



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 4, 2014

Mr. Nick Lealos  
Office of Agency Counsel  
Legal Section MC 110-1A  
Texas Department of Insurance  
P.O. Box 149104  
Austin, Texas 78714-9104

OR2014-02116

Dear Mr. Lealos:

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# 513130 (TDI# 143858).

The Texas Department of Insurance (the "department") received a request for information pertaining to a named individual. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code and privileged under Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the submitted representative sample of information.<sup>1</sup>

You inform us some of submitted information is from a closed investigative enforcement case file. Thus, you acknowledge this information is subject to section 552.022(a)(1) of the Government Code. This section provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is excepted from disclosure under section 552.108 of the Government Code or made confidential under the Act or other law. Gov't Code § 552.022(a)(1). Although you

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<sup>1</sup>We 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.

assert the information at issue is excepted from disclosure under section 552.107 of the Government Code, this section is a discretionary exception to disclosure that protects a governmental body's interest and does not make information confidential. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the department may not withhold the information subject to section 552.022 under section 552.107. However, the Texas Supreme Court has held that the Texas Rules of Civil Procedure and Texas Rules of Evidence are "other law" within the meaning of section 552.022. *In re City of Georgetown*, S.W.3d 328, 336 (Tex. 2001). *See In re City of Georgetown*, 53 S.W.3d 328, 3636 (tex. 2001). Accordingly we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503 and your argument under rule 192.5 for the information subject to section 552.022(a)(1). We will also consider your arguments for the information not subject to section 552.022(a)(1) of the Government Code.

Next, we note the department has redacted portions of the submitted information. You do not assert, nor does our review of the records indicate, you have been authorized to withhold this information without seeking a ruling from this office. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2001). Therefore, information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. In this instance, we can discern the nature of the redacted information; thus, being deprived of this information does not inhibit our ability to make a ruling. In the future, however, the department should refrain from redacting any information that it is not authorized to withhold in seeking an open records ruling. Failure to do so may result in the presumption the redacted information is public. *See* Gov't Code § 552.302.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses information protected by other statutes, including section 402.083 of the Labor Code. Section 402.083 provides that "[i]nformation in or derived from a claim file regarding an employee is confidential and may not be disclosed by the [Division of Worker's Compensation of the Texas Department of Insurance] except as provided by this subtitle[.]" Lab. Code § 402.083(a). This office has interpreted section 402.083 to protect only that "information in or derived from a claim file that explicitly or implicitly discloses the identities of employees who file workers' compensation claims." Open Records Decision No. 619 at 10 (1993). However, we also have stated "[w]hether specific information implicitly discloses the identify of a particular employee must be determined on a case-by-case basis." *Id.* Prior decisions of this office have found information revealing the date of injury, as well as an injured employee's name, beneficiary name, commission claim number, social security number, home telephone number, home address, and date of birth implicitly or explicitly identifies claimants and is therefore

excepted from disclosure under section 552.101 in conjunction with section 402.083.<sup>2</sup> Only in those cases where release of the employer's identity would reveal the claimant's identity may the identity of an employer be withheld. You state the information you have marked is derived from claim files and implicitly or explicitly discloses the identities of employees who have filed workers' compensation claims. Based on your representations and our review, we find the information we have marked implicitly or explicitly identifies workers' compensation claimants. Therefore, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 402.083 of the Labor Code. However, we conclude you have not shown the remaining information at issue either implicitly or explicitly identifies employees who have filed workers' compensation claims. Therefore, the remaining information at issue is not confidential under section 402.083 of the Labor Code, and may not be withheld under section 552.101 of the Government Code.

We now address your claims under section 552.101 of the Government Code in conjunction with section 402.093 of the Labor Code. Section 552.101 also encompasses section 402.092. Section 402.092 provides confidentiality and exceptions to confidentiality for the investigation files of the Division of Workers' Compensation of the Department of Insurance (the "division"). Section 402.092 provides, in relevant part:

(b) Information maintained in the investigation files of the division is confidential and may not be disclosed except:

- (1) in a criminal proceeding;
- (2) in a hearing conducted by the division;
- (3) on a judicial determination of good cause;
- (4) to a governmental agency, political subdivision, or regulatory body if the disclosure is necessary or proper for the enforcement of the laws of this or another state or of the United States; or
- (5) to an insurance carrier if the investigation file relates directly to a felony regarding workers' compensation or to a claim in which restitution is required to be paid to the insurance carrier.

(c) Division investigation files are not open records for purposes of [the Act].

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<sup>2</sup>The "commission" refers to the predecessor agency of the division, which was established under House Bill 7, 79th Legislature, R.S. (2005).

(d) Information in an investigation file that is information in or derived from a claim file, or an employer injury report or occupational disease report, is governed by the confidentiality provisions relating to that information.

Labor Code § 402.092(b)-(d). For purposes of section 402.092, an investigation file is “any information compiled or maintained by the division with respect to a division investigation authorized under this subtitle or other workers’ compensation law [but] does not include information or material acquired by the division that is relevant to an investigation by the insurance fraud unit and subject to Section 701.151, Insurance Code.” *Id.* § 402.092(a).

You assert portions of the submitted information are contained in investigation files assembled by the Office of the Medical Advisor and Medical Quality Review Panel pursuant to their statutory duties under sections 413.0511 and 413.0512 of the Labor Code. Further, we understand the information at issue is not subject to the release provisions in section 402.092, section 413.0511, section 413.0513, or section 413.0514 of the Labor Code. Accordingly, we find the department must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 402.092 of the Labor Code.

Rule 192.5 encompasses the attorney work product privilege. For purposes of section 552.022 of the Government Code, information may be withheld under rule 192.5 only to the extent 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 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 the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate (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 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 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.

You explain the remaining information is a closed investigation enforcement case file and includes a Request for Disposition, which was prepared by a department attorney in preparation for potential administrative action against an insurance company. You also state the related case file documents were prepared by a department attorney and reveal the attorney's mental impressions, conclusions, and legal theories regarding the litigation file and possible resolution. You contend the information reveals whether the attorneys considered specific information to be significant, the attorney's thoughts regarding the information communicated to or uncovered by the attorneys, and actions to be taken. Based on your representations and our review, we agree the information you marked is protected core work product. Accordingly, the department may withhold the information you marked under Texas Rule of Civil Procedure 192.5.<sup>3</sup>

In summary, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 402.083 of the Labor Code and the information you marked under section 552.101 of the Government Code in conjunction with section 402.092 of the Labor Code. The department may withhold the information you marked under Texas Rule of Civil Procedure 192.5. The remaining information must be released.

You also ask this office to issue a previous determination that would permit the department to withhold information collected, assembled, or maintained in a division investigative file under section 413.0511 or section 413.0512 of the Labor Code under section 552.101 of the Government Code in conjunction with sections 402.092 and 413.0513 of the Labor Code without the necessity of requesting a decision under section 552.301 of the Government Code. We decline to issue such a previous determination at this time. Accordingly, 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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of the submitted information.

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in cursive script that reads "Paige Thompson". The signature is written in black ink and is positioned above the typed name.

Paige Thompson  
Assistant Attorney General  
Open Records Division

PT/dls

Ref: ID# 513130

Enc. Submitted documents

c: Requestor  
(w/o enclosures)