



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 4, 2019

Mr. Edward Konop
Texas Windstorm Insurance Association
Associate Compliance Specialist
P.O. Box 99090
Austin, Texas 78709-9090

OR2019-27861

Dear Mr. Konop:

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# 785623 (TWIA ID #000609).

The Texas Windstorm Insurance Association ("TWIA") received a request for two specified claim files, as well as information pertaining to a particular company.¹ You claim some of the submitted information is excepted from disclosure under sections 552.107, 552.108, and 552.111 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure. We have considered your arguments and reviewed the submitted information.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov't Code § 552.107(1). When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to

¹We note TWIA sought and received clarification of the request for information. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “to facilitate the rendition of professional legal services” to the client governmental body. 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. *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 a 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, and lawyer representatives. 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.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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. *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 that 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).

TWIA states the information it indicated consists of communications involving attorneys for TWIA and TWIA employees and officials in their capacities as clients. TWIA states these communications were made in furtherance of the rendition of professional legal services to TWIA. TWIA states these communications were intended to be, and have remained, confidential. Based on these representations and our review, we find TWIA has demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, TWIA may withhold the information TWIA indicated under section 552.107(1) of the Government Code.²

²As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”³ Gov’t Code § 552.101. This section encompasses information protected by other statutes. Section 701.154 of the Insurance Code provides in relevant part:

(a) Except as otherwise provided by law, an authorized governmental agency or an insurer that possesses or receives information or material under [chapter 701 of the Insurance Code] may not release that information or material to the public.

(b) Information provided under [chapter 701] by an insurer to the insurance fraud unit [of the Texas Department of Insurance] or an authorized governmental agency is not subject to public disclosure. The information may be used by the insurance fraud unit or authorized governmental agency only in performing duties described by this chapter.

Ins. Code § 701.154(a)-(b). You state TWIA was established to provide wind and hail insurance for Texas Gulf Coast property owners in the event of catastrophic loss. Thus, we find TWIA is an insurer for purposes of chapter 701. *See id.* §§ 701.001(3) (defining “insurer” as person engaged in business of insurance as principal or agent), .001(4) (definition of “person” includes association). We understand TWIA provided the information at issue to the Fraud Unit of the Texas Department of Insurance (the “fraud unit”) pursuant to section 701.051 of the Insurance Code. *See id.* § 701.051(a) (delineating duty to report fraudulent insurance act to fraud unit or authorized governmental agency). Additionally, we note you have submitted a representation from the fraud unit stating this information is confidential under chapter 701 and the fraud unit objects to its release. Therefore, we conclude Exhibit B is confidential under section 701.154(a) of the Insurance Code, and TWIA must withhold it in its entirety under section 552.101 of the Government Code on that basis.⁴

In summary, TWIA may withhold the information you indicated under section 552.107(1) of the Government Code. TWIA must withhold Exhibit B in its entirety under section 552.101 of the Government Code in conjunction with section 701.154(a) of the Insurance Code. TWIA must release the remaining information.

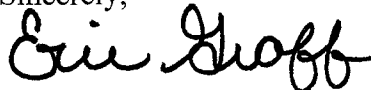
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

³ The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink that reads "Erin Groff". The signature is written in a cursive, flowing style.

Erin Groff
Assistant Attorney General
Open Records Division

EMG/jxd

Ref: ID# 785623

c: Requestor