



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 6, 2010

Mr. Kenneth A. Krohn
Assistant City Attorney
City of El Paso
2 Civic Center Plaza, 9th Floor
El Paso, Texas 79901

OR2010-15232

Dear Mr. Krohn:

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# 395838.

The City of El Paso (the "city") received a request for all information concerning a specified claim against the city, its settlement, payments to four named individuals, and any documents concerning the recommendation to settle, including documents regarding the individuals' claim based on the theory of detrimental reliance and the city's analysis of that claim. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code and protected under rule 192.5 of the Texas Rules of Civil Procedure.¹ We have considered your arguments and reviewed the submitted representative sample of information.²

¹Although you also raise rule 503 of the Texas Rules of Evidence, you have not submitted arguments explaining how this rule applies to the submitted information. Therefore, we assume you have withdrawn this claim. *See* Gov't Code §§ 552.301.302.

²We assume 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 those records contain substantially different types of information than that submitted to this office.

Initially, we note you have not submitted information relating to payments made to four named individuals. Accordingly, to the extent information responsive to the request existed on the date the city received the request, we assume you have released it. If the city has not released any such information, it must do so at this time. *See id.* §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

Section 552.111 of the Government Code excepts from disclosure “an interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. This exception 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); 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. CIV. P. 192.5. In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied

a) 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 b) 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. In the case of a communication, a governmental body must show the communication was between a party and the party’s representatives. ORD 677 at 7-8. 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.

You state the information at issue consists of material the city attorney's office developed in anticipation of litigation and during the ongoing course of negotiations in an effort to avoid possible litigation relating to a claim against the city. You further state the requested information contains the attorney's thought processes and evaluation of the claim, mental impressions, opinions, conclusions, or legal theories. Based on your representations and our review, we find the city may withhold the submitted information under 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 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,



Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/em

Ref: ID# 395838

Enc. Submitted documents

c: Requestor
(w/o enclosures)