



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 23, 2010

Ms. Ashley Allen
Staff Attorney - Administrative Law Section
Legal Services Division
Texas General Land Office
P.O. Box 12873
Austin, Texas 78711

OR2010-09231

Dear Ms. Allen:

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# 383875.

The Texas General Land Office (the "GLO") received a request for the file pertaining to a named individual and a specified property. You state you have released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code, as well as privileged under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted information includes court-filed documents that are subject to section 552.022 of the Government Code. Section 552.022 states, in relevant part:

¹Although you raise section 552.101 of the Government Code in conjunction with the attorney-client privilege under rule 503 of the Texas Rules of Evidence and the attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision No. 676 (2002).

(a) [T]he following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(17). The court-filed documents at issue may be withheld only if they are confidential under other law. *See Id.* § 552.022(a)(17). The GLO seeks to withhold the court-filed documents under sections 552.103 and 552.111 of the Government Code, as well as rule 192.5 of the Texas Rules of Civil Procedure. Sections 552.103 and 552.111 are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 439, 475-76 (Tex. App.—Dallas, 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111 deliberative process), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103 and 552.111 are not other laws that make information expressly confidential for the purposes of section 552.022. Therefore, the court-filed documents may not be withheld under section 552.103 or section 552.111. However, you assert the court-filed documents are privileged under rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court has held the Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider your assertion of the attorney work product privilege under Texas Rule of Civil Procedure 192.5 for the information subject to section 552.022 of the Government Code. We will also address your remaining arguments for the information not subject to section 552.022.

Rule 192.5 of the Texas Rule of Civil Procedure encompasses the attorney work product privilege. For purposes of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. *See Open Records Decision No. 677* at 9-10 (2002). Rule 192.5 defines core work product as the work product of an attorney or an attorney's representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney's representative. *See 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 the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative: *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 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 part of the work product test requires the governmental body to show the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. See TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both parts of the work product test is privileged under rule 192.5, provided the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). See *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 governmental body may assert the file is excepted from disclosure in its entirety because such a request implicates the core work product aspect of the privilege. ORD No. 677 at 5-6. Thus, in such a situation, if the governmental body demonstrates the file was created for trial or 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 *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); 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").

You state the requested information consists of the entire litigation file of an attorney representing the GLO. You state the GLO anticipates filing suit pertaining to the property at issue. You explain the attorney conducted the research and gathered the documents at issue in anticipation of filing suit. Based on your representations and our review of the information at issue, we agree the present request encompasses the entire litigation file of the GLO's attorney. Accordingly, we conclude the GLO may withhold the information subject to section 552.022 of the Government Code as core work product under rule 192.5 of the Texas Rules of Civil Procedure.

We will now address your arguments with respect to the remaining information you seek to withhold. 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." See Gov't Code § 552.111. This section encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v.*

Dallas Morning News, 22 S.W.3d 351, 360 (Tex. 2000); ORD 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. CIV. P. 192.5. A governmental body seeking to withhold information under this exception bears the burden of demonstrating 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. The test for determining whether information was created or developed in anticipation of litigation is the same as that discussed above concerning rule 192.5. Again, if a requestor seeks an attorney's entire litigation file and a governmental body demonstrates the file was created in anticipation of litigation, we will presume the entire file is protected from disclosure as attorney work product. ORD No. 647 at 5 (1996) (citing *Valdez*, 863 S.W.2d 458, 461) (organization of attorney's litigation file necessarily reflects attorney's thought processes).

As noted above, you state the GLO anticipates filing suit pertaining to the property at issue and the request encompasses the entire litigation file of an attorney representing the GLO in anticipated litigation pertaining to the subject matter of the request. You explain the information at issue contains research conducted and documents created by an attorney or the attorney's representatives in anticipation of litigation. You also state the information at issue contains the attorney's mental impressions, conclusions, and legal theories. Based on your representations and our review, we conclude the GLO may withhold the remaining information at issue as attorney work product under section 552.111 of the Government Code.²

We note an e-mail you state you are releasing contains an e-mail address that may be subject to section 552.137 of the Government Code.³ Section 552.137 excepts from disclosure "an

²As our ruling is dispositive, we need not address the remaining argument against disclosure of the submitted information.

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail address at issue is not excluded by subsection (c). Therefore, the GLO must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner has affirmatively consented to its public disclosure.

In summary, the GLO may withhold the information subject to section 552.022 under Texas Rule of Civil Procedure 192.5. The GLO must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner has affirmatively consented to its public disclosure. The GLO may withhold the remaining information not subject to section 552.022 under section 552.111 of the Government Code.

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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/eeg

Ref: ID# 383875

Enc. Submitted documents

c: Requestor
(w/o enclosures)