

TWIA, Lewis, and Mostyn raise section 552.107(2) of the Government Code, which they argue provides a basis for withholding the remaining requested information. A claim under section 552.107(2) can provide a compelling reason for non-disclosure under section 552.302. Section 552.107(2) provides that "[i]nformation is excepted from [required public disclosure] if . . . a court by order has prohibited disclosure of the information." Gov't Code § 552.107(2). TWIA relies on a temporary injunction (the "injunction") entered by the court in *Vardell v. Texas Windstorm Insurance Association*, No. 09-CV-2012, 122nd Judicial District Court, Galveston County, Texas (*Vardell v. TWIA*), as a basis for withholding certain requested information from disclosure.¹⁰ TWIA has provided a copy of the injunction. Notwithstanding the plain language of the order, TWIA argues the injunction prohibits it from either releasing the remaining requested information or submitting the remaining information to this office for review. Lewis and Mostyn contend that release of the remaining requested information is prohibited by the injunction and by a "Standing Pretrial Order Concerning Hurricane Ike Residential Property Claims" entered in *In re: Hurricane Ike Residential Property Claim Litigation*, 212th Judicial District Court for Galveston County, Texas, and a "Standing Pretrial Order Concerning Hurricane Ike Commercial Claims Filed in County and District Court" entered in *In re: Hurricane Ike Commercial Claim Litigation*, 212th Judicial District Court, Galveston County, Texas (the "standing orders"). Mostyn has submitted copies of the standing orders.

Having considered the parties' arguments and reviewed the injunction and the standing orders, we note that section 552.022(b) of the Government Code provides as follows:

(b) A court in this state may not order a governmental body or an officer for public information to withhold from public inspection any category of public information described by Subsection (a) or to not produce the category of public information for inspection or duplication, unless the category of information is expressly made confidential under other law.

Id. § 552.022(b). Under section 552.022(b), a court may not order a governmental body to withhold from the public information encompassed by section 552.022(a) – unless that information is expressly made confidential under other law. That is, the Act does not allow

¹⁰TWIA indicates that the injunction supersedes a temporary restraining order and a second temporary restraining order previously entered by the court in *Vardell v. TWIA*.

a court to withhold from disclosure information that the Legislature has deemed to be expressly public. We note the court's injunction and the standing orders do not find the remaining requested information to be confidential under other law. Therefore, because a court cannot order TWIA to withhold information which is encompassed by section 552.022(a) unless that information is expressly made confidential under other law, TWIA may not rely upon the injunction and standing orders to withhold the remaining requested information under section 552.107(2) of the Government Code to the extent the order could be read as purporting to have that effect.

TWIA, Lewis, and Mostyn also raise section 552.101 for some of the remaining requested information. TWIA contends that some of the remaining information is confidential under federal law and common-law privacy. Lewis claims section 552.101 in conjunction with section 154.053 of the Civil Practice and Remedies Code. Mostyn contends that the remaining information includes a spreadsheet created and maintained by TWIA that is confidential under section 154.073 of the Civil Practice and Remedies Code. A claim under section 552.101 can provide a compelling reason for non-disclosure under section 552.302. But because TWIA has not submitted any of the remaining requested information to this office, we have no basis to conclude that any of the information in question is confidential under section 552.101. Thus, we have no choice but to order TWIA to release the rest of the requested information in accordance with section 552.302 of the Government Code. If TWIA believes the remaining information is confidential and may not lawfully be released, it must challenge this ruling in court pursuant to section 552.324 of the Government Code.

In summary: (1) TWIA may withhold the submitted pre-mediation reports under Texas Rule of Evidence 503; and (2) TWIA must withhold the submitted mediation reports under section 552.101 of the Government Code in conjunction with section 154.073 of the Civil Practice and Remedies Code. The rest of the requested information must be released to the requestors, to the extent it is responsive to their respective requests.¹¹

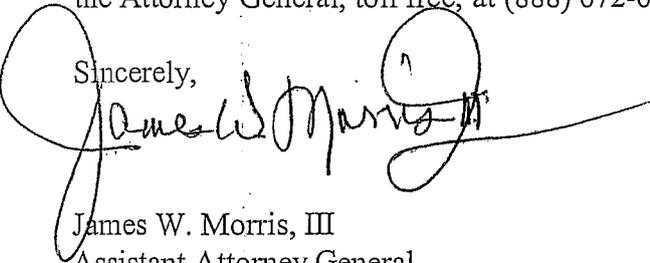
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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,

¹¹Because the information sought by requestors who are members of the Texas Legislature must be released under section 552.302, we need not consider the applicability of section 552.008. That is, because this information must be disclosed to all requestors, we do not address the legislative requestors' special rights of access.

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,



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JWM/em

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