



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 7, 2013

Mr. David F. Brown
Counsel for the Texas Windstorm Insurance Association
Ewell, Bickham, & Brown, LLP
111 Congress Avenue, Suite 400
Austin, Texas 78701

OR2013-07566

Dear Mr. Brown:

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# 486763 (TWIA ID No. 000027).

The Texas Windstorm Insurance Association (the "association"), which you represent, received a request for the Martin, Disiere, Jefferson, & Wisdom, LLP ("MDJW") billing records on the Multidistrict Litigation 75924-1 during a specified period of time. You state you are providing a portion of the requested information to the requestor. You claim the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. You also state release of the submitted information may implicate the proprietary interests of MDJW. Accordingly, you have notified MDJW of the request and of its right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the circumstances). We have received

comments from MDJW.¹ We have considered the submitted arguments and reviewed the submitted representative sample of information.²

Initially, we note a portion of the submitted information, which we have marked, is not responsive to the instant request for information because it was created after the association received the request for information. This ruling does not address the public availability of any information that is not responsive to the request and the association is not required to release such information in response to this request.

Next, we note a portion of the remaining responsive information may have been the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2013-07209 (2013). In Open Records Letter No. 2013-07209, we held, in relevant part, the association may withhold the information we marked in the attorney-fee bills at issue under rule 503 of the Texas Rules of Evidence and section 552.110(b) of the Government Code. There is no indication the law, facts, or circumstances on which the prior ruling was based has changed. Accordingly, to the extent the information responsive to the instant request for information is identical to the information previously ruled upon by this office, the association may continue to rely on Open Records Letter No. 2013-07209 as a previous determination and withhold or release the previously ruled upon information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, to the extent the responsive information is not encompassed by Open Records Letter No. 2013-07209, we will consider your arguments against its release.

Next, we note the submitted responsive documents consist of information that is subject to section 552.022 of the Government Code, which provides in pertinent part:

- (a) 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:

¹Although MDJW raises section 552.101 of the Government Code in conjunction with Texas Rule of Civil Procedure 192.5 and Texas Rule of Evidence 503, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

²We 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 those records contain substantially different types of information than that submitted to this office.

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(16). The information at issue consists of attorney-fee bills subject to section 552.022(a)(16). Although you seek to withhold this information under sections 552.103, 552.107, and 552.111 of the Government Code, these sections are discretionary exceptions to disclosure that protect a governmental body's interests and do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 677 (2002) (governmental body may waive attorney work product privilege under section 552.111), 676 at 6 (attorney-client privilege under section 552.107 may be waived), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the association may not withhold the information subject to section 552.022 under sections 552.103, 552.107, or 552.111 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" that make information expressly confidential for the purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, 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. Additionally, because section 552.101 makes information confidential under the Act, we will address its applicability to the information subject to section 552.022.³

The association raises Texas Rule of Evidence 503 for information in the submitted attorney fee bills. Rule 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

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:

³We note MDJW asserts attorney-client privilege under Texas Rule of Evidence 503 and section 552.107 of the Government Code, as well as attorney work product privilege under Texas Rule of Civil Procedure 192.5 and section 552.111 of the Government Code. However, these are discretionary exceptions that protect only the interests of a governmental body, as distinguished from exceptions intended to protect the interests of third parties. *See* Open Records Decision Nos. 677 at 10-11 (attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure and section 552.111 may be waived), 676 at 12 (attorney-client privilege under rule 503 of the Texas Rules of Evidence and section 552.107 may be waived), 522 (1989) (discretionary exceptions intended to protect only interests of governmental body as distinct from exceptions intended to protect information deemed confidential by law or interests of third parties). Accordingly, the association may not withhold any of the submitted information on the basis of MDJW's arguments under these exceptions.

(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

(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).

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. *See* ORD 676 at 6-7. Thus, in order to withhold attorney-client privileged 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. *Id.* Upon a demonstration of all three factors, the entire communication is 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 claim the submitted attorney-fee bills are confidential in their entirety under rule 503. However, as noted above, section 552.022(a)(16) of the Government Code provides information "that is *in* a bill for attorney's fees" is not excepted from required disclosure unless it is confidential under other law or privileged under the attorney-client privilege. *See* Gov't Code § 552.022(a)(16) (emphasis added). This provision, by its express language, does not permit the entirety of an attorney-fee bill to be withheld. *See also* Open Records Decision Nos. 676 (attorney fee-bill cannot be withheld in entirety on basis it contains or is attorney-client communication pursuant to language in section 552.022(a)(16)), 589 (1991)

(information in attorney-fee bill excepted only to extent information reveals client confidences or attorney's legal advice). Thus, the attorney-fee bills may not be withheld in their entirety.

You assert the fee bills include confidential communications between the Texas Department of Insurance ("TDI"), TDI's representatives, the association, the association's outside counsel, and the association's representatives. You state pursuant to section 441.053 of the Insurance Code, TDI has administrative oversight of the association. See Ins. Code § 401.053(a) (commissioner can place insurer under supervision if necessary due to insurer's insolvency, exceeding of powers, or failure to comply with the law). You explain this relationship places TDI in the role of supervisor over the association, which includes granting TDI immediate and complete access to any information, including confidential or privileged information, that is under the association's control, the authority to review all claims payments, and access to all claims information, including documents, comments, payments, policy information, litigation information, and analysis. You further explain Alvarez & Marsal Insurance Advisory Services, LLC ("AMIAS") is a management consultant firm engaged by TDI and assists TDI and the association in various matters including claims evaluation and settlements. You state these parties, the association, the association's outside counsel, and the association's representatives, are all privileged parties because they share a common legal interest in regards to the matters at issue. See TEX. R. EVID. 503(b)(1)(c) (discussing privilege among parties "concerning a matter of common interest"); see also *In re Auclair*, 961 F.2d 65, 69 (5th Cir. 1992) (citing *Hodges, Grant & Kaufmann v. United States Government*, 768 F.2d 719, 721 (5th Cir. 1985)) (attorney-client privilege not waived if privileged communication is shared with third person who has common legal interest with respect to subject matter of communication). You state these communications were made for the purpose of facilitating the rendition of professional legal services to the association and were intended to be and have remained confidential. Based on your representations and our review, we find the information we have marked may be withheld under Texas Rule of Evidence 503.⁴ We note, however, you have failed to identify some of the parties to the communications in the submitted attorney fee bills. See ORD 676 at 8 (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 communicated. Therefore, we find you have failed to demonstrate 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.

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

The association also raises rule 192.5 of the Texas Rules of Civil Procedure for the remaining information in the submitted attorney fee bills. For 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. *See* ORD 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 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 there was a substantial chance 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 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 privileged 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.*, 861 S.W.2d at 427.

You state the information at issue is protected by the attorney work product privilege because it contains detailed legal and risk analyses of claims, potential claims, and defenses. You further state this information was prepared or developed in the anticipation of litigation that would arise or continue based on the claims described in the information at issue. You generally assert that, on the date of the request, there were multiple pending claims involving the association. Upon review, we find you have failed to demonstrate how any of the remaining information consists of mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative created for trial or in anticipation of litigation. Accordingly, the association may not withhold any of the remaining information at issue under Texas Rule of Civil Procedure 192.5.

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. Section 552.101 encompasses information protected by other statutes. You contend some of the remaining responsive information is confidential under section 2210.105 of the Insurance Code, which provides, in pertinent part:

(g) The presence of the commissioner or the commissioner's designated representative at a closed meeting does not waive or impair any privilege, including attorney-client privilege, that exists in statute or at common law.

Ins. Code § 2210.105(g). You assert pursuant to section 2210.105(g) any document memorializing a communication in a closed meeting that is otherwise privileged remains exempt and not waived by the involvement of TDI. However, upon review, we find section 2210.105(g) neither expressly makes information confidential nor prohibits public disclosure of any information for purposes of section 552.101 of the Government Code. *See* Open Records Decision No. 487 at 2 (1987) (confidentiality under statutory predecessor to section 552.101 required express language making certain information confidential or stating information shall not be released to public); *see also* Open Records Decision No. 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure). Therefore, we find none of the remaining responsive information may be withheld under section 552.101 of the Government Code in conjunction with section 2210.105(g) of the Insurance Code.

Next, MDJW raises section 552.110 of the Government Code. Section 552.110 protects (1) trade secrets and (2) commercial or financial information, the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. Gov't Code § 552.110. Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure information that is trade secrets obtained from a person and information that is privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of a "trade secret" from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides a trade secret to be as follows:

[A]ny formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the

production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (citation omitted); *see also Huffines*, 314 S.W.2d at 776. In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret, as well as the Restatement's list of six trade secret factors.⁵ *See* RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.* § 552.110(b); Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

MDJW argues release of some of its remaining information would cause the company substantial competitive harm. Upon review, we conclude MDJW has established the release of some of the information at issue, which we have marked, would cause the company substantial competitive injury. Therefore, the association must withhold the information we have marked under section 552.110(b).⁶ However, we find MDJW has not made the specific

⁵There are six factors the Restatement gives as indicia of whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

⁶As our ruling is dispositive of this information, we need not address MDJW's remaining arguments against its disclosure.

factual or evidentiary showing required by section 552.110(b) that release of any of the remaining information at issue would cause the company substantial competitive harm. *See* ORD 319 at 3 (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). We note the pricing information of a government contractor is generally not excepted under section 552.110(b) because we believe the public has a strong interest in the release of prices charged by a government contractor. *See* Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors), 319 at 3 (information relating to pricing is not ordinarily excepted from disclosure under statutory predecessor to section 552.110). *See generally* Dep't of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Accordingly, the association may not withhold any of the remaining responsive information at issue under section 552.110(b) of the Government Code.

MDJW also argues its some of its remaining information constitutes trade secrets. We note pricing information pertaining to a particular proposal or contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." RESTATEMENT OF TORTS § 757 cmt. b; *see also Huffines*, 314 S.W.2d at 776. Upon review, we find MDJW has failed to demonstrate the information for which it asserts section 552.110(a) meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for this information. Accordingly, the association may not withhold any of the remaining responsive information at issue on the basis of section 552.110(a) of the Government Code.

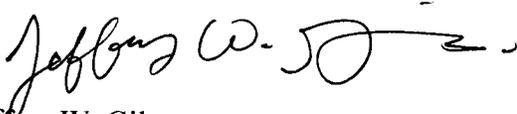
In summary, to the extent the information at issue is identical to the information previously ruled upon by this office in Open Records Letter No. 2013-07209, the association may continue to rely on this ruling as a previous determination and withhold or release the previously ruled upon information in accordance with that ruling. The association may withhold the information we have marked under Texas Rule of Evidence 503. The association must withhold the information we have marked under section 552.110(b) of the Government Code. The association must release the remaining responsive 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, 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 black ink, appearing to read "Jeffrey W. Giles", with a stylized flourish at the end.

Jeffrey W. Giles
Assistant Attorney General
Open Records Division

JWG/bhf

Ref: ID# 486763

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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