



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 12, 2004

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

OR2004-5695

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# 204944.

The Texas Alcoholic Beverage Commission (the "commission") received a request for a copy of a particular incident report. You inform us that you have released some records but claim that other information is protected under Texas Rule of Civil Procedure 192.5 and is excepted from disclosure under sections 552.101, 552.103, and 552.130 of the Government Code. We have considered your arguments and reviewed the submitted information.

Initially, we note, and you acknowledge, that the submitted information constitutes a completed report made of, for, or by the commission. Section 552.022 of the Government Code provides that "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body" constitutes "public information . . . not excepted from required disclosure . . . unless . . . expressly confidential under other law" or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). You do not claim that the submitted information is excepted from disclosure under section 552.108. You assert instead that Exhibit D may be withheld pursuant to section 552.103 of the Government Code. 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 section 552.103); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). 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 any of the submitted information under section 552.103 of the Government Code.

However, 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.” *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). This office has determined that when the work-product privilege is claimed for information that is subject to release under section 552.022, the proper analysis is whether the information at issue is excepted under Texas Rule of Civil Procedure 192.5. Open Records Decision No. 677 at 8-9 (2002). We will therefore consider whether the submitted information is confidential under Rule 192.5. In addition, we will consider your claims regarding sections 552.101 and 552.130, which do constitute other law for purposes of section 552.022.

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 inform us that 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 submitted information 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 the submitted information contains the investigators' mental impressions, conclusions, and opinions. You also inform us that access to the submitted information 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, we conclude that you have demonstrated that the information submitted as Exhibit D is protected under Texas Rule of Civil Procedure 192.5, and it may be withheld on that basis.

We turn now to your arguments regarding the highlighted information in Exhibit C. You contend that the highlighted social security numbers are confidential. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information that other statutes make confidential. Section 58.001 of the Occupations Code provides:

The social security number of an applicant for or holder of a license, certificate of registration, or other legal authorization issued by a licensing agency to practice in a specific occupation or profession that is provided to the licensing agency is confidential and not subject to disclosure under Chapter 552, Government Code.

Occ. Code § 58.001. We understand you to represent that the highlighted social security numbers pertain to individuals who are licensed or have applied to be licensed by the commission. Based on this understanding, we agree that these social security numbers are confidential under section 58.001 of the Occupations Code and must be withheld from the general public pursuant to section 552.101. We note, however, that the requestor identifies himself as the legal representative of one of the named individuals. The protections of section 58.001 are intended to protect an individual's privacy. Therefore, the requestor's client's social security number may not be withheld from him under section 552.101 on the basis of section 58.001. *See Gov't Code § 552.023(b)* (governmental body may not deny access to person to whom information relates or that person's authorized representative on grounds that information is considered confidential by privacy principles). The social security number of the individual whom the requestor does not represent must be withheld under section 552.101 in conjunction with section 58.001.

Finally, you note that Exhibit C includes Texas-issued motor vehicle record information. Section 552.130 of the Government Code excepts from disclosure information that "relates

to: (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or] (2) a motor vehicle title or registration issued by an agency of this state." However, this exception is intended to protect an individual's privacy. Therefore, the requestor's client's driver's license number may not be withheld from him on the basis of section 552.130. See Gov't Code § 552.023(b). The driver's license number of the individual who is not the requestor's client must be withheld under section 552.130.

In summary, Exhibit D may be withheld pursuant to Texas Rule of Civil Procedure 192.5. The social security number and Texas driver's license number of the individual who is not the requestor's client must be withheld under sections 552.101 and 552.130 respectively.

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).

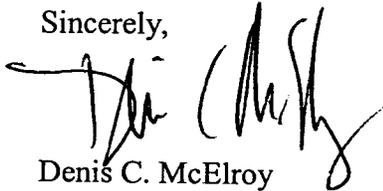
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/sdk

Ref: ID# 204944

Enc. Submitted documents

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(w/o enclosures)