



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 10, 1997

Ms. Mary Keller
Senior Associate Commissioner
Legal and Compliance
Texas Department of Insurance
333 Guadalupe Street, P.O. Box 149104
Austin, Texas 78714-9104

OR97-0317

Dear Ms. Keller:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 103723.

The Texas Department of Insurance (the "department") received a request for various information relating to Texas Insurance Code § 21.79E - Action for Amount of Deductible. You state that some of the requested information will be provided to the requestor, but contend the remaining information is excepted from disclosure under sections 552.103, 552.107 and 552.111 of the Government Code. We have considered your arguments and have reviewed the documents submitted.

We will first address your claim under section 552.103. You assert that the requested information is related to ongoing litigation, the case of *State Farm v. The Attorney General of Texas*, cause number 96-01410, Travis County, Texas. Although the department is not a party to this suit, you state that it filed an *amicus curiae* brief in support of the plaintiff's motion for reconsideration and therefore, the department has an ongoing interest in this matter. You further state that the information consists of attorney work product related to the ongoing litigation which, if released, would reveal one staff attorney's mental processes, conclusions and legal theories.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the governing body is or may be a party. This office has stated that the "work product doctrine . . . merely represents one aspect of section (552.103) information

relating to litigation.” Open Records Decision No. 429 (1985). *See also* Open Records Decision No. 647 (during the pendency of litigation, work product of an attorney in a civil proceeding is protected from disclosure by section 552.103 of the Government Code so long as the exception is timely raised). Before we will allow exceptions for an attorney’s work product under 552.103, the governing body must first meet its burden of showing the applicability of 552.103 in a particular situation. *Id.*, Open Records Decision No. 575 (1990). The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref’d n.r.e.); Open Records Decision No. 551 (1990) at 4. The department must meet both prongs of this test for information to be excepted under section 552.103(a).

We conclude that the filing by the department of a brief as *amicus curiae* in a suit which does not otherwise involve the department does not make the department a “party” to litigation for purposes of section 552.103. We therefore find that the department has not met its burden in establishing that it is a party to ongoing litigation under 552.103, and therefore it may not withhold the requested information under this section. *See* Open Records Decision No. 575 (1990) (a discovery privilege relevant to litigation between private parties does not shield information held by a governmental body from public disclosure).

You next contend some of the requested information includes legal advice and opinions, which are attorney-client communications exempt from public disclosure under section 552.107. Section 552.107 excepts information from disclosure if:

it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.

Gov’t Code § 552.107. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only “privileged information,” that is, factual information or requests for legal advice communicated by the client to the attorney and legal advice or opinion rendered by the attorney to the client. *Id.* at 7-8. Section 552.107(1) does not, however, protect purely factual information. *Id.*

After reviewing the submitted documents, we conclude the department may withhold part of this information under the attorney-client privilege of section 552.107. We have marked with red tags the information that may be withheld, and with green tags that which must be released.¹

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts

¹Because we conclude the information you seek to withhold under section 552.111 is excepted from disclosure under section 552.107, we need not address your 552.111 arguments.

presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/ch

Ref.: ID# 103723

Enclosures: Marked documents

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(w/o enclosures)