



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 29, 2010

Ms. Lisa Hoyt  
Assistant General Counsel  
Texas Department of Agriculture  
P.O. Box 12847  
Austin, Texas 78711

OR2010-14813A

Dear Ms. Hoyt:

This office issued Open Records Letter No. 2010-14813 (2010) on September 29, 2010. Since that date, you have clarified your arguments on which the previous ruling was based. Therefore, we have examined that ruling and determined that there was an error. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306 of the Government Code, and that error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on September 29, 2010. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act ("Act")). This ruling was assigned ID# 403029.

The Texas Department of Agriculture (the "department") received a request for information related to a specified 2007 incident. You claim that the requested information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure.<sup>1</sup> We have considered your claims and reviewed the submitted

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<sup>1</sup>You raise section 552.101 of the Government Code as an exception to disclosure, but you have provided no arguments regarding the applicability of this section. Since you have not submitted arguments concerning section 552.101, we assume that you no longer urge it. *See* Gov't Code §§ 552.301(b), (e), .302. We note that section 552.101 does not encompass discovery privileges. *See* Open Records Decision No. 676 at 1-3 (2002).

information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we address the requestor's contention that some of the requested information was previously released to the Lubbock Police Department. The Act does not permit the selective disclosure of information to the public. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). Information that has been voluntarily released to a member of the public may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988). *But see* Open Records Decision Nos. 579 (1990) (exchange of information among litigants in "informal" discovery is not "voluntary" release of information for purposes of statutory predecessor to section 552.007), 454 at 2 (1986) (governmental body that disclosed information because it reasonably concluded that it had constitutional obligation to do so could still invoke statutory predecessor to section 552.108). However, a release to another governmental body, such as the Lubbock Police Department, is not a release to the public. Information may be transferred between governmental bodies that are subject to the Act without waiving exceptions to the public disclosure of that information or affecting its confidentiality on the basis of a recognized need to maintain an unrestricted flow of information between governmental bodies. *See* Attorney General Opinions JM-590 (1986), H-836 (1976), H-242 (1974), M-713 (1970); Open Records Decision Nos. 655 (1997), 567 (1990), 561 (1990), 516 (1989), 414 (1984). Accordingly, the Act does not require the department to release the information if it was previously released to the Lubbock police department.

We note the submitted information includes copies of the department's final orders in Case Number 2414-00003035. The final orders each contain findings of fact, conclusions of law, an order assessing a monetary penalty, and the signature of the Commissioner of Agriculture. Section 2001.004 of the Government Code states a state agency shall make available for public inspection all final orders, decisions, and opinions. Gov't Code § 2001.004; *see also id.* § 552.022(a)(12) (final opinions and orders issued in adjudication of cases are expressly public). The Act's exceptions to required public disclosure are generally inapplicable to information that statutes other than the Act expressly make public. Open Records Decision No. 623 at 3 (1994). Thus, the department must release the final orders, which we have marked.

Next, we note some of the remaining information consists of a completed investigation, which is subject to section 552.022 of the Government Code. Section 552.022 provides in part as follows:

[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:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[.]

Gov't Code § 552.022(a)(1). Thus, the completed investigation is made expressly public by section 552.022(a)(1). Therefore, the department may only withhold the information at issue to the extent it is excepted from disclosure under section 552.108 of the Government Code or confidential under other law.<sup>2</sup> Sections 552.103, 552.107, and 552.111 of the Government Code are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit*, 4 S.W.3d at 475-76 ; Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 663 at 5 (1999) (governmental body may waive section 552.111), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103, 552.107, and 552.111 are not other laws that make information confidential for the purposes of section 552.022(a)(1). Therefore, the department may not withhold the completed investigation under section 552.103, section 552.107, or section 552.111 of the Government Code.

However, the Texas Supreme Court has held the Texas Rules of Evidence and 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). We will therefore consider your assertions of 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 for the information subject to section 552.022(a)(1). We will also address your arguments for the remaining information not subject to section 552.022.

Rule 192.5 of the Texas Rules 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 that the material was (1) created for trial or in anticipation of litigation and

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<sup>2</sup>The department does not raise section 552.108 as an exception to disclosure.

(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 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 part of the work product test requires the governmental body to show that the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney's 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 confidential under rule 192.5, provided that 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 that the file is excepted from disclosure in its entirety because 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 that the file was created in anticipation of litigation, this office will presume that the entire file is within the scope of the privilege. *See* 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 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").

You state the submitted information relates to pesticide use and the department has the authority to enforce matters related to pesticide use and distribution pursuant to Chapter 76 of the Agriculture Code. You further state the department has the authority to assess administrative penalties against individuals who violate the cited statutory provisions. Agric. Code §§ 12.020, 76.1555(a). You further explain the department litigates enforcement proceedings under the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code. You represent to this office that the submitted information encompasses the department's entire litigation file with regard to the investigation at issue. We understand the file was created by attorneys, staff, and other representatives of the department in anticipation of litigation. *Cf.* Open Records Decision No. 588 (1991) (contested case under

APA constitutes litigation for purposes of statutory predecessor to section 552.103). Based on your representations, we agree the present request encompasses the entire litigation file of the department. Accordingly, we conclude the department may withhold the completed investigation 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. 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 submitted information encompasses the department's entire litigation file with regard to the investigation at issue, and you indicate the file was created in anticipation of litigation. Based on your representations and our review, we conclude the department may withhold the remaining information as attorney work product under section 552.111 of the Government Code.

In summary, the department's final orders, which we have marked, must be released pursuant to section 2001.004 of the Government Code. The remaining information is privileged attorney work product that the department may withhold under section 552.111 of the

Government Code and rule 192.5 of the Texas Rules of Civil Procedure. As our ruling is dispositive, we do not address your remaining claims.

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](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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/dls

Ref: ID# 403029

Enc. Submitted documents

c: Requestor  
(w/o enclosures)