



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 4, 2009

Ms. Susan Denmon Banowsky
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Austin, Texas 78746-7568

OR2009-15720

Dear Ms. Banowsky:

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# 358975.

The Texas Windstorm Insurance Association (the "association"), which you represent, received two requests from the same requestor for information regarding (1) assessments charged to and paid by association members since January 1, 2005; (2) all settlement agreements since January 1, 2005 in which the association is a party; (3) contracts and billing records from third party adjusting companies since January 1, 2005; (4) the names of the adjusting companies hired or contracted by the association and amounts paid to these companies since January 1, 2005; (5) documents showing all entities or individuals the association has agreed to indemnify or has indemnified since January 1, 2005; (6) indemnification agreements between the association and other parties since January 1, 2005; and (7) information indicating the association's indemnification criteria. You state you have released the first category of information to the requestor. You further state that there is no information responsive to the seventh category of the request.¹ You question whether the association is a governmental body and whether the submitted information is subject to the Act. In the alternative, you claim that the submitted information is excepted from disclosure

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

under sections 552.103, 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 192.5.² We have considered your arguments and reviewed the submitted information.³

The Act applies to “governmental bodies” as that term is defined in section 552.003(1)(A) of the Government Code. Under the Act, the term “governmental body” includes “a board, commission, department, committee, institution, agency, or office that is within or is created by the executive or legislative branch of state government and that is directed by one or more elected or appointed members[.] Gov’t Code § 552.003(1)(A)(I).

The association was created by legislative act in 1971 to provide windstorm and hail coverage as an insurer of last resort.⁴ *See* Acts 1971, 62nd Leg., p. 843, ch. 100. The association’s enabling statute is Chapter 2210 of the Insurance Code. Ins. Code § 2210. The board of directors of the association is composed of nine members, who are appointed by the Commissioner of Insurance (the “commissioner”) in accordance with the requirements of section 2210.102 of the Insurance Code.⁵ *Id.* § 2210.102. Further, the board of directors of the association is “responsible and accountable to the commissioner.” *Id.* § 2210.101. In addition, the commissioner “by rule shall adopt the plan of operation to provide Texas windstorm and hail insurance in a catastrophe area.” *Id.* § 2210.151; 28 T.A.C. § 5.4001. Thus, the association was created by the legislative branch of government, its board of directors are appointed by the commissioner, the board of directors of the association is responsible and accountable to the commissioner, and it functions under a plan adopted by the commissioner.

Accordingly, on the basis of the above factors, we determine that the association is within the executive branch of the state, and is a governmental body for the purposes of section 552.003(1)(A)(i) of the Government Code. *See* Attorney General Opinion GA-0065 (2003) (finding the Texas Water Advisory Council to be within the executive branch of state government, created by the legislative branch of government, and an entity consisting of thirteen members to be directed by one or more elected or appointed members, and therefore

²Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Civil Procedure 192.5, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

³We 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 that those records contain substantially different types of information than that submitted to this office.

⁴We note that the association was originally the Texas Catastrophe Property Insurance Association.

⁵We note that, as of June 19, 2009, the commission has the duty to appoint the entirety of the board of the association. *See* Ins. Code § 552.102 as amended by Acts of May 21, 2007, 80th Leg., R.S., ch. 548 § 2.14; Act of June 2, 2009, 81st Leg., R.S., ch. 1408 § 18, sec. 2210, eff. June 19, 2009.

a governmental body for purposes of section 552.003(1)(A)(i) of the Government Code); cf, Attorney General Opinion DM-284 (1994) (finding that because governing body of Texas Title Insurance Guarantee Association and other associations (collectively the "associations") were in whole or part appointed by State Board of Insurance and because the associations functioned under a plan of operation that must be approved by the commissioner, the associations were "within the executive. . . branch of the state," as entities within the Department of Insurance; thus since the associations were "directed by one or more elected or appointed members," the associations were governmental bodies for the purposes of the Open Meetings Act); compare Gov't Code § 552.003(1)(A)(i) (defining "governmental body" for purposes of the Act) with *id.* § 551.001(3) (defining "governmental body" for purposes of the Open Meetings Act). As the submitted information consists of records of the association that were collected, assembled, or maintained in connection with the transaction of the association's official business, we conclude that the submitted information is subject to the Act and must be released unless the association demonstrates that the information falls within an exception to public disclosure under the Act. See Gov't Code §§ 552.006, .021, .301, .302. Accordingly, we will consider the submitted arguments.

We note that portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022(a) provides in part that:

(a) 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:

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege; [and]

...

(18) a settlement agreement to which a governmental body is a party.

