



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 16, 2014

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

OR2014-12336

Dear Mr. Harris:

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# 529246 (TDI #150126).

The Texas Department of Insurance (the "department") received a request for copies of communications between department employees and Texas Windstorm Insurance Association ("TWIA") employees.¹ You state e-mail addresses of members of the public will be redacted pursuant to Open Records Decision No. 684 (2009).² You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107,

¹You inform us the requestor was required to make a deposit for payment of anticipated costs for the request under section 552.263 of the Government Code, which the department received. *See* Gov't Code § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date that governmental body receives deposit or bond).

²Open Records Decision No. 684 is a previous determination issued by this office authorizing all governmental bodies to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

and 552.111 of the Government Code.³ You also state you notified TWIA of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released). We have received comments from TWIA. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note some of the submitted information is not responsive to the present request because it is not a communication between department employees and TWIA. This ruling does not address the public availability of the non-responsive information, which we have marked, and the department need not release it in response to this request.

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, such as section 36.252 of the Insurance Code, which provides:

(a) Information or material acquired by the department that is relevant to an investigation is not a public record for the period that the department determines is relevant to further or complete an investigation.

(b) Investigation files are not open records for purposes of [the Act], except as specified herein.

Ins. Code § 36.252. Section 36.251 of the Insurance Code states "investigation file"

means any information collected, assembled, or maintained by or on behalf of the department with respect to an investigation conducted under this code or other law. The term does not include information or material acquired by the department that is:

- (1) relevant to an investigation by the insurance fraud unit; and
- (2) subject to Section 701.151 [of the Insurance Code].

³Although you raise section 552.022 of the Government Code, that provision is not an exception to disclosure. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are expressly confidential under the Act or other law. *See* Gov't Code § 552.022. We note the proper exceptions to raise when asserting the attorney-client privilege and work product privilege for information not subject to section 552.022 of the Government Code are sections 552.107 and 552.111 of the Government Code, respectively. *See* Open Records Decision Nos. 676 at 1 -2 (2002), 677 (2002).

Id. § 36.251. You state the information you have indicated is part of a case file that pertains to a pending investigation by the department's enforcement section. You do not indicate the information at issue is relevant to an investigation by the department's insurance fraud unit. Accordingly, based on your representations and our review, we find the information you have indicated is confidential under section 36.252 of the Insurance Code and must be withheld under section 552.101 of the Government Code until such time the department determines the submitted information is no longer relevant to further or complete its investigation.⁴

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. Gov't Code § 552.107. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* ORD 676 at 6-7. First, a governmental body must demonstrate the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.*, meaning it was "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). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

You assert the remaining information consists of confidential communications between representatives of the department, the department's attorneys, representatives of TWIA, and TWIA's attorneys. You state pursuant to section 441.053 of the Insurance Code, the department has administrative oversight of TWIA. *See* Ins. Code § 401.053(a) (commissioner can place insurer under supervision if necessary due to insurer's insolvency, exceeding of powers, or failure to comply with law). You explain this relationship places the department in the role of supervisor over TWIA, which includes requiring the department to participate in TWIA's decision making process in various matters, including the review of expenditures, personnel decisions, contracting, and litigation matters. You state these communications were made for the purpose of facilitating the rendition of professional legal services to the department and were intended to be and have remained confidential. Based on your representations and our review, we find the remaining information may be withheld under section 552.107 of the Government Code.⁵

In summary, the department must withhold the information you have indicated under section 552.101 of the Government Code in conjunction with section 36.252 of the Insurance Code. The department may withhold the remaining information under section 552.107 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.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 providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Meredith L. Coffman
Assistant Attorney General
Open Records Division

MLC/dls

⁵As our ruling for this information is dispositive, we need not address your remaining arguments against its disclosure.

Ref: ID# 529246

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Texas Windstorm Association
c/o Mr. David F. Brown
Ewell, Brown & Blanke, L.L.P.
111 Congress Avenue, 28th Floor
Austin, Texas 78701
(w/o enclosures)

