



October 8, 2002

Mr. Tim Molina  
Assistant Attorney General  
Assistant Public Information Coordinator  
Office of the Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

OR2002-5684

Dear Mr. Molina:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 170706.

The Office of the Attorney General (the "OAG") received a request for information relating to the Crazy Water Retirement Hotel in Mineral Wells, Texas. You state that the OAG will release responsive pleadings and other documents that have been filed with a court. The OAG claims that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.137 of the Government Code, Texas Rule of Civil Procedure 192.5, and Texas Rule of Evidence 503. We have considered your arguments and have reviewed the information you submitted.<sup>1</sup>

We first note that one of the submitted documents is subject to section 552.022 of the Government Code. Section 552.022(a) 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:

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<sup>1</sup>This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the OAG to withhold any information that is substantially different from the submitted information. See Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). In this instance, the submitted documents include a completed report made for the OAG. This report must be released under section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 or expressly confidential under other law. The OAG raises sections 552.103 and 552.111 with regard to the report. We note, however, that these sections are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived. As such, sections 552.103 and 552.111 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.) (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), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111). Thus, the OAG may not withhold the completed report under sections 552.103 or 552.111.

The Texas Supreme Court has held, however, 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*, 53 S.W.3d 328 (Tex. 2001). The OAG claims that the completed report is protected by the attorney work product privilege, which also is found in rule 192.5 of the Texas Rules of Civil Procedure. Therefore, we will consider whether the report is confidential under rule 192.5.

An attorney's work product is confidential under rule 192.5. Work product is defined 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). Accordingly, in order to withhold attorney work product from disclosure under rule 192.5, a governmental body must demonstrate that the material, communication, or mental impression was created for trial or in anticipation of litigation. *Id.* To show that the information at issue was created in anticipation of litigation, a governmental body must demonstrate that (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 *National 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. Information that meets the work product test is confidential under rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in rule 192.5(c). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.–Houston [14th Dist.] 1993, no writ).

You indicate that the report in question was prepared by a representative of the OAG in connection with pending civil litigation in which the OAG represents the Texas Department of Insurance. Based on your representations and our review of the information in question, we conclude that you have shown that the report is confidential under Texas Rule of Civil Procedure 192.5.

The OAG claims that the remaining information is protected from disclosure under the attorney work product aspect of section 552.111 of the Government Code. Section 552.111 excepts from required public disclosure “[a]n interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency.” 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 is able to show that (1) the information was created for trial or in anticipation of litigation under the test articulated in *National Tank Co. v. Brotherton*, 851 S.W.2d 193 (Tex. 1993) and (2) the information in question consists of or tends to reveal an attorney’s “mental processes, conclusions, and legal theories.” Open Records Decision No. 647 at 5 (1996).

You state that the rest of the submitted information was created or assembled by or on behalf of the OAG in connection with the pending case in which the OAG represents the Department of Insurance. You assert that the requestor seeks access to the OAG’s entire litigation file. In *Curry v. Walker*, 873 S.W.2d 379, 381 (Tex. 1994), the Texas Supreme Court held that a request for a district attorney’s “entire file” was “too broad” and 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.” *Curry*, 873 S.W.2d at 380, citing *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993). Thus, if a requestor seeks access to an attorney’s entire litigation file, and the governmental body seeks to withhold the entire file and 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. See Open Records Decision No. 647 at 5 (1996) (citing *National Union*). Therefore, based on your representations and our review of the remaining information, we conclude that the OAG may withhold this information under the attorney work product aspect of section 552.111 of the Government Code.

In summary, the OAG may withhold the completed report under Texas Rule of Civil Procedure 192.5. The OAG may withhold the rest of the submitted information under section 552.111 of the Government Code. As we are able to make these determinations, we need not address your other arguments against disclosure.

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).

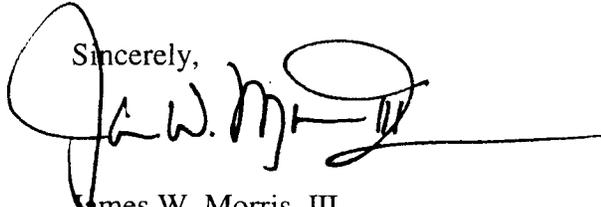
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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 long horizontal line extending to the right.

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

JWM/sdk

Ref: ID# 170706

Enc: Submitted documents

c: Mr. Frank P. Colosi  
Casey & Colosi  
314 Main Street, Suite 200  
Fort Worth, Texas 76102-7407  
(w/o enclosures)