



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 21, 2014

Mr. David F. Brown
Counsel for the Texas Windstorm Insurance Association
Ewell, Brown, & Blanke, L.L.P.
111 Congress Avenue, 28th Floor
Austin, Texas 78701

OR2014-12616

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# 529895 (TWIA ID# 000244).

The Texas Windstorm Insurance Association (the "association"), which you represent, received a request for all billing records and expense reports submitted to the association by McLeod, Alexander, Powel & Apffel, P.C., and Bracewell & Giuliani, L.L.P., during a specified time period. You state the association will release some of the requested information. You also state the association does not have information responsive to some of the request.¹ You claim some of the submitted information is excepted from disclosure under sections 552.107, 552.111, and 552.136 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the submitted representative sample of information.²

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

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.

We note, and the association acknowledges, the submitted information consists of attorney fee bills that are 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 confidential under the Act or other law. Gov’t Code § 552.022(a)(16). Although the association raises sections 552.107 and 552.111 of the Government Code for the attorney fee bills, these exceptions are discretionary in nature and do not make information confidential under the Act. *See* Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the association may not withhold the submitted information under sections 552.107 or 552.111. However, the Texas Supreme Court has held the Texas Rules of Evidence and Texas Rules of Civil Procedure are “other law” that make information expressly confidential for purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will consider the association’s assertion of the attorney-client privilege and the attorney work product privilege under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, respectively. Additionally, the association raises section 552.136 of the Government Code, which makes information confidential for purposes of section 552.022. Accordingly, we will also consider the applicability of this exception to the submitted information.

Texas Rule of Evidence 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:

- (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 it is 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 attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show 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 the communication is confidential by explaining it was not intended to be disclosed to third persons and 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).

The association asserts the fee bills include confidential communications between the Texas Department of Insurance (“TDI”), TDI’s representatives, the association, the association’s representatives, and the association’s outside counsel. The association states 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 law). The association explains this relationship places TDI in the role of supervisor over the association, which includes requiring TDI to participate in litigation-related discussions with the association and the association’s counsel so TDI could approve expenditures for legal counsel or settlements. The association states 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. Upon review, we find the information we have marked consists of confidential attorney-client communications and may be withheld under Texas Rule of Evidence 503.³ However, we find the association has not demonstrated the remaining information consists of privileged communications. Accordingly, we find the association has failed to demonstrate the applicability of the attorney-client privilege to the remaining information at issue, and the association may not withhold it under rule 503.

Texas Rule of Civil Procedure 192.5 encompasses the attorney work product privilege. For purposes of section 552.022 of the Government Code, information may be withheld 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. *See* TEX. R. CIV. P. 192.5(a), (b)(1).

³As our ruling for this information is dispositive, we need not address your remaining argument against its disclosure.

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 when the governmental body received the request for information, and (2) consists of an attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *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 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 prong of the work product test requires the governmental body to show the documents at issue contain the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test may be withheld under rule 192.5, provided the information does not fall within the purview of the exceptions to the privilege enumerated in rule 192.5(c). *See Caldwell*, 861 S.W.2d at 427.

The association contends portions of the remaining information constitute attorney work product protected by rule 192.5 of the Texas Rules of Civil Procedure. The association states the remaining information at issue consists of materials prepared by an attorney for the association in support of pending litigation. Upon review, we find the association has demonstrated the information we have marked constitutes core attorney work product. Therefore, we conclude the association may withhold the information we have marked under Texas Rule of Civil Procedure 192.5. However, we find the association has not demonstrated any of the remaining information at issue consists of mental impressions, opinions, conclusion, or legal theories of an attorney or an attorney's representative that were created for trial or in anticipation of trial. Therefore, the association may not withhold any of the remaining information at issue under rule 192.5 of the Texas Rules of Civil Procedure.

Section 552.136 of the Government Code provides, "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). Upon review, we find the association must withhold the information we have marked under section 552.136 of the Government Code. However, we find the association has failed to demonstrate the remaining information it marked is subject to section 552.136; thus, the association may not withhold it on that basis.

In summary, the association may withhold the information we have marked under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. The association must withhold the information we have marked under section 552.136 of the Government Code. The association must release the remaining 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



David L. Wheelus
Assistant Attorney General
Open Records Division

DLW/bhf

Ref: ID# 529895

Enc. Submitted documents

c: Requestor
(w/o enclosures)