



September 14, 2001

Ms. Amanda Crawford  
Public Information Coordinator  
Office of the Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

OR2001-4120

Dear Ms. Crawford:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 151999.

The Office of the Attorney General (the "OAG") received a written request for "all documents related to any past or present investigation involving" Rimkus Consulting Group, Inc. ("Rimkus"). You state that approximately 1500 pages of responsive documents have been made available to the requestor. You contend, however, that certain other documents, a representative sample of which you submitted to this office, are excepted from public disclosure pursuant to sections 552.101 and 552.111 of the Government Code.<sup>1</sup>

We must first address, however, a threshold issue. The requestor contends that the OAG did not timely comply with the requirement found in section 552.301(d) of the Government Code, which provides as follows:

(d) A governmental body that requests an attorney general decision under Subsection (a) must provide to the requestor within a reasonable time *but not*

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<sup>1</sup>In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision No. 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.

*later than the 10th business day after the date of receiving the requestor's written request:*

- (1) a written statement that the governmental body wishes to withhold the requested information and has asked for a decision from the attorney general about whether the information is within an exception to public disclosure; and
- (2) a copy of the governmental body's written communication to the attorney general asking for the decision or, if the governmental body's written communication to the attorney general discloses the requested information, a redacted copy of that written communication. [Emphasis added.]

Failure to comply with the requirements of section 552.301(d) results in the legal presumption that the requested information must be released to the requestor unless there exist compelling reasons for withholding the information. Gov't Code § 552.302.

The OAG received the current records request on June 27, 2001. Consequently, the tenth business day following receipt of the request was July 12, 2001, the day on which you submitted your request for an open records ruling. The requestor has confirmed in correspondence to this office that he received a copy of your ruling request with a postmark of July 12, 2001. By sending the requestor a copy of your ruling request on July 12, 2001, you substantially complied with both requirements under section 552.301(d). Accordingly, we conclude that the OAG timely complied with section 552.301(d).<sup>2</sup> We therefore will consider your arguments for non-disclosure regarding the records at issue.

You first contend that the records submitted as Exhibit 8 are made confidential under section 17.61 of the Business and Commerce Code, and thus must be withheld from the public pursuant to section 552.101 of the Government Code.<sup>3</sup> Section 17.61(f) governs the release of materials obtained by the OAG pursuant to a Civil Investigative Demand, and provides in pertinent part as follows:

No documentary material produced pursuant to a demand under this section, unless otherwise ordered by a court for good cause shown, shall be produced for inspection or copying by, nor shall its contents be disclosed to any person

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<sup>2</sup>Other correspondence, postmarked July 13, 2001, was sent to the requestor apparently for the sole purpose of providing an itemized estimate of charges for copies of the records to be released. See Gov't Code § 552.2615.

<sup>3</sup>Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

other than the authorized employee of the consumer protection division without the consent of the persons who produced the material. The consumer protection division shall prescribe reasonable terms and conditions allowing the documentary material to be available for inspection and copying by the person who produced the material or any duly authorized representative of that person.

This provision requires the OAG to withhold all documentary material the consumer protection division obtained pursuant to a Civil Investigative Demand. In this instance, the requestor does not appear to be acting as the authorized representative of Rimkus. We therefore conclude that the OAG must withhold the documentary material you submitted under Exhibit 8 in accordance with section 17.61(f) of the Business and Commerce Code.

Finally, you contend that the remaining information at issue, which you submitted as Exhibits 4 through 7, is attorney work product excepted from disclosure under section 552.111 of the Government Code. *See* Open Records Decision No. 647 at 2-3 (1996) (citing *Owens-Corning Fiberglass v. Caldwell*, 818 S.W.2d 749 (Tex. 1991)). Section 552.111 of the Government Code excepts from required public disclosure:

An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.

This office has stated that if a governmental body wishes to withhold attorney work product under section 552.111, it must show that the material 1) was created for trial or in anticipation of litigation under the test articulated in *National Union Fire Insurance Company v. Valdez*, 863 S.W.2d 458 (Tex. 1993), and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. *See id.*

When showing that the requested documents were created in anticipation of litigation for the first prong of the work product test, a governmental body's task is twofold. The governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances 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. *See id.* at 5. In this regard, you have provided the following explanation:

In 1997, the Insurance Practices Section ("IPS") of the OAG opened an investigation file in anticipation of litigation . . . which related to insurance company claim handling practices on home foundation claims. IPS reasonably anticipated litigation when it opened this investigation in 1997 because it believed many insurers were denying foundation claims when they should have been paying them, there was already pending private litigation regarding this widespread problem, legal arguments existed on both side of

the issue as to whether there was insurance coverage, and a very significant amount of money was involved.

Based on the above representations and our review of the information at issue, we conclude that you have met the first prong of the work product test. Furthermore, having reviewed the information at issue, we conclude that the information reveals attorney mental impressions, conclusions, and strategy. We therefore conclude that the OAG may withhold Exhibits 4 through 7 in their entirety as attorney work product under section 552.111 of the Government Code.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

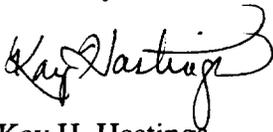
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kay H. Hastings  
Assistant Attorney General  
Open Records Division

KHH/RWP/seg

Ref: ID# 151999

Enc. Submitted documents

c: Mr. David T. Dorr, P.E.  
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(w/o enclosures)