



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 6, 2010

Ms. Cynthia Villarreal-Reyna  
Section Chief, Agency Counsel  
Legal and Regulatory Affairs MC 110-1A  
P.O. Box 149104  
Austin, Texas 78714-9104

OR2010-18253

Dear Ms. Villarreal-Reyna:

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# 401921 (TDI# 108353).

The Division of Workers' Compensation of the Texas Department of Insurance (the "division") received a request for eight categories of information regarding a medical quality review. You state the division has released some of the requested information, including a portion of the submitted information, to the requestor. You also state some of the submitted information is encompassed by a previous determination issued to the division in Open Records Letter No. 2005-01938 (2005). You claim the rest of the submitted information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. We have considered your arguments and reviewed the information you submitted.<sup>1</sup>

You inform us parts one, two, and six of the instant request for information either seek information that did not exist when the division received the request or would require the division to create responsive information. We note the Act does not require the division to release information that did not exist when it received the request or create responsive information.<sup>2</sup> You also note part eight of the request asks a question. Although a

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<sup>1</sup>To the extent the submitted information consists of representative samples, this letter ruling assumes the representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the department 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).

<sup>2</sup>See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

governmental body is not required to answer factual questions or create new information in responding to a request, a governmental body must make a good-faith effort to relate a request to information that is within the governmental body's possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). We assume the division has done so and will respond to the requestor's question appropriately.

You also state parts of the submitted documents, which you have marked, are not responsive to the instant request. This decision does not address the public availability of the non-responsive information, which need not be released in response to the request.

Next, we address your arguments against disclosure of the information at issue. You have marked information the division seeks to withhold on the basis of Open Records Letter No. 2005-01938. The previous determination issued in that decision authorizes the division to withhold, under section 552.101 of the Government Code in conjunction with section 402.092 of the Labor Code without the necessity of requesting a ruling under the Act, information in a division investigative file maintained under section 413.002, section 413.0511, or section 413.0512 of the Labor Code, unless the information is subject to the release provisions of sections 402.092, 413.0511, 413.0513, or 413.0514 of the Labor Code or is claim file information subject to subsection 402.092(d) of the Labor Code. You indicate the information you have marked is encompassed by the previous determination. You also inform us the information at issue is not subject to the release provisions of sections 402.092, 413.0511, 413.0513, or 413.0514 of the Labor Code, nor is it claim file information subject to subsection 402.092(d) of the Labor Code. Therefore, based on your representations and our review of the information at issue, we conclude the division must withhold the marked information on the basis of Open Records Letter No. 2005-01938. *See* Open Records Decision No. 673 (2001) (listing elements of second type of previous determination under Gov't Code § 552.301(a)).

Section 552.101 of the Government Code 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. You have marked information the division seeks to withhold under section 402.083 of the Labor Code, which provides that "[i]nformation in or derived from a claim file regarding an employee is confidential and may not be disclosed by the division except as provided by this subtitle[.]" Labor Code § 402.083(a). This office has interpreted section 402.083 to protect only that "information in or derived from a claim file that explicitly or implicitly discloses the identities of employees who file workers' compensation claims." Open Records Decision No. 619 at 10 (1993). However, we also have stated that "[w]hether specific information implicitly discloses the identity of a particular employee must be determined on a case-by-case basis." *Id.* You explain that the names of the claimants to whom the claim information at issue pertains were provided to the requestor by the division's Office of Medical Advisor (the "OMA") in connection with an investigation by the OMA and a pending review by the Medical Quality Review Panel of impairment rating examinations conducted by the requestor as a designated doctor in the Texas workers' compensation system. You assert that because the requestor already has access to the names of the claimants, the redaction of their

identifying information would not be sufficient in this instance, as “it will be apparent to the requestor who the claimant[s] are.” You also state the requestor does not appear to be eligible to obtain the claim information pursuant to section 402.084 of the Labor Code. Based on your representations and our review of the information at issue, we conclude the division must withhold the claim information you have marked under section 552.101 of the Government Code in conjunction with section 402.083 of the Labor Code.<sup>3</sup>

Section 552.111 of the Government Code excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. Section 552.111 of the Government Code encompasses the attorney work product privilege found at rule 192.5 of the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 192.5; *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines attorney work product as consisting of

- (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 governmental body that seeks to withhold information on the basis of the attorney work product privilege under section 552.111 bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. *See id.*; ORD 677 at 6-8. In order for this office to conclude that information was created or developed in anticipation of litigation, we must be satisfied that

- (a) 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 (b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

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<sup>3</sup>As we are able to make this determination, we need not address your other arguments against disclosure of the claim information.

*Nat'l Tank Co. 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; ORD 677 at 7.

You claim the attorney work product privilege for the submitted forms titled "Request for Disposition" and "Enforcement Tracking of Orders" and the submitted document titled "Request for Disposition Process." You state these documents were created for the purpose of "aiding [division] attorneys in communicating matters pertaining to the litigation [of] enforcement cases." Having considered your arguments, we note the documents in question consist of blank forms and instructions for using one of the forms. These documents contain no information relating to any specific case or other enforcement matter. We find you have not demonstrated these documents constitute material prepared, mental impressions developed, or a communication made in anticipation of litigation or for trial. *See* TEX.R.CIV.P. 192.5. We therefore conclude the division may not withhold the blank "Request for Disposition" and "Enforcement Tracking of Orders" forms or the document titled "Request for Disposition Process" on the basis of the attorney work product privilege under section 552.111 of the Government Code.

Section 552.111 also encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of the deliberative process privilege under section 552.111 is to protect advice, opinion, and recommendation in the decisional process and encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (Gov't Code § 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). Moreover, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

You state the "Enforcement Tracking of Orders" form is used by non-attorney staff and attorneys to communicate information relating to regulatory matters. You also state the

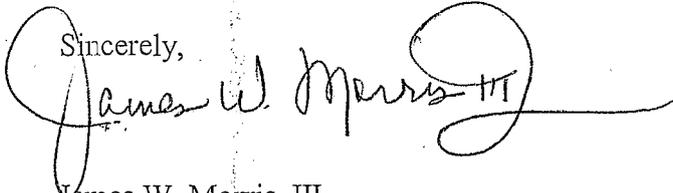
initiation and resolution of a regulatory matter is a matter of policy. Having considered your arguments, we again note the document in question is a blank form that contains no information relating to any specific regulatory matter. We find you have not demonstrated the form constitutes advice, recommendations, or opinions relating to policymaking processes. We therefore conclude the division may not withhold the blank "Enforcement Tracking of Orders" form on the basis of the deliberative process privilege under section 552.111 of the Government Code.

In summary: (1) the division must withhold the information encompassed by Open Records Letter No. 2005-01938 you have marked on the basis of that decision; and (2) the division must withhold the claim information you have marked under section 552.101 of the Government Code in conjunction with section 402.083 of the Labor Code. The division must release the rest of the submitted information.

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](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,

A handwritten signature in cursive script that reads "James W. Morris, III". The signature is written in black ink and is positioned to the right of the word "Sincerely,".

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/em

Ref: ID# 401921

Enc: Submitted documents

c: Requestor  
(w/o enclosures)