OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

July 30, 2003

Mr. Lou Bright
General Counsel
Texas Alcoholic Beverage Commission
P.O. Box 13127
Austin, Texas 78711-3127

OR2003-5254

Dear Mr. Bright:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 185061.

The Texas Alcoholic Beverage Commission (the "commission") received a request for information relating to an administrative case involving "The Hurricane Hut." You state that the commission has released some of the requested information. You claim that the remaining requested information is protected from disclosure under sections 552.101, 552.103, and 552.130 of the Government Code and Texas Rule of Civil Procedure 192.5. We have considered your arguments and have reviewed the information you submitted.

We first note that the information at issue is subject to 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:
>
> > (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 information at issue is contained in a completed report made of, for, or by the commission. Additionally, you state that this information is part of a completed investigation made of, for, or by the commission.

Therefore, the information at issue 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. You claim that the information submitted as Exhibit D is excepted from disclosure under section 552.103 of the Government Code. We note, however, that section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *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 Gov't Code § 552.103); Open Records Decision No. 542 at 4 (1990) (litigation exception may be waived). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the commission may not withhold Exhibit D under section 552.103.

You also claim that the information submitted as Exhibit D qualifies as attorney work product under Texas Rule of Civil Procedure 192.5. The Texas Supreme Court has 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*, 53 S.W.3d 328 (Tex. 2001). The attorney work product privilege is found at Texas Rule of Civil Procedure 192.5. Accordingly, we will determine whether rule 192.5 is applicable to Exhibit D.

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 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 that

the information does not fall within the purview of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You inform us that the information submitted as Exhibit D was prepared by agents of the commission for the purpose of instituting civil litigation. You state that this information will form the basis of administrative charges that will be presented to the State Office of Administrative Hearings by attorneys for the commission. You also inform us that the agents of the commission who prepared the information in Exhibit D were acting as representatives of attorneys for the commission who are responsible for conducting administrative litigation. You state that when the information was prepared, there was a substantial chance that litigation would ensue, and the information was prepared in the belief that litigation would ensue. You assert that Exhibit D contains the investigators' mental impressions, conclusions, and opinions. Additionally, you contend that this information constitutes a communication made in anticipation of litigation among a party's representatives. You also inform us that access to the information in Exhibit D has been confined to those employees of the commission necessary to prepare for litigation of the matter to which the information pertains. Having considered your arguments and reviewed the information for which you claim the attorney work product privilege, we find that you have demonstrated that Exhibit D is confidential in its entirety under Texas Rule of Civil Procedure 192.5. The commission may therefore withhold Exhibit D under rule 192.5.

You also seek to withhold driver's license numbers marked in Exhibit C under section 552.130 of the Government Code. Section 552.130 excepts from public disclosure information that relates to "a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]" Gov't Code § 552.130(a)(1). We agree that the commission must withhold the Texas driver's license numbers that you have marked in Exhibit C under section 552.130.

In summary, the commission may withhold Exhibit D under Texas Rule of Civil Procedure 192.5. The commission must withhold the marked Texas driver's license numbers in Exhibit C under section 552.130 of the Government Code. As we are able to make these determinations, we need not address section 552.101.

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).

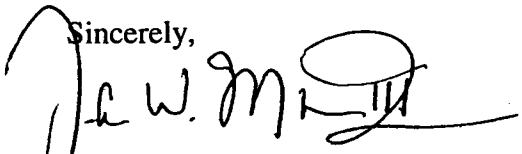
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Dep't of Pub. 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,



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

JWM/sdk

Ref: ID# 185061

Enc: Submitted documents

c: Mr. Ronald A. Monshaugen
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(w/o enclosures)