



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 9, 2009

Mr. Warren M. S. Ernst
Chief of the General Counsel Division
City of Dallas
1500 Marilla, Room 7DN
Dallas, Texas 75201

OR2009-14320

Dear Mr. Ernst:

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# 357951.

The City of Dallas (the "city") received a request for four categories of information related to a specified address, including (1) any issued code violations, (2) the cause number of any court case, (3) a log of 3-1-1 or code compliance calls by tenants at the address, and (4) the file of a named code compliance litigation attorney. You state the city will provide the requestor with most of the requested information. You claim the requested litigation file is excepted from disclosure under sections 552.107 and 552.111 of the Government Code, and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5.¹ We have considered your arguments and reviewed the submitted representative sample of information.²

¹Although you also raise section 552.101 of the Government Code in conjunction with the attorney work product privilege, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

²We 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.

Initially, you indicate the submitted information consists of a concluded investigation into code violations at the specified address. This information is therefore subject to section 552.022(a)(1) of the Government Code, which provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). Although you raise sections 552.107 and 552.111 of the Government Code, these sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. See Open Records Decision Nos. 677 at 10 (2002) (governmental body may assert work product under section 552.111 for information not subject to section 552.022, and Rule of Civil Procedure 192.5 for core work product subject to section 552.022), 676 at 6 (2002) (where section 552.022 is applicable to information at issue, governmental body should raise Texas Rule of Evidence 503 not section 552.107), 665 at n.5 (2000) (discretionary exceptions generally). As such, sections 552.107 and 552.111 are not "other law" that make information confidential for the purposes of section 552.022, and the city may not withhold any of the submitted information under these sections. 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, 337 (Tex. 2001). Therefore, we will consider your arguments under rules 192.5 and 503.

For purposes 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. ORD 677 at 9-10. 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 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 the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation there was a substantial chance that litigation would ensue, and (2) the party resisting discovery believed in good faith there was a substantial chance 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 the documents at issue contain 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).

Furthermore, if a requestor seeks a governmental body's entire litigation file, the file may be excepted from disclosure in its entirety on the grounds that such a request implicates the core work product aspect of the privilege. See ORD 677 at 5-6. Thus, in such a situation, if the governmental body demonstrates the file was created in anticipation of litigation, this office will presume the entire file is within the scope of the privilege. Open Records Decision No. 647 at 5 (1996) (citing *National 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); see also *Curry v. Walker*, 873 S.W.2d 379, 380 (Tex. 1994) (holding "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").³

The requested litigation file relates to a series of code violations pertaining to an apartment complex at the specified address. You inform this office the city filed a lawsuit against the owner of this apartment complex to enforce these code violations. You state the information in Exhibits D, E, and F relate to the city's preparation for this lawsuit. Specifically, you represent the information in Exhibits D, E, and F was prepared by city attorneys and employees in their preparation for the trial related to the filed lawsuit. You also inform this office the city and the owner of the specified property entered into an agreed final judgment on March 10, 2009, disposing of the lawsuit. The agreed judgment requires the city to inspect the property at issue on certain specified dates to ensure the property owner's compliance with the judgment. The information in Exhibit G was created after the execution of the agreed judgment, but prior to one of these scheduled inspections. You represent the information in Exhibit G was created by city attorneys and employees in anticipation of filing an additional suit to enforce the agreed judgment in the event of the owner's non-compliance. We find you have demonstrated that the requested file was created in anticipation of litigation. You state that the request encompasses the named attorney's entire litigation file regarding the specified property. We therefore conclude the city may withhold the requested litigation file as core attorney work-product under rule 192.5 of the Texas Rules of Civil Procedure.⁴

³We note, however, that the court in *National Union* also concluded that a specific document is not automatically considered to be privileged simply because it is part of an attorney's file. 863 S.W.2d 458, 461 (Tex. 1993). The court held that an opposing party may request specific documents or categories of documents that are relevant to the case without implicating the attorney work product privilege. *Id.*; ORD 647 at 5.

⁴Because our ruling is dispositive, we need not address your remaining argument against disclosure.

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, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Bob Davis", written in a cursive style.

Bob Davis
Assistant Attorney General
Open Records Division

RSD/cc

Ref: ID# 357951

Enc. Submitted documents

cc: Requestor
(w/o enclosures)