



May 23, 2001

Mr. Joe F. Grubbs
Ellis County and District Attorney
1201 N. Hwy. 77, Suite B
Waxahachie, Texas 75165-5140

OR2001-2131

Dear Mr. Grubbs:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 147553.

The Ellis County and District Attorney's Office received a request for information relating to the requestor. You have submitted, as the information that you deem to be responsive to the request, a civil case file and a criminal case file. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted.

We first note that the submitted case files contain documents that fall within the scope of section 552.022 of the Government Code. Section 552.022 provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(17) (emphasis added). Section 552.022(a)(17) requires the release of the submitted pleadings and other legal documents that have been filed with a court, unless those documents contain information that is expressly confidential under other law. Sections 552.103 and 552.108 of the Government Code are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived. As such, these exceptions are not other law that makes information confidential for the purposes of section 552.022. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76

(Tex. App.--Dallas 1999, no pet.) (stating that governmental body may waive section 552.103); Open Records Decision Nos. 542 at 4 (1990) (litigation exception does not implicate third-party rights and may be waived), 177 at 3 (1977) (governmental body may waive statutory predecessor to ~~section 552.108~~). ~~Thus, you may not withhold~~ any of the information that is contained in the court-filed documents under section 552.103 or section 552.108.

You also contend that the submitted case files constitute privileged attorney work product. Section 552.111 of the Government Code, which excepts information that comes within the attorney work product privilege, also is a discretionary exception to disclosure and thus does not constitute "other law" for purposes of section 552.022. See Open Records Decision No. 470 at 7 (1987) (stating that governmental body may waive statutory predecessor to section 552.111).

However, the attorney work product privilege also is found in rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court recently held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." See *In re City of Georgetown*, No. 00-0453, 2001 WL 123933, at *8 (Tex. Feb. 15, 2001). Thus, we will consider whether the information contained in the court-filed documents is confidential under rule 192.5.

An attorney's core work product is confidential under rule 192.5. Core work product is defined as the work product of an attorney or an attorney's representative developed in anticipation of litigation or for trial that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. See TEX. R. CIV. P. 192.5(a), (b)(1). The attorney work product privilege can be waived, however, if the privileged information is voluntarily disclosed in a non-privileged context. See TEX. R. EVID. 511; *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 554 (Tex. 1990); *Carmona v. State*, 947 S.W.2d 661, 663 (Tex. App.--Austin 1997, no writ); *Arkla, Inc. v. Harris*, 846 S.W.2d 623, 630 (Tex. App.--Houston [14th Dist.] 1993, no writ); *State v. Peca*, 799 S.W.2d 426, 431 (Tex. App.--El Paso 1990, no writ). Thus, and assuming for the sake of argument that any information in the court-filed documents qualifies as privileged core work product under rule 192.5, we conclude that the inclusion of such information in a court filing waived the privilege. Thus, you may not withhold any of the information that is contained in court filings under rule 192.5.

We note, however, that documents in the criminal case file, including one of the court filings, contain information that is confidential under section 552.101 of the Government Code in conjunction with the Medical Practice Act (the "MPA").¹ The MPA is codified at subtitle B of title 3 of the Occupations Code. See Occ. Code § 151.001. Section 159.002 of the MPA provides in relevant part:

¹Section 552.101 protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter . . . may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). The MPA includes provisions that govern the disclosure of information that it encompasses. *See* Occ. Code §§ 159.003, .004, .005, .006. This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of chapter 552 of the Government Code.² We have marked the responsive documents that are governed by the MPA. You may release those documents only if you are permitted to do so under the MPA.

We next address your exceptions to the release of the remaining information in the submitted case files. Section 552.103 provides in relevant part.

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To sustain this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) that the information in question is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. – Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. – Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both prongs of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

²*See* Open Records Decision No. 598 (1991). The Seventy-sixth Legislature repealed the predecessor statute, article 4495b of Vernon's Texas Civil Statutes, in enacting the Occupations Code. *See* Act of May 13, 1999, 76th Leg., R.S., ch. 388, §§ 6, 7, 1999 Tex. Gen. Laws 1431, 2439-40. The legislation was a non-substantive codification.

We first consider whether the information in the civil case file is excepted from disclosure under section 552.103. You inform this office that the civil case file relates to a lawsuit that remains pending. You further inform us, however, that six former defendants in the case, including yourself and other former prosecutors in your office, have been dismissed as parties to the litigation. You point out that "it is always possible for a defendant to be pulled back into litigation until the case is complete and final with no chance of appeal." But you do not inform us that either Ellis County or any officer or employee of Ellis County is still a party to the litigation. Thus, you have not demonstrated that the information in the civil case file relates to litigation to which Ellis County or an officer or employee of Ellis County was a present or prospective party on the date of your receipt of the request for the information. Therefore, you may not withhold the civil case file under section 552.103. See Open Records Decision Nos. 557 at 6 (1990) (stating that the mere contemplation of litigation involving the governmental body does not establish that litigation is pending or reasonably anticipated under statutory predecessor), 392 at 3 (1983) (stating that litigation exception is applicable only where the litigation involves or is expected to involve the governmental body claiming the exception).

You also claim that the criminal case file is excepted from disclosure under section 552.103. You concede, however, that "the criminal case file is a closed case." Thus, you do not demonstrate that the criminal case file relates to litigation that was pending or reasonably anticipated on the date of your receipt of the request for information. Therefore, you may not withhold the information in the criminal case file under section 552.103. See Open Records Decision Nos. 551 at 4 (1990) (stating that litigation exception applies only while litigation is reasonably anticipated and during its actual pendency), 350 at 3 (1982) (stating that statutory predecessor is no longer applicable when litigation has been concluded).

Next, we consider whether the information that is not subject to release under section 552.022 may be withheld as attorney work product. In Open Records Decision No. 647 (1996), this office held that a governmental body may withhold information under section 552.111 if the governmental body can show (1) that the information was created for civil trial or in anticipation of civil litigation under the test articulated in *National Tank Company v. Brotherton*, 851 S.W.2d 193 (Tex. 1993), or after a civil lawsuit is filed, and (2) that the work product consists of or tends to reveal an attorney's "mental processes, conclusions, and legal theories." See ORD 647 at 5. The work product doctrine is applicable to litigation files in criminal as well as civil litigation. See *Curry v. Walker*, 873 S.W.2d 379, 381 (Tex. 1994) (citing *United States v. Nobles*, 422 U.S. 225, 236 (1975)).

A governmental body may withhold attorney work product from disclosure if it demonstrates that the material was (1) created for trial or in anticipation of civil litigation and (2) consists of or tends to reveal an attorney's mental processes, conclusions, and legal theories. See ORD 647 at 4. The first element of the work product test has two parts. The governmental body must demonstrate (1) that 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) that 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. *Id.* at 4. 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.” *See National Tank Co.*, 851 S.W.2d at 204. The second element of the work product test requires a showing that the information at issue tends to reveal the attorney’s mental processes, conclusions, and legal theories. *See* ORD 647 at 4. The governmental body must demonstrate that the information “consists of or tends to reveal the thought processes of an attorney in the civil litigation process.” *Id.* The attorney work product privilege generally does not extend to facts obtained by the attorney. *Id.* In this instance, you do not demonstrate that the information at issue qualifies as attorney work product under the test in Open Records Decision No. 647 (1996). Therefore, that information is not excepted from disclosure under section 552.111.

You also contend that the criminal case file contains information that is excepted from disclosure under section 552.108. Section 552.108, the “law enforcement exception,” provides in relevant part:

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

...

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov’t Code § 552.108(b)(3). A governmental body that raises section 552.108 must reasonably explain, if the requested information does not supply the explanation on its face, how and why section 552.108 is applicable to that information. *See* Gov’t Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). You contend that the criminal case file contains “information of an internal record or notation that is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or reflects the mental impressions or legal reasoning of an attorney representing the state.” But you do not direct our attention to any specific information that you claim is protected by section 552.108(b)(3). Having considered your representation and reviewed the information at issue, we conclude that you have not demonstrated that any of the information is protected by section 552.108. *See* Gov’t Code § 552.301(e)(2) (providing that governmental body must label requested information to indicate which exceptions apply to which parts of the information); ORD 434 at 3 (stating that unless prosecutor’s records show on their face that public disclosure would interfere with law enforcement or prosecution, prosecutor must identify the particular records or parts thereof that should be withheld from disclosure and the particular explanation applicable to them).

Lastly, we note that the criminal case file includes information relating to Texas motor vehicle registrations. Section 552.130 of the Government Code excepts from disclosure “a motor vehicle title or registration issued by an agency of this state[.]” Gov’t Code § 552.130(a)(2). You must withhold Texas license plate numbers and other information relating to motor vehicle registrations under section 552.130, unless the information concerns a motor vehicle that is registered to the requestor. The requestor has a special right of access to registration information concerning her own vehicle under section 552.023.³

In summary, the responsive court filings must be released under section 552.022(a)(17) of the Government Code, unless any information contained in those documents is expressly confidential under other law. One of the court filings and other documents in the criminal case file contain information that is confidential under the Medical Practice Act. You may release that information only if the MPA permits you to do so. You must withhold information in the criminal case file that relates to motor vehicle registrations under section 552.130, unless the requestor has a special right of access to the information under section 552.023. The remaining information in the civil and criminal case files is not excepted from disclosure under sections 552.103, 552.108, or 552.111 of the Government Code and also must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the

³Section 552.023 of the Government Code provides that “[a] person or a person’s authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person’s privacy interests.”

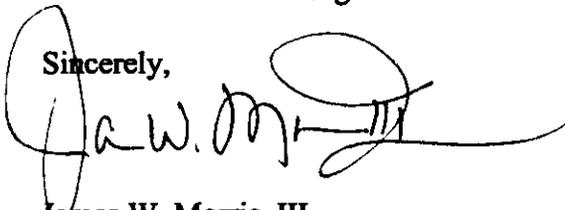
governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'J.W. Morris III', with a large, stylized flourish extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 147553

Encl: Submitted documents

cc: Ms. Anna Lynne Dean
P.O. Box 159
Hico, Texas 76457
(w/o enclosures)