



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

November 30, 1993

Ms. Alesia L. Sanchez  
Legal Assistant  
Legal Services, 110-1A  
Texas Department of Insurance  
P.O. Box 149104  
Austin, Texas 78714-9104

OR93-728

Dear Ms. Sanchez:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code (former V.T.C.S. article 6252-17a).<sup>1</sup> Your request was assigned ID# 21806.

The Texas Department of Insurance received an open records request for all the department's records regarding Standard Indemnity Company, Ltd. You are seeking to withhold some of the records requested under section 552.101 of the Government Code (formerly V.T.C.S. article 6252-17a, section 3(a)(1)). You are also seeking to withhold other records under sections 552.107 and 552.111 of the Government Code (formerly V.T.C.S. article 6252-17a, sections 3(a)(7) and 3(a)(11)). You argue that sections 552.107 and 552.111 except all or part of 17 documents from required public disclosure. For the sake of simplicity, we have marked these documents as exhibits 1 through 17.

You first contend that section 552.101, in conjunction with article 1.10D, section 5(a) of the Insurance Code, excepts some of the requested information from required public disclosure. We agree. Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You advise us that some of the requested information is relevant to an

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<sup>1</sup>We note that the Seventy-Third Legislature codified the Open Records Act as chapter 552 of the Government Code and repealed article 6252-17a, V.T.C.S. See Acts 1993, 73d Leg., ch. 268, §§ 1, 46. The codification of the Open Records Act in the Government Code is a nonsubstantive codification. *Id.* § 47.

inquiry by the insurance fraud unit. Section 5(a) of article 1.10D of the Insurance Code provides that:

Any information or material acquired by the department that is relevant to an inquiry by the insurance fraud unit is not a public record for as long as the commissioner considers reasonably necessary to complete the investigation, protect the person under investigation from unwarranted injury, or serve the public interest.

In enacting section 5(a) of article 1.10D, the legislature chose to grant the commissioner, rather than the attorney general, the authority to decide if certain requested information is confidential. *See* Open Records Decision No. 608 (1992) at 2. Therefore, you may withhold under section 552.101 the materials you have designated as falling within the scope of section 5(a).

Next, you argue that the documents now marked exhibits 1 through 5 contain legal advice and opinions excepted from disclosure under section 552.107. We conclude that portions of exhibits 3 and 4 constitute legal advice provided that the documents were written by an attorney for the department. Section 552.107(1)<sup>2</sup> excepts from required public disclosure information covered by the attorney-client privilege. This privilege encompasses information that reveals client communications to the attorney regarding the subject matter of the representation and attorney communications of legal advice and opinion to the client. Open Records Decision No. 574 (1990) at 3. We have examined the documents you claim contain legal advice and have concluded that the portions of exhibits 3 and 4 that we have marked constitute advice or opinion. We cannot determine from the documents, however, whether they were written by attorneys. Therefore, we conclude merely that you may withhold the marked information if it was written by an attorney.

Finally, you argue that the documents marked exhibits 6 through 17 contain information excepted from disclosure by section 552.111. You mistakenly claim, however, that section 552.111 protects attorney work product from disclosure. Section 552.111 provides that "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency is excepted from the requirements of section 552.021."<sup>3</sup> This section excepts from disclosure internal agency communications consisting of advice, recommendations, and opinions reflecting the policymaking processes of the governmental body. This section does not protect facts or written observations of facts. Open Records Decision No. 615 (1993) at 5.

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<sup>2</sup>Section 552.107(2) concerns information subject to a court order prohibiting disclosure and is not involved in this case.

<sup>3</sup>Section 552.021 states the general rule that information held by a governmental body is public information.

Although section 552.111 might apply to some information that also qualifies as attorney work product, work product is excepted from disclosure under section 552.103. Open Records Decision No. 429 (1985) at 4. Section 552.103 excepts from disclosure information "relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision of a state is or may be a party . . . ." To establish that this section applies to information, a governmental body must demonstrate that it is involved in or reasonably anticipates it will be involved in litigation and that the information relates to that litigation. *See* Open Records Decision No. 542 (1990) at 2 (stating that the governmental body must show how and why an exception applies); 555 (1990) at 2 (declaring that for the litigation exception to apply the requested information must relate to litigation that is pending or reasonably anticipated).

We have examined exhibits 6 through 17 and have concluded that they contain some recommendations and opinions that may be withheld under section 552.111. You have not, however, established that any of the information is attorney work product excepted from disclosure under section 552.103; you have not demonstrated that the department is involved in or reasonably anticipates any litigation to which the information relates. Therefore, you may not withhold any information as attorney work product under section 552.103. On other hand, you may withhold under section 552.111 the portions of exhibits 7, 9, 11, and 17 that we have marked.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open-records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Margaret A. Roll  
Assistant Attorney General  
Open Government Section

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Ref.: ID# 218006

Enclosures: Submitted documents

cc: Mr. R.L. Mikesell, Esq.  
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(w/o enclosures)