Id. § 552.022(a)(3), (16), (18). In this instance, the submitted information includes information in an account, voucher, or contract relating to the expenditure of public funds by the association, attorney fee bills, and settlement agreements to which the association is a party. Thus, the association must release this information pursuant to subsections 552.022(a)(3), 552.022(a)(16), and 552.022(a)(18) unless it is expressly confidential under other law. You assert that this information is excepted under

sections 552.103, 552.107, 552.111, and 552.136 of the Government Code and protected under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. However, sections 552.103, 552.107, and 552.111 are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 676 at 6 (2002) (section 552.107 is not other law for purposes of section 552.022), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Therefore, the association may not withhold the information subject to section 552.022, which we have marked, under section 552.103, section 552.107, or section 552.111 of the Government Code. However, the Texas Supreme Court has held that the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your arguments under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5 for the information that is subject to section 552.022. In addition, because section 552.136 of the Government Code constitutes other law for the purposes of section 552.022, we will consider your arguments under that section. We will also address your arguments under sections 552.103, 552.107, and 552.111 for the information not subject to section 552.022.

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

You state that the information you seek to withhold in the submitted attorney fee bills either documents communications between the association’s defense counsel and its third party adjuster made for the purpose of facilitating the rendition of professional legal services by the attorney to the association or reflects communications made between counsel for the association and its co-defendants made for the purpose of the rendition of professional legal services. You inform us that you have a joint defense agreement with these co-defendants concerning a matter of common interest. You contend the information you have marked constitutes communications between the association’s counsel, representatives and employees of the association, counsel for the co-defendants, and representatives of the co-defendants. You state that these communications were not intended to be disclosed and that they have remained confidential. Based on your representations and our review, we conclude that some of the information is protected by the attorney-client privilege, and the association may withhold the information we have marked under Texas Rule of Evidence 503. We note, however, that some of the remaining information you have marked under rule 503 does not document a communication. Accordingly, you have failed to establish that the remaining information you have marked documents confidential communications that were made between privileged parties. Therefore, we conclude that Texas Rule of Evidence 503 is not applicable to the remaining information you have marked and it may not be withheld on this basis.

Texas Rule of Civil Procedure 192.5 encompasses the attorney work product privilege. For purposes of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent that the information implicates the core work product aspect of

the work product privilege. *See* Open Records Decision No. 677 at 9-10 (2002). 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). Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate that the material was (1) created for trial or in anticipation of litigation and (2) consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *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 that (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 part of the work product test requires the governmental body to show that the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both parts of the work product test is confidential under rule 192.5, provided that the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d at 427.

Having considered your arguments and reviewed the information at issue, we conclude you have not demonstrated that any of the remaining information consists of core work product for purposes of Texas Rule of Civil Procedure 192.5. Accordingly, the association may not withhold any of the remaining information under rule 192.5.

Section 552.136 of the Government Code states "[n]otwithstanding any other provision of this chapter, 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). Accordingly, the association must withhold the account numbers you have marked, and the additional information we have marked, in the information subject to section 552.022 under section 552.136 of the Government Code.

We now address your arguments for the information not subject to 552.022 of the Government Code. Section 552.103 of the Government Code provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Id. § 552.103(a), (c). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, a governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

You state the remaining information relates to claims against the association for extra-contractual damages. You inform us that the association is "currently defending more than 650 lawsuits arising from Hurricane Ike alone," and provide documentation showing that litigation is pending against the association. You further inform us that a number of the lawsuits are being handled as multi-district litigation. Based on your representations and our review, we find you have demonstrated litigation was pending when the association received this request for information. Further, we find the remaining information consists of documents relating to the pending litigation. Thus, we conclude the association may withhold the remaining information under section 552.103 of the Government Code.⁶

We note, however, once the information at issue has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See Open Records Decision Nos. 349 (1982), 320 (1982).* Thus, any information at issue that has either been obtained from or provided to all opposing parties in the litigation is not excepted from disclosure under section 552.103(a) and must be

⁶As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

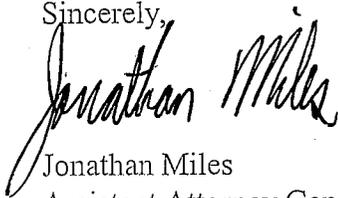
disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, with the exception of the information we have marked as privileged under Texas Rule of Evidence 503 and the marked information under section 552.136 of the Government Code, the association must release the information subject to sections 552.022(a)(3), 552.022(a)(16), and 552.022(a)(18) of the Government Code. The remaining information may be withheld under section 552.103(a) of the Government Code.

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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/cc

Ref: ID# 358975

Enc. Submitted documents

c: Requestor
(w/o enclosures)