



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 21, 2011

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

OR2011-13673

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# 430687.

The City of Dallas (the "city") received a request for twelve categories of information regarding two named former city employees. You state some information will be released to the requestor upon his response to a cost estimate, with redactions as permitted by section 552.024(c) of the Government Code¹ and Open Records Decision No. 684 (2009).²

¹Section 552.117 of the Government Code exempts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117). Section 552.024(c) authorizes a governmental body to withhold information subject to section 552.117 without requesting a decision from this office if the employee or official, or former employee or official, chooses not to allow public access to the information. *See* Gov't Code § 552.024(c).

²Open Records Decision No. 684 is a previous determination issued by this office authorizing all governmental bodies to withhold ten categories of information without the necessity of requesting an attorney general decision. *See* ORD 684 at 14-15. However, if the city redacted information under section 552.130 or 552.136 of the Government Code pursuant to Open Records Decision No. 684, we note on September 1, 2011, the Texas legislature amended sections 552.130 and 552.136 to allow a governmental body to redact the information described in subsections 552.130(a)(1) and (a)(3) and 552.136(b), without the necessity of seeking

You claim the remaining requested information is excepted from disclosure under sections 552.107, 552.111, and 552.116 of the Government Code, and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5.³ We have considered your arguments