



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 22, 2011

Ms. Susan Denmon Banowsky
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OR2011-02659

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# 409755.

The Texas Windstorm Insurance Association (the "association"), which you represent, received two requests from the same requestor for all documents detailing windstorm claims, photographs, and inspections regarding property owned by two named individuals in four locations in the wake of Hurricane Ike and all documents pertaining to a specified address. You state the association is withholding portions of the submitted information subject to sections 552.136 and 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. Additionally, we note you have notified third parties of the request. *See Gov't Code* § 552.304 (interested third party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information, a portion of which is a representative sample.²

¹We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including insurance policy numbers and bank account numbers under section 552.136 of the Government Code and e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. Thus, we do not address your remaining arguments for this information.

²We 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 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.

Initially, we note that the submitted information falls within the scope of section 552.022(a) of the Government Code, which provides that several categories of information are subject to required public disclosure unless they are made expressly confidential under "other law." *See id.* § 552.022(a)(1) (completed report, audit, evaluation, or investigation made of, for, or by governmental body), (3) (information in account, voucher, or contract relating to receipt or expenditure of public or other funds by governmental body), (5) (all working papers, research material, and information used to estimate need for or expenditure of public funds or taxes by governmental body, on completion of estimate), and (16) (information in bill for attorney's fees that is not privileged under attorney-client privilege). Therefore, the submitted information must be released pursuant to section 552.022, unless the information is expressly confidential under other law. *See id.* § 552.022(a). The association claims portions of the submitted information are excepted from disclosure under sections 552.103, 552.107(1), and 552.111 of the Government Code. However, these are discretionary exceptions to disclosure that protect a 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 Gov't Code § 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103, 552.107(1), and 552.111 are not other law that makes information confidential for the purposes of section 552.022. Therefore, the association may not withhold any of the submitted information under section 552.103, section 552.107(1), or section 552.111 of the Government Code. The Texas Supreme Court has held, however, that the Texas Rules of Evidence and Texas Rules of Civil Procedure are "other law" that makes information confidential for the purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege, as encompassed by section 552.107(1), is also found at Texas Rule of Evidence 503, and the attorney work product privilege, as encompassed by section 552.111, is also found at Texas Rule of Civil Procedure 192.5. Accordingly, we will consider the association's assertions of the attorney-client and attorney work product privileges under rules 503 and 192.5 for portions of the submitted information. As section 552.101 of the Government Code also constitutes "other law" for purposes of section 552.022, we will also consider the association's arguments for the submitted information under this exception.

Texas Rule of Evidence 503 enacts the attorney-client privilege, providing in relevant part:

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

You assert portions of Exhibit 6, which you have marked, consist of confidential communications between the association and the association's outside legal counsel. You state these communications were made for the purpose of facilitating the rendition of professional legal services to the association. Further, you state that the submitted information was intended to be, and has remained, confidential. Accordingly, the association may withhold the information we have marked on the basis of the attorney-client privilege under Texas Rule of Evidence 503.³ We note, however, that you have failed to identify some of the parties to the communications in the submitted attorney fee bills. *See* ORD 676 at 8 (governmental body must inform this office of identities and capacities of individuals to whom each communication at issue has been made; this office cannot necessarily assume that communication was made only among categories of individuals identified in rule 503). Additionally, some of the information you have marked does not indicate it was actually communicated. We find you have failed to demonstrate that any of the remaining information at issue in Exhibit 6 documents privileged attorney-client communications.

³As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Accordingly, none of the remaining information at issue in Exhibit 6 may be withheld under Texas Rule of Evidence 503.

Next, we address your argument under Texas Rule of Civil Procedure 192.5 for some of the remaining information at issue in Exhibit 6. Rule 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* ORD 677 at 9-10. 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's 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.*, 861 S.W.2d at 427.

In this instance, we find you have failed to demonstrate that any of the remaining information at issue in Exhibit 6 consists of mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative that were created for trial or in anticipation of litigation. We, therefore, conclude the association may not withhold any of the remaining information at issue in Exhibit 6 under rule 192.5 of the Texas Rules of Civil Procedure.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. You assert the remaining information is excepted from public disclosure under section 552.101 in conjunction with the Gramm-Leach-Bliley Act (the "GLB Act"). *See* 15 U.S.C. § 6801 *et seq.* The Federal Financial Modernization Act, also known as the

GLB Act, became law in November 1999. The purpose of the GLB Act is to promote competition in the financial services industry. *See* H.R. Conf. Rep. No. 106-434, at 245 (1999), *reprinted in* 1999 U.S.C.C.A.N. 245, 245. Reflecting Congressional concern regarding the dissemination of consumers' personal financial information, the GLB Act provides certain privacy protections "to protect the security and confidentiality of [consumers'] nonpublic personal information." 15 U.S.C. § 6801(a). The statute defines nonpublic personal information ("NPI") as "personally identifiable financial information ["PIFI"] - (i) provided by a consumer to a financial institution; (ii) resulting from any transaction with the consumer or any service performed for the consumer; or (iii) otherwise obtained by the financial institution." *Id.* § 6809(4)(A). Federal regulations define PIFI as

any information: (i) [a] consumer provides to [a regulated financial institution] to obtain a financial product or service . . . ; (ii) [a]bout a consumer resulting from any transaction involving a financial product or service between [a regulated financial institution] and a consumer; or (iii) [a regulated financial institution] otherwise obtain[s] about a consumer in connection with providing a financial product or service to that consumer.

16 C.F.R. § 313.3(o)(1). Sections 6802(a) and (b) of title 15 of the United States Code provide in pertinent part as follows:

(a) Notice requirements

Except as otherwise provided in this subchapter, a financial institution may not, directly or through any affiliate, disclose to a nonaffiliated third party any nonpublic personal information, unless such financial institution provides or has provided to the consumer a notice that complies with section 6803 of this title.

(b) Opt out

(1) In general

A financial institution may not disclose nonpublic personal information to a nonaffiliated third party unless--

(A) such financial institution clearly and conspicuously discloses to the consumer, in writing or in electronic form or other form permitted by the regulations prescribed under section 6804 of this title, that such information may be disclosed to such third party;

(B) the consumer is given the opportunity, before the time that such information is initially disclosed, to direct that such information not be disclosed to such third party; and

(C) the consumer is given an explanation of how the consumer can exercise that nondisclosure option.

15 U.S.C. § 6802(a), (b). "Nonaffiliated third party" is defined as "any entity that is not an affiliate of, or related by common ownership or affiliated by corporate control with, the financial institution, but does not include a joint employee of such institution." *Id.* § 6809(5). Additionally, section 22.14 of title 28 of the Texas Administrative Code provides as follows:

(a) Conditions for disclosure. Except as otherwise authorized in this subchapter, a covered entity may not, directly or through any affiliate, disclose any nonpublic personal financial information about a consumer to a nonaffiliated third party unless:

(1) the covered entity has provided to the consumer an initial notice as required under § 22.8 of this title (relating to Initial Privacy Notice);

(2) the covered entity has provided to the consumer an opt out notice as required in § 22.11 of this title (relating to Form of Opt Out Notice to Consumers and Opt Out Methods);

(3) the covered entity has given the consumer a reasonable opportunity, before it discloses the information to the nonaffiliated third party, to opt out of the disclosure; and

(4) the consumer does not opt out.

28 T.A.C. § 22.14(a). Section 6809(3)(A) of title 15 of the United States Code defines financial institution as "any institution the business of which is engaging in financial activities as described in section 1843(k) of Title 12." 15 U.S.C. § 6809(3)(A). Section 1843(k)(4)(b) of title 12 defines the following activity as financial in nature: "Insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability, or death, or providing and issuing annuities, and acting as principal, agent, or broker for purposes of the foregoing, in any State." 12 U.S.C. § 1843(k)(4)(B).

The association is an association composed of all property insurers authorized to engage in the business of property insurance in Texas, other than insurers prevented by law from writing on a statewide basis coverages available through the association. Ins. Code § 2210.051(a); *see id.* §§ 2210.006, 2210.051(b) (to engage in business of insurance in Texas, property insurer must be member of the association); *see also* 28 T.A.C. § 5.4001(c)(2)(D). The primary purpose of the association is to provide an adequate market for windstorm and hail insurance in Texas seacoast territories. *Id.* § 2210.001. In addition, you state the association is an insurance company. *See id.* §§ 2210.053(a)(1), 2210.203(a); *see also Tex. Windstorm Ins. Ass'n v. Poole*, 255 S.W.3d 775, 777 (Tex. App.—Amarillo

2008, pet. denied) (the association has “attributes of a private insurance business while operating under a governmental cloak”). Based on these representations, we agree the association is a financial institution for purposes of the GLB Act and a covered entity for purposes of section 22.14. We understand the requestor is a nonaffiliated third party. *See* 15 U.S.C. § 6809(5); 28 T.A.C. § 22.2(20).

You seek to withhold information regarding particular policyholders’ insurance files, including claim numbers, addresses, telephone numbers, loan information, liability limits, coverage amounts, premium information, claim information, claim amounts, and amounts paid, and other financial information, such as valuations, depreciation, and deductible amounts under the GLB Act and chapter 22 of title 28 of the Texas Administrative Code. You state the above categories of information were provided to the association for the purpose of obtaining insurance and are also information resulting from transactions with insureds or services performed for insureds by the association, a regulated financial institution. *See* 15 U.S.C. § 6809(4)(A), 16 C.F.R. § 313.3(o)(1). You do not indicate the association provided opt out notices to the insureds. Because the names and contact information were provided to the association by the insureds in order to obtain a service, this information falls under the definition of PIFI. *See generally Individual Reference Services Group, Inc. v. Fed. Trade Comm’n*, 145 F. Supp.2d 6, 26-31 (D.D.C. 2001) (discussing language, structure, and history of GLB Act to determine whether certain information meets definition of PIFI). Based on your representations and our review, we determine the association is prohibited by section 6802(a) and (b) of title 15 of the United States Code and section 22.14(a) of title 28 of the Texas Administrative Code from releasing the insureds’ names and contact information. Accordingly, the information we have marked must be withheld from disclosure under section 552.101 in conjunction with the GLB Act. Because the remaining information does not personally identify any of the insureds, this information does not constitute PIFI. Therefore, the remaining information may not be withheld under section 552.101 in conjunction with the GLB Act.

Section 552.101 of the Government Code also encompasses section 36.159 of the Insurance Code, which governs the Texas Department of Insurance subpoena powers and duty to protect confidentiality of privileged records. You assert section 36.159(c) makes confidential the remaining information at issue. Subchapter C of chapter 36 pertains to the power of the commissioner of the Texas Department of Insurance (the “commissioner”) to issue subpoenas with respect to a matter that the commissioner has authority to consider or investigate. *See* Ins. Code § 36.152. Section 36.159 provides in relevant part the following:

(a) A record subpoenaed and produced under this subchapter that is otherwise privileged or confidential by law remains privileged or confidential until admitted into evidence in an administrative hearing or a court.

...

(c) Specific information relating to a particular policy or claim is privileged and confidential while in the possession of an insurance company,

organization, association, or other entity holding a certificate of authority from the department and may not be disclosed by the entity to another person, except as specifically provided by law.

Id. § 36.159(a), (c). You assert the remaining information is confidential under section 36.159(c) because the association is an insurance company and an association, and the requested information relates to particular policies and claims in the association's possession. *See id.* § 36.159(c). However, you have not shown the requested information is otherwise privileged or confidential by law and relates to a matter in which the commissioner has issued a subpoena pursuant to subchapter C of the Insurance Code. *See id.* §§ 36.152, .159(a). Accordingly, we find you have failed to establish the remaining information is confidential under section 36.159(c) of the Insurance Code, and the association may not withhold it under section 552.101 of the Government Code on that ground.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Prior decisions of this office have found financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). For example, information related to an individual's mortgage payments, assets, bills, and credit history is generally protected by the common-law right to privacy. *See* Open Records Decision Nos. 545, 523 (1989); *see also* ORD 600 (personal financial information includes choice of particular insurance carrier). In this instance, however, the claimants' names and contact information are being withheld under section 552.101 in conjunction with the GLB Act, and any privacy interest those individuals may have in their financial information has already been protected. Therefore, the none of the remaining information is confidential under common-law privacy, and the association may not withhold it on that basis.

Finally, we note that some of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

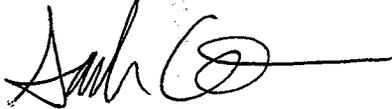
In summary, the association may withhold the information we have marked under Texas Rule of Evidence 503. The association must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the GLB Act. The

remaining information must be released to the requestor, but any information that is protected by copyright may only be released in accordance with copyright law.

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,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/vb

Ref: ID# 409755

Enc. Submitted documents

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