



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 1, 2012

Mr. Stanton Strickland
Associate Commissioner
General Counsel Division
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2012-12022

Dear Mr. Strickland:

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# 460662 (TDI Ref. No. 127436).

The Texas Department of Insurance (the "department") received a request for a specified motion and mediation statement. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code.¹ We have considered your arguments and reviewed the submitted information.

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. Section 154.073 of the Civil Practice and Remedies Code provides in relevant part that:

- (a) Except as provided by subsections (c), (d), (e), and (f), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not

¹Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Civil Procedure 192.5, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision No. 676 at 1-2 (2002). Further, in this instance, the proper exceptions to raise when asserting the work product privilege for information not subject to section 552.022 of the Government Code is section 552.111. *See id.*, Open Records Decision No. 677 (2002).

subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

(b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings related to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

Civ. Prac. & Rem. Code § 154.073(a), (b). You state the submitted pre-mediation statement is a communication made to an impartial third party pursuant to a formal dispute resolution process under chapter 154 of the Civil Practice and Remedies Code. Upon review, we agree this information, which you have marked, consists of a communication relating to the subject matter of the dispute made by a participant in an alternative dispute resolution procedure. Accordingly, we find the information at issue is confidential under section 154.073 of the Civil Practice and Remedies Code and must be withheld under section 552.101 of the Government Code.²

You assert the remaining information is excepted from disclosure based on the attorney work product privilege. Section 552.111 of the Government Code excepts from disclosure “[a]n 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 encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); ORD 677 at 4–8. Rule 192.5 defines work product as:

(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 seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. *Id.*; ORD 677 at 6–8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

²As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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.

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 inform us the remaining information was created by a department attorney for litigation to which the department was a party. However, we note the information at issue was filed with the State Office of Administrative Hearings, which is a non-privileged party. Therefore, we conclude the work product privilege under section 552.111 has been waived. Thus, the department may not withhold any of the remaining information on the basis of the attorney work product privilege under section 552.111 of the Government Code.

In summary, the department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 154.073 of the Civil Practice and Remedies 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.

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,



Michelle R. Garza
Assistant Attorney General
Open Records Division

MRG/som

Ref: ID# 460662

Enc. Submitted documents

c: Requestor
(w/o enclosures)