



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 22, 2011

Ms. Susan Denmon Banowsky  
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Austin, Texas 78746-7568

OR2011-18879

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# 440355.

The Texas Windstorm Insurance Association (the "association"), which you represent, received two requests from the same requestor for the following categories of information: (1) all checks to two named individuals from April 1, 2011 through October 4, 2011, including expensive reports and documents pertaining to expense reports; (2) all employees and contractors whose employment at the association ended between April 1, 2011 and October 4, 2011, including specified information pertaining to such individuals; (3) communications between the association and the Texas Department of Insurance (the "department") from April 1, 2011 through October 4, 2011 regarding association employees or contractors under specified sections of the Government Code; (4) all checks to a named individual from April 1, 2011 through October 19, 2011, including expensive reports and documents pertaining to expense reports; (5) all checks paid to two named individuals or law firms from November 1, 2010 through October 19, 2011, including invoices with duties and rates, and expensive reports and documents pertaining to expense reports. You state the association has released information responsive to categories one and four, and a portion of categories two, three, and five to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.111 of the Government Code, and privileged under Texas Rule of Evidence 503 and Texas Rule of

Civil Procedure 192.5. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we note the submitted information responsive to the second request is subject to section 552.022(a)(16) of the Government Code. Section 552.022(a)(16) provides for required public disclosure of “information that is in a bill for attorney’s fees and that is not privileged under the attorney-client privilege,” unless the information is made confidential under the Act or other law. Gov’t Code § 552.022(a)(16). The submitted information consists of attorney fee bills. Thus, the association must release this information pursuant to section 552.022(a)(16) unless it is expressly confidential under the Act or other law. The Texas Supreme Court has held that the Texas Rules of Evidence and the Texas Rules of Civil Procedure are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503 and the attorney work product privilege under Texas Rule of Civil Procedure 192.5 for the information subject to section 552.022. As section 552.101 of the Government Code applies to confidential information, we will also consider the association’s arguments for the information at issue under this exception

We first address your arguments for the information that is subject to section 552.022. Texas Rule of Evidence 503 enacts the attorney-client privilege, providing in relevant 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;
- (D) between representatives of the client or between the client and a representative of the client; or

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<sup>1</sup>We assume 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.

(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 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).

You assert portions of the information at issue, which you have marked, consist of confidential communications between the association and the association’s outside legal counsel. You state these communications were made for the purpose of facilitating the rendition of professional legal services to the association. Further, you state that the submitted information was intended to be, and has remained, confidential. Accordingly, the association may withhold the information we have marked on the basis of the attorney-client privilege under Texas Rule of Evidence 503.<sup>2</sup> We note, however, that you have failed to identify some of the parties to the communications in the submitted attorney fee bills. *See* Open Records Decision No. 676 at 8 (2002) (governmental body must inform this office of identities and capacities of individuals to whom each communication at issue has been made; this office cannot necessarily assume that communication was made only among categories of individuals identified in rule 503). Additionally, some of the information you have marked does not indicate it was actually communicated. We find you have failed to demonstrate that any of the remaining information at issue documents privileged attorney-client communications. Accordingly, none of the remaining information at issue may be withheld under Texas Rule of Evidence 503.

Next, we address your argument under Texas Rule of Civil Procedure 192.5 for some of the remaining information at issue. 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

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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, we find you have failed to demonstrate that any of the remaining information at issue 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 the association may not withhold any of the remaining information at issue under rule 192.5 of the Texas Rules of Civil Procedure.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Section 401.051 of the Insurance Code requires the Texas Department of Insurance (the "department"), or an examiner appointed by the department, to visit each insurance carrier and examine the carrier's financial condition, ability to meet liabilities, and compliance with the laws affecting the conduct of the carrier's business. Ins. Code § 401.051(a), (b). In connection with this examination process, section 401.058 states:

(a) A final or preliminary examination report and any information obtained during an examination are confidential and are not subject to disclosure under [the Act].

(b) Subsection (a) applies if the examined carrier is under supervision or conservatorship. Subsection (a) does not apply to an examination conducted in connection with a liquidation or receivership under this code or another insurance law of this state.

*Id.* § 401.058. The association states that the information at issue in the submitted attorney fee bills was created by the department during the course of examinations under chapter 401 of the Insurance Code. However, the present request is for information held by the association, not the department. The association has not explained how or why section 401.058 would be applicable to information in its possession. *See* Open Records Decision No. 640 at 4 (1996) (the department must withhold any information obtained from audit “work papers” that are “pertinent to the accountant’s examination of the financial statements of an insurer” under statutory predecessor to section 401.058). Thus, you have failed to demonstrate the information at issue is confidential under section 401.058 of the Insurance Code, and the association may not withhold it under section 552.101 of the Government Code on that basis.

We next turn to your claim under section 552.103 of the Government Code for a portion of the remaining submitted information at issue, which is responsive to the first request. Section 552.103 provides in pertinent 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 that it seeks to withhold. To meet this burden, the 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 state, and provide documentation showing, that a lawsuit styled *Texas Windstorm Insurance Association v. Bill Tassin*, cause no. D1-GN-11-002037 in the District Court of Travis County, 98th Judicial District was pending on the date the association received the first request. Further, you state that the information at issue relates to the pending case. Upon review, we agree litigation to which the association is a party was pending at the time the association received the first request for information. We also conclude the information at issue is related to the pending litigation.

We note, however, once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any information at issue that has either been obtained from or provided to all opposing parties in the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. We note information to which the named employee had access in the usual scope of his employment is not considered to have been obtained by the opposing party to pending litigation and thus may be withheld under section 552.103. In this instance, a portion of the submitted information reflects it was sent or received by the former employee or his attorney, the opposing party. Therefore, all potential parties have already seen these documents. As such, the association may not withhold these documents, which we have marked for release, under section 552.103 of the Government Code. The association may withhold the remaining information, which we have marked, under section 552.103 of the Government Code.<sup>3</sup> Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the association may withhold the information we have marked on the basis of the attorney-client privilege under Texas Rule of Evidence 503. The association may withhold the information we have marked under section 552.103 of the Government Code. The remaining information must be released.

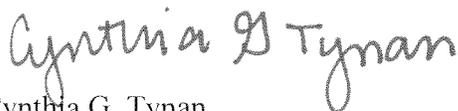
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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,



Cynthia G. Tynan  
Assistant Attorney General  
Open Records Division

CGT/ag

Ref: ID# 440355

Enc. Submitted documents

c: Requestor  
(w/o enclosures)