



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 23, 2011

Ms. Susan Denmon Banowsky  
Counsel for the Texas Windstorm Insurance Association  
Vinson & Elkins  
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Austin, Texas 78746-7568

OR2011-08988

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# 421570.

The Texas Windstorm Insurance Association (the "association"), which you represent, received a request for the following six categories of information: (1) e-mails between any of four named individuals and Reid, Jones, McRorie & Williams, Inc. from February 1, 2009 to March 31, 2011; (2) responses to a specified request for proposals ("RFP") issued on February 14, 2011; (3) responses to the specified RFP that were rescinded or removed; (4) checks issued to a named individual from February 14, 2011 to March 31, 2011, as well as the reasons for each check's issuance; (5) e-mails between a named individual and the Texas Department of Insurance from February 1, 2009 to April 1, 2009; and (6) applications, resumes, and other forms of inquiry received from January 1, 2011 to March 31, 2011 for a specified position.<sup>1</sup> You state the association has released all information responsive to categories four and six of the request, as well as some information responsive to categories one and five. You inform us the association is withholding portions of the information that are subject to sections 552.136 and 552.137 of the Government Code pursuant to Open

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<sup>1</sup>The association sought and received clarification of the instant request from the requestor. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

Records Decision No. 684 (2009).<sup>2</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.104, 552.107, and 552.111 of the Government Code.<sup>3</sup> You also state release of portions of the submitted information may implicate the proprietary interests of the third party RFP respondents. Thus, you state the association notified these third parties of the association's receipt of the request for information and of their right to submit arguments to this office as to why the information at issue should not be released.<sup>4</sup> See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have considered the submitted arguments and reviewed the submitted information, portions of which are representative samples.<sup>5</sup> We have also considered comments submitted by the requestor. See Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note ACC claims its RFP response is not responsive to the request for information. However, the association has submitted such information as responsive. See Open Records Decision No. 561 at 8-9 (1986) (governmental body required to make good faith effort to relate request to information within its possession or control). Additionally, upon review, we find ACC's RFP response is responsive to the request for information. Thus, we consider the submitted arguments against its disclosure.

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<sup>2</sup>Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information without the necessity of requesting an attorney general decision, including insurance policy numbers and bank account numbers under section 552.136 of the Government Code and e-mail addresses of members of the public under section 552.137 of the Government Code.

<sup>3</sup>Although you also raise the attorney-client privilege under Texas Rule of Evidence 503 and the attorney work product privilege under Texas Rule of Civil Procedure 192.5, we note sections 552.107 and 552.111 of the Government Code are the proper exceptions to raise when asserting the attorney-client and attorney work product privileges in this instance.

<sup>4</sup>The notified parties are: ABJ Adjusters, Inc.; Advanced Claims Concepts, Inc. ("ACC"); Alamo Claim Service; Allcat Claims Service, LP; Allied American Adjusting Co., LLC; All-Tech Claims Management, LLC; Amcat; AmeriClaim Group; Associated Adjusters Network, Inc.; Austin Braden Corp.; BrightClaim, Inc.; Brush Country Claims, Ltd.; Catastrophe Specialist Inc.; CJW & Associates; CNC Catastrophe & National Claims; Crawford & Company; Eberl Claims Service; Evans Claims Services; G&G Insurance Adjusters; GAB Robins and Cunningham Lindsey; Global Risk Solutions; HGI Catastrophe Services, LLC; Integrity Adjusters, LLC; Leading Edge Claims Service; Legacy Claim Services, LLC; Mason Catastrophe Claims, Inc.; Maverick Claims, LLC; N&C Claims Service; NADO Insurance Services; NCA Group; Pacesetter Claims Service; Principal Claim Solutions; RJMW Claims Service; Sabine Claims Services Inc.; Schafer, Wood & Associates, Inc.; Specialty Claim Services, LLC; Team One Adjusting Services, LLC; The Keyes Group, Inc.; The Littleton Group; Trinity Insurance Services Group; US Staffing Adjusting Services; Vericclaim Inc.; Walker Group, Inc.; and Wardlaw Claims Service.

<sup>5</sup>We assume the "representative samples" of records submitted to this office are 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.

In his comments to this office, the requestor excluded certain types of information from the scope of his request. Specifically, the requestor excludes bank account numbers, insurance policy numbers, and the financial and personal information, including names, of policy-holders. Accordingly, such information is not responsive to the request for information. This ruling does not address the public availability of non-responsive information, and such information need not be released in response to this request.<sup>6</sup>

You claim the proposals that are responsive to categories two and three of the request are excepted under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). Section 552.104 does not except information relating to competitive bidding situations once a contract has been executed. Open Records Decision Nos. 306 (1982), 184 (1978).

You inform this office the specified RFP was issued on February 14, 2011, and that the association seeks to contract for professional insurance adjusting services. You explain the association is in the process of identifying those respondents with which it intends to enter contract negotiations and, thus, has not yet executed a contract related to this RFP. You explain release of the proposals at this time would hinder the association's ability to receive the best possible offers in this negotiation process. Based on your representations and our review of the information at issue, we agree the association may withhold the submitted proposals under section 552.104 of the Government Code.<sup>7</sup> *See* Open Records Decision No. 170 at 2 (1977) (release of bids while negotiation of proposed contract is in progress would necessarily result in an advantage to certain bidders at the expense of others and could be detrimental to the public interest in the contract under negotiation). However, the association may no longer withhold the submitted information under this exception to disclosure once a contract is executed. *See* ORD 541 at 5.

Next, you claim some of the remaining information responsive to the first category of the request is protected by the attorney-client privilege. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a

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<sup>6</sup>As we are able to make this determination, we need not address your raised exceptions to disclosure of this information.

<sup>7</sup>A our ruling is dispositive for this information, we need not address the remaining arguments against its disclosure.

communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.*, meaning it was “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).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the e-mails submitted in Exhibit 2 were communicated between individuals you identify as association employees, association representatives, and legal counsel for the association or its representatives. You state these communications were made for the purpose of advising the association and its co-defendants regarding legal matters. You also represent the communications have been disclosed only to association employees, attorneys, and representatives. Thus, based on your representations and our review, we agree Exhibit 2 constitutes privileged attorney-client communications. Accordingly, the association may withhold Exhibit 2 under section 552.107(1) of the Government Code.<sup>8</sup>

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<sup>8</sup>As our ruling is dispositive for this information, we need not address the remaining argument against its disclosure.

Section 552.117 of the Government Code may also be applicable to some of the submitted information.<sup>9</sup> Section 552.117 excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Act of May 24, 2011, 82<sup>nd</sup> Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Section 552.117 encompasses personal cellular telephone numbers, provided the cellular telephone service is paid for by the employee with his or her own funds. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). The association may only withhold information under section 552.117(a)(1) on behalf of employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. We have marked a cellular telephone number in the remaining information. If the employee to whom this number pertains timely elected to keep his information confidential, and service for this number is paid for with the employee's own funds, the association must withhold this number under section 552.117(a)(1) of the Government Code. The association may not withhold this number under section 552.117(a)(1) if the employee did not make a timely election to keep the information confidential, or if the employee does not pay for service for this number using his own funds.

In summary, the association may withhold the submitted proposals under section 552.104 of the Government Code. The association may withhold Exhibit 2 under section 552.107(1) of the Government Code. If the employee to whom the marked cellular telephone number pertains timely elected to keep his information confidential, and service for this number is paid for with the employee's own funds, the association must withhold the marked number under section 552.117(a)(1) of the Government Code. The remaining responsive information must be released.

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.

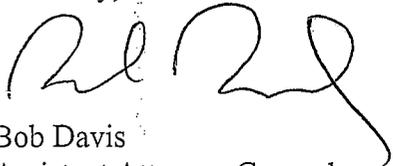
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free,

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<sup>9</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,



Bob Davis  
Assistant Attorney General  
Open Records Division

RSD/eb

Ref: ID# 421570

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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Alamo Claim Service  
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Allcat Claims Services, LP  
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BrightClaim, Inc.  
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Catastrophe Specialist, Inc. (CSI)  
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CNC Catastrophe & National Claims  
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Eberl Claims Service  
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G&G Insurance Adjusters  
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Evans Claims Services  
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GAB Robins & Cunningham Lindsey  
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