



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 31, 2012

Mr. David Durden
Vice President - Legal
Texas Windstorm Insurance Association
P.O. Box 99090
Austin, Texas 78709-9090

OR2012-17403

Dear Mr. Durden:

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# 469525.

The Texas Windstorm Insurance Association ("TWIA") received two requests from the same requestor for sixteen categories of information relating to 1) any claims or lawsuits filed against TWIA by Galveston County, any entity affiliated with Galveston County, or any governmental entity located in Galveston County and 2) any claims or lawsuits filed against TWIA by a named individual, a named law firm, or filed by parties represented by the named individual or the named law firm. You state you have released some of the responsive information. You state you will redact policy numbers subject to section 552.136 of the Government Code and e-mail addresses of members of the public subject to section 552.137 of the Government Code.¹ You claim the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code and privileged under Texas

¹Section 552.136 authorizes a governmental body to redact the information described in section 552.136(b) without the necessity of seeking an attorney general decision. See Gov't Code § 552.136(b). If a governmental body redact such information, it must notify the requestor in accordance with section 552.136(e). See *id.* § 552.136(d), (e). Additionally, this office issued Open Records Decision No. 684, a previous determination to all governmental bodies, which authorizes the withholding of ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. We have considered the exception you claim and reviewed the submitted representative samples of information.²

Next, you state the requestor has excluded “personal tax information, social security numbers, home addresses, and names of insureds or claimants” from the scope of his requests “unless the information is part of or has already been disclosed in a public record.” As some of the claimants have filed lawsuits in regard to their claims, their information is presumably part of a public record, and, thus, is responsive to the request. On the other hand, the information of claimants who did not file lawsuits in regard to their claim is not part of or disclosed in a public record and, thus, is not responsive to the request for information. This ruling does not address the public availability of any information that is not responsive to the requests, and TWIA is not required to release this information in response to these requests.

Next, you state TWIA is in communication with the requestor regarding clarification and narrowing of the requests for information. *See id.* § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request). We note a governmental body has a duty to make a good-faith effort to relate a request for information to information the governmental body holds. Open Records Decision No. 561 (1990). In this case, as you have submitted information responsive to the request and have made arguments against disclosure of this information, we will address the applicability of your arguments to the submitted information.³

Next, we note some of the submitted information may have been the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2010-17600 (2010) and 2011-01122 (2011). We have no indication the law, facts, or circumstances upon which these prior rulings were based have changed. Therefore, to the extent the information responsive to the instant request for information is identical to the information previously ruled upon by this office, TWIA must continue to rely on Open Records Letter Nos. 2010-17600 and 2011-01122 as previous determinations and withhold or release the previously ruled upon information in accordance with those rulings. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior

²We assume that the “representative samples” 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.

³We note once TWIA receives clarification of the request for information, TWIA must again seek a ruling from this office before withholding any additional responsive information. *See City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we note the submitted information contains completed reports subject to section 552.022 of the Government Code. Section 552.022(a) provides in relevant part the following:

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). You seek to withhold this information under sections 552.107(1) and 552.111 of the Government Code. However, sections 552.107(1) and 552.111 are discretionary exceptions to disclosure that protect a governmental body's interests. *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 information subject to section 552.022, which we have marked, under section 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 marked information subject to section 552.022. We will also address TWIA's arguments under sections 552.107 and 552.111 for the information not subject to section 552.022.

Rule 192.5 encompasses the attorney work product privilege. For the purposes of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. ORD No. 677 at 9-10. 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. 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 the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate (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 there was a substantial chance 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 the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney's or an attorney's representative. 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 the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You seek to withhold the information subject to section 552.022 in Exhibits A and B as attorney core work product. You state TWIA "is and has been a defendant in numerous lawsuits arising from claims made under TWIA policies, including hundreds of lawsuits following Hurricane Ike." You state the information at issue pertains to discussions among TWIA attorneys, staff, and consultants regarding litigation strategy and defense, and the information "includes and reveals mental impressions and preparation of [TWIA] and its representatives" regarding the litigation. Based on your representations and our review, we find you have demonstrated the 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. Consequently, TWIA may withhold the information subject to section 552.022 in Exhibits A and B under rule 192.5.

Next, we address the remaining information in Exhibits A and B that is not subject to section 552.022. Section 552.111, which 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," encompasses the attorney work product privilege in rule 192.5. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); ORD No. 677 at 4-8. Section 552.111 protects work product as defined in rule 192.5(a) 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). A governmental body seeking to withhold information under the work product aspect of section 552.111 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. The test to determine whether information was created or developed in anticipation of litigation is the same as that discussed above concerning rule 192.5.

As noted above, you state the remaining information you seek to withhold in Exhibits A and B consists of attorney work product. You state this information includes and reveals mental impressions of TWIA attorneys and representatives regarding strategy and defense of litigation arising from claims made under TWIA policies. Based on your representations and our review, we conclude TWIA may withhold the remaining information you seek to withhold in Exhibits A and B as attorney work product under section 552.111 of the Government Code.

We note the remaining information contains an e-mail address of a member of the public. Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c).⁴ Gov't Code § 552.137(a)-(c). The e-mail address at issue is not a type specifically excluded by section 552.137(c) of the Government Code. Accordingly, TWIA must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the e-mail address has affirmatively consented to its disclosure.

In summary, to the extent the information responsive to the instant request for information is identical to the information previously ruled upon by this office, TWIA must continue to rely on Open Records Letter Nos. 2010-17600 and 2011-01122, as previous determinations and withhold or release the previously ruled upon information in accordance with those

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

rulings. TWIA may withhold the information in Exhibits A and B subject to section 552.022 under rule 192.5 of the Texas Rules of Civil Procedure. TWIA may withhold the remaining information you seek to withhold in Exhibits A and B under section 552.111 of the Government Code. TWIA must withhold the e-mail address we have marked under section 552.137, unless the owner consents to its release. 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,



Kristi L. Wilkins
Assistant Attorney General
Open Records Division

KLW/ag

Ref: ID# 469525

Enc. Submitted documents

c: Requestor
(w/o enclosures)