



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 11, 2009

Ms. Barbara Toby Baruch
Assistant City Attorney
City of Galveston
P.O. Box 779
Galveston, Texas 77553-0779

OR2009-06279

Dear Ms. Baruch:

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# 342806 (City ORR# 09-079, 09-097, 09-172).

The City of Galveston (the "city") received three requests for information pertaining to a specified incident. You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.103, 552.108, 552.111, 552.117, 552.130, and 552.147 of the Government Code and privileged under Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the submitted information.

We note the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part:

(a) 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). The submitted information consists of completed investigations. Completed investigations must be released under section 552.022(a)(1), unless the information is excepted from disclosure under section 552.108 or expressly confidential under "other law." Although you claim this information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code, these exceptions to disclosure are discretionary exceptions that protects a 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); see also Open Records Decision Nos. 522 (1989) (discretionary exceptions in general), 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 470 at 7 (1987) (statutory predecessor to section 552.111 may be waived). As such, sections 552.103 and 552.111 are not "other laws" for the purposes of section 552.022. Thus, the city may not withhold the completed investigations under sections 552.103 or 552.111 of the Government Code. However, 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 (Tex. 2001). Therefore, we will consider your argument that the information subject to section 552.022 is privileged under Rule 192.5 of the Texas Rules of Civil Procedure. We will also consider your arguments under sections 552.101, 552.117, 552.130, and 552.147, which are other laws for the purposes of section 552.022, and section 552.108 for the submitted information.

Section 552.108(b)(2) of the Government Code excepts from disclosure an internal record of a law enforcement agency that relates to an investigation that concluded in a result other than conviction or deferred adjudication. Gov't Code § 552.108(b)(2). A governmental body claiming section 552.108(b)(2) must demonstrate that it is a law enforcement agency and the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication.

The city claims portions of the submitted information are subject to section 552.108(b)(2). You state the portions you seek to withhold constitute the original law enforcement investigation conducted by the city's police department that was conducted prior to the subsequent investigation conducted at the direction of the city's risk manager. You further state the claimed portions are internal records of a law enforcement investigation that did not result in conviction or deferred adjudication. Accordingly, we agree pages 200368-200383, 200395-200399, and 200615-200696 are subject to section 552.108(b)(2).

However, we note that section 552.108 does not except from disclosure "basic information about an arrested person, an arrest, or a crime." *Id.* § 552.108(c). Section 552.108(c) refers to the basic front-page information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177, 186-87 (Tex. Civ. App.—Houston [14th Dist.] 1975), writ *ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). See Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). The city must release basic information under section 552.108(c), even if the

information does not literally appear on the front page of an offense or arrest report. Thus, except for basic information, the city may withhold pages 200368-200383, 200395-200399, and 200615-200696 under section 552.108(b)(2).¹

You claim the remaining information is privileged under rule 192.5 of the Texas Rules of Civil Procedure. Information subject to section 552.022 is “expressly confidential” for purposes of that section under Rule 192.5 only to the extent the information implicates the core work product aspect of the privilege. *See* 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).

In order to withhold attorney 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. ORD 677 at 6-7. 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 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*, 861S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state the city reasonably anticipates litigation arising from the incident at issue. You also state the remaining information was prepared by a department of the city at the request of the City Manager after the city hired an attorney to represent it in litigation. Thus, we find you have demonstrated the remaining information constitutes attorney work product that is

¹As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

protected by rule 192.5. Accordingly, the city may withhold this information on the basis of core work product for purposes of Texas Rule of Civil Procedure 192.5.²

In summary, except for basic information, the city may withhold pages 200368-200383, 200395-200399, and 200615-200696 under section 552.108(b)(2). The city may withhold the remaining information under rule 192.5 of the Texas Rules of Civil Procedure.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Olivia A. Maceo
Assistant Attorney General
Open Records Division

OM/eeg

Ref: ID# 342806

Enc. Submitted documents

c: Requestor (3)
(w/o enclosures)

²As our ruling is dispositive, we need not address your remaining arguments against the disclosure of this information.