



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 30, 2004

Mr. John Feldt
Assistant District Attorney
Denton County
P.O. Box 2850
Denton, Texas 76202

OR2004-7382

Dear Mr. Feldt:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 208142.

The Denton County Criminal District Attorney's Office (the "district attorney") received a request for the "complete records of the complaints against Denton County and any of its elected officials, employees or departments made by [three named individuals] and Robinson & Robinson, including any notes, administrative records and e-mails concerning the actions taken by the Commissioner Court or the District Attorney's Office about the complaints." You state that you have released a copy of a settlement agreement pursuant to section 552.022(a)(18) of the Government Code. You also state that you do not have information responsive to a portion of the request.¹ You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.111, 552.117, and 552.137 of the Government Code. We have considered the

¹ We note that the Public Information Act (the "Act") does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request for information. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.-San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). A governmental body must make a good faith effort to relate a request for information to any responsive information that is within its custody or control. *See Open Records Decision No. 561 at 8-9 (1990).*

exceptions you claim and reviewed the submitted representative sample of information.² We have also received and considered comments from an interested third party. *See* Gov't Code § 552.304 (allowing interested party to submit comments indicating why requested information should or should not be released).

Initially, we note that a portion of the submitted information found in Exhibit E is subject to section 552.022 of the Government Code. Section 552.022 provides in part 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:

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). We have marked the information that comes within the scope of section 552.022(a)(3). That information must be released unless it is expressly confidential under other law. You seek to withhold the information that is subject to section 552.022 under sections 552.103, 552.107, and 552.111. We note, however, that sections 552.103, 552.107, and 552.111 are discretionary exceptions to disclosure that protect 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 Nos. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived). As such, sections 552.103, 552.107, and 552.111 are not other law that make information confidential for purposes of section 552.022. Thus, you may not withhold any of the submitted information that is subject to section 552.022 under section 552.103, 552.107, or 552.111. However, the attorney work product privilege is also found in Rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court 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, 337 (Tex. 2001). Thus, we will determine whether the information is confidential under Rule 192.5.

² We assume that the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

For the purpose of section 552.022(a), 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 explain that the submitted information was created and gathered by the district attorney while preparing for reasonably anticipated litigation. As for the second prong of the work product test, the Texas Supreme Court has held that a request for an attorney's "entire file" was "too broad" and, citing *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993), held 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 v. Walker*, 873 S.W.2d 379, 380 (Tex. 1994). Because the requestor in this instance seeks all information in the district attorney's litigation file, we agree that complying with such a request would reveal the district attorney's thought processes concerning the anticipated litigation. Having met both prongs of the work product test, the district attorney may withhold the information that is subject to section 552.022(a) as core work product under Rule 192.5.

We will now address the remaining submitted information in the district attorney's file that is not subject to section 552.022(a). Section 552.111 excepts from disclosure "an

interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” This section encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Evidence. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product 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. Evid. 192.5. A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. Tex. R. Civ. P. 192.5; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied 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 [created or obtained the information] for the purpose of preparing for such litigation. *Nat’l Tank Co. 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; ORD 677 at 7.

If a requestor seeks an attorney’s entire litigation file, and a 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. Open Records Decision No. 647 at 5 (1996) (citing *Nat’l Union Fire Ins. Co. v. Valdez*, 863 S.W.2d 458, 461 (Tex. 1993)) (organization of attorney’s litigation file necessarily reflects attorney’s thought processes). The present request encompasses the district attorney’s entire litigation file. Furthermore, you have demonstrated that the file was created in anticipation of litigation. Therefore, we conclude that the district attorney may withhold the information in the file that is not subject to section 552.022(a) from disclosure under section 552.111 of the Government Code.

In summary, the section 552.022(a)(3) information may be withheld under Rule 192.5 of the Texas Rules of Civil Procedure. The district attorney may withhold the remaining submitted

information pursuant to section 552.111 of the Government Code. As our ruling is dispositive, we need not address your remaining 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 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,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 208142

Enc. Submitted documents

c: Mr. Tom Reedy
Denton Record-Chronicle
314 East Hickory
Denton, Texas 76201
(w/o enclosures)

Mr. Douglas M. Robison
Robison & Robison
120 North Austin
Denton, Texas 76201
(w/o enclosures)