



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

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Ms. Cynthia Villarreal-Reyna
Section Chief, Agency Counsel
Legal and Compliance Division
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2004-3002

Dear Ms. Villarreal-Reyna:

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# 199102.

The Texas Department of Insurance (the "department") received a request for information related to a specified complaint. You state that some responsive information will be provided to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.111, and 552.137 of the Government Code, and under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. We have considered the exceptions you claim and reviewed the submitted information.

We begin by noting that some of the submitted documents are not responsive to the instant request for information, as they were created after the date that the department received the request. This ruling does not address the public availability of any information that is not responsive to the request, and the department need not release that information in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at time request was received).

You inform us that the submitted responsive information comprises a completed investigation made of, for, or by the department that is subject to section 552.022 of the Government Code. In pertinent part, 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). This information must be released under section 552.022(a)(1) unless it is expressly made confidential under other law or excepted from disclosure under section 552.108 of the Government Code.¹ The department raises section 552.111 of the Government Code with regard to the information that is encompassed by section 552.022(a)(1). We note, however, that this section is a discretionary exception to public disclosure that protects the governmental body's interests and may be waived.² As such, section 552.111 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the department may not withhold any of the information that is encompassed by section 552.022 under section 552.111.

You claim the attorney-client and work product privileges under section 552.101 of the Government Code and under the Texas Rules of Evidence and the Texas Rules of Civil Procedure. Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." As we recently reaffirmed in Open Records Decision No. 676 (2002), section 552.101 does not encompass the Texas Rules of Evidence and Civil Procedure. *See* Open Records Decision No. 676 at 2 ("we find no authority to support a conclusion that the Texas Rules of Civil Procedure or the Texas Rules of Evidence are constitutional law, statutory law, or judicial decisions so as to fall within section 552.101's purview"). However, the Texas Supreme Court has held that the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" that makes information expressly confidential for the purposes of section 552.022 of the Government Code. *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). The attorney-client privilege is found at Texas Rule of Evidence 503, and the attorney work product

¹The department does not seek to withhold any of the responsive information under section 552.108 of the Government Code.

²*See* Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege may be waived), 665 at 2 n.5 (discretionary exceptions generally), 470 at 7 (1987) (statutory predecessor to section 552.111 may be waived).

privilege is found at Texas Rule of Civil Procedure 192.5. Therefore, we will consider whether the department may withhold the submitted information under rules 503 and 192.5.

Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. Tex. R. Evid. 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. See Open Records Decision No. 676 (2002). Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero*

Energy Corp., 973 S.W.2d 453, 4527 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (privilege attaches to complete communication, including factual information).

You inform us that some of the submitted information consists of communications between attorneys for the department and department staff. You state that these communications were not intended to be disclosed to third persons other than those to whom disclosure was made in furtherance of the rendition of professional legal services to the department or those reasonably necessary for the transmission of the communications. You also state that the department has maintained the confidentiality of these attorney-client communications. Based on your representations, we conclude that some of the submitted information is confidential under Texas Rule of Evidence 503. We have marked the information that the department may withhold under rule 503.

For the purpose of section 552.022, information is confidential under Rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. Open Records Decision No. 677 at 9-10 (2002). 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. Tex. R. Civ. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under Rule 192.5, a governmental body must demonstrate that the material was 1) created for trial or in anticipation of litigation and 2) consists of an attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *Id.* The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. 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 Nat'l 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. The second prong of the work product test requires the governmental body to show that the documents at issue contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. Tex. R. Civ. P. 192.5(b)(1). A document containing core work product information that meets both prongs of 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 portions of the remaining submitted information are part of an investigative file that was created in anticipation of litigation. You state that a reasonable person would

have concluded that there was a substantial chance of litigation and that the investigation was conducted for the purpose of preparing for the litigation. You contend that the litigation file, the attorneys' notes and other contents of the file, and the organization of the file reveal the thought processes, conclusions, and legal theories of attorneys for the department and attorneys' representatives. Based on your representations, we conclude that the information we have marked qualifies as core attorney work product and is confidential under Texas Rule of Civil Procedure 192.5. Therefore, the department may withhold that information under rule 192.5.

Finally, we address your claim under section 552.137 of the Government Code. Section 552.137 provides:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Section 552.137 does not apply to a government employee's work e-mail address or a business's general e-mail address or web address. You inform us that the member of the public who submitted the information at issue has not affirmatively consented to the release of the e-mail address contained in the submitted materials. Accordingly, we conclude that the department must withhold the e-mail address you have marked under section 552.137(a).

In summary, we have marked the information that the department may withhold under rule 503 and 192.5. The department must withhold the e-mail address you have marked under section 552.137(a). The remaining submitted information must be released to the requestor.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 199102
Enc. Submitted documents

c: Mr. Ricky Lovell
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(w/o enclosures)