



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 21, 2017

Mr. David Wheelus
Public Information Coordinator
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2017-29054

Dear Mr. Wheelus:

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# 689146 (TDI# 188739).

The Texas Department of Insurance (the "department") received a request for information pertaining to a specified company from a specified time period.¹ You state the department will release some information. You state the department will redact certain information pursuant to the previous determination issued to the department in Open Records Letter No. 2017-20483 (2017).² You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have

¹You state the department sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²Open Records Letter No. 2017-20483 is a previous determination issued to the department authorizing it to withhold, under section 552.101 of the Government Code in conjunction with section 401.058 of the Insurance Code, insurance carrier examination reports without the necessity of requesting an attorney general decision if the examination was not conducted in connection with a liquidation or receivership.

considered the exceptions you claim and reviewed the submitted representative sample of information.³

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. This section encompasses information protected by other statutes, such as section 401.201 of the Insurance Code, which provides the following:

Information relating to the financial solvency of an organization regulated by the department under [the Insurance Code] or another insurance law of this state that is obtained by the department’s early warning system is confidential and is not subject to disclosure under Chapter 552, Government Code. Ins. Code § 401.201. You state the information at issue relates to the financial solvency of the named company and was obtained through the department’s early warning system. You further indicate the named company is regulated by the department under the Insurance Code. Based on your representations and our review, we determine the information you indicated must be withheld under section 552.101 of the Government Code in conjunction with section 401.201 of the Insurance Code.⁴

Section 552.101 of the Government Code also encompasses information protected by section 823.011 of the Insurance Code. Section 823.011 states, in relevant part, the following:

(a) This section applies only to information, including documents and copies of documents, that is:

(1) reported or otherwise provided under Subchapter B or C [of Chapter 823 of the Insurance Code] or Section 823.201(d) or (e) or section 823.0147[.]

...

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.

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

(b) The information shall be confidential and privileged for all purposes. Except as provided by Subsections (c) and (d), the information may not be disclosed without the prior written consent of the insurer to which it pertains.

Id. § 823.011(a)(1), (b). You state the information at issue, which consists of exhibits to required notices, was provided to the department under subchapter C of chapter 823 of the Insurance Code. You state the exceptions to confidentiality found in subsections (c) and (d) of section 823.011 do not apply to the information at issue, and you do not indicate the insurers to which it pertains have consented to its disclosure. *See id.* § 823.011(b)-(d). Therefore, we conclude the department must withhold the information you indicated under section 823.011 of the Insurance Code pursuant to section 552.101 of the Government Code.

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” *See Gov’t Code* § 552.111. This section encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as:

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

- a) 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 b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. 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; ORD 677 at 7.

The work product doctrine under section 552.111 of the Government Code is applicable to litigation files in criminal and civil litigation. *Curry v. Walker*, 873 S.W.2d 379, 381 (Tex. 1994); *see also U.S. v. Nobles*, 422 U.S. 225, 236 (1975). In *Curry*, the Texas Supreme Court held that a request for a district attorney’s “entire file” was “too broad” and, citing *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993), held that “the decision as to what to include in [the file] necessarily reveals the attorney’s thought processes concerning the prosecution or defense of the case.” *Id.* at 380. Accordingly, if a requestor seeks an attorney’s entire litigation file, and a governmental body demonstrates that the file was created in anticipation of litigation, we will presume that the entire file is excepted from disclosure under the attorney work product aspect of section 552.111. Open Records Decision No. 647 at 5 (1996); *see Nat'l Union*, 863 S.W.2d at 461 (organization of attorney’s litigation file necessarily reflects attorney’s thought processes).

You state the remaining information is representative of the entire litigation file that was compiled by attorneys for the department. You state the file was created in anticipation of trial. We find the request at issue, in part, constitutes a request for an “entire” litigation file for purposes of the *Curry* decision. Thus, we agree the department may withhold the remaining information under section 552.111 of the Government Code.

In summary, the department must withhold the information you indicated under section 552.101 of the Government Code in conjunction with section 401.201 of the Insurance Code.

The department must withhold the information you indicated under section 552.101 of the Government Code in conjunction with section 823.011 of the Insurance Code. The department may withhold the remaining information under section 552.111 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,

A handwritten signature in black ink, appearing to read "Matthew Taylor", with a long horizontal flourish extending to the right.

Matthew Taylor
Assistant Attorney General
Open Records Division

MHT/tdw

Ref: ID# 689146

Enc. Submitted documents

c: Requestor
(w/o enclosures)