



May 23, 2002

Ms. Sara Shiplet Waitt
Senior Associate Commissioner
Texas Department of Insurance
Legal & Compliance
P.O. Box 149104
Austin, Texas 78714-9104

OR2002-2780

Dear Ms. Waitt:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 163328.

The Texas Department of Insurance (the “department”) received a request for files, notes, correspondence, and other information relating to Commissioner’s Order 01-0963 regarding Crawford & Company. You state that the department will release some of the requested information. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.137 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This exception protects information that another statute makes confidential. The department claims that some of the requested information is confidential under section 552.101 in conjunction with article 21.58A of the Insurance Code. Article 21.58A relates to Health Care Utilization Review Agents and provides in part:

- (i) Each utilization review agent shall utilize written medically acceptable screening criteria and review procedures which are established and periodically evaluated and updated with appropriate involvement from

physicians, including practicing physicians, dentists, and other health care providers. . . . Such written screening criteria and review procedures shall be available for review and inspection to determine appropriateness and compliance as deemed necessary by the commissioner and copying as necessary for the commissioner to carry out his or her lawful duties under this code, provided, however, that any information obtained or acquired under the authority of this subsection and article is confidential and privileged and not subject to the open records law or subpoena except to the extent necessary for the commissioner to enforce this article.

Ins. Code art. 21.58A § 4(i). You state that some of the submitted information is part of the Utilization Review Plan of Crawford & Company, including policies and procedures for review, and is the type of information that is confidential under section 4(i) of article 21.58A. Based on your representations, we agree that this information is excepted from disclosure under section 552.101 of the Government Code in conjunction with article 21.58A of the Insurance Code.

Next, we note that the rest of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). In this instance, the rest of the submitted information pertains to a completed investigation. Therefore, the department must release this information under section 552.022(a)(1), unless it is excepted from disclosure under section 552.108 or expressly confidential under other law. The department claims that some of the information that relates to the investigation is protected by the attorney-client privilege under section 552.107 and the attorney work product and deliberative process privileges under section 552.111. Sections 552.107 and 552.111 are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived. As such, these exceptions are not other law that makes information confidential for the purposes of section 552.022. *See* Open Records Decision Nos. 630 at 4-7 (1994) (attorney-client privilege under section 552.107 may be waived), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111). Therefore, the department may not withhold any of the information that relates to the completed investigation under sections 552.107 or 552.111.

We note, however, that the attorney-client privilege also is found in rule 503 of the Texas Rules of Evidence. The Texas Supreme Court has held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” See *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will determine whether any of the submitted information is confidential under rule 503.

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. 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).

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. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided that 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 department asserts that some of the information that relates to the investigation consists of privileged communications between the department's staff attorneys and employees authorized to act on behalf of the department. Based on these representations, we conclude that the department has shown that some of the submitted information is protected by the attorney-client privilege under Texas Rule of Evidence 503. The department may withhold that information, which we have marked, under rule 503.

The department also contends that some of the submitted information constitutes attorney work product. The attorney work product privilege is also found in rule 192.5 of the Texas Rules of Civil Procedure. Therefore, we will consider whether the information for which the department claims this privilege is confidential under rule 192.5. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001) (Texas Rules of Civil Procedure are 'other law' within meaning of Gov't Code § 552.022).

An attorney's core work product is confidential under rule 192.5. Core work product is defined as the work product of an attorney or an attorney's representative developed in anticipation of litigation or for trial that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. 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 that the material (1) was created for trial or in anticipation of litigation 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 that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate (1) that 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) that 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 National 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 that the documents at issue contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test is confidential under rule 192.5, provided that the information does not fall within the purview of the exceptions to the

privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

The department asserts that the information that is responsive to this request for information encompasses an attorney's entire litigation file. The department indicates that this information relates to an enforcement action that resulted in an order of the Commissioner of Insurance. The department claims that the responsive information reveals the organizational tactics, mental processes, and conclusions used in developing the department's case against Crawford. We note that the requestor has informed the department that his request is for information that pertains to a specific individual's complaint. Thus, we disagree with the department's characterization of the requested information as comprising an attorney's entire file. We conclude, however, that the department has shown that some of the information in question was created for trial or in anticipation of litigation and consists of the mental impressions, opinions, conclusions, or legal theories of an attorney for the department or an attorney's representative. The department may withhold that information, which we have marked, under Texas Rule of Civil Procedure 192.5.

Lastly, we address the department's claim under section 552.137 of the Government Code. This exception, which the Seventy-seventh Legislature added to chapter 552 of the Government Code, provides as follows:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. We agree that section 552.137 is applicable to the e-mail addresses of private individuals that the department has marked. The department states that the individuals to whom these e-mail addresses belong have not affirmatively consented to their public disclosure. Therefore, the department must withhold these e-mail addresses under section 552.137 of the Government Code.

In summary, the department must withhold some of the submitted information under section 552.101 of the Government Code in conjunction with article 21.58A of the Insurance Code. The department also may withhold the information that is protected by the attorney-client privilege under Texas Rule of Evidence 503 and the information that is protected by the attorney work product privilege under Texas Rule of Civil Procedure 192.5. The department must withhold the private individuals' e-mail addresses under section 552.137. The department must release the rest of the submitted information.

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).

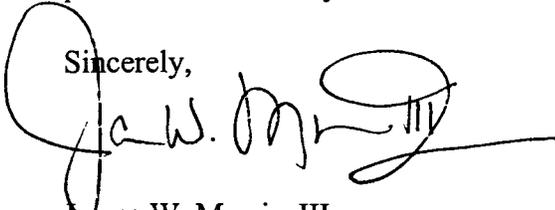
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. 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,

A handwritten signature in black ink, appearing to read "J.W. Morris III". The signature is written in a cursive style with a large initial "J" and a long horizontal stroke at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 163328

Enc: Marked documents

c: Ms. Diana Silva
c/o Mr. John Silva
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(w/o enclosures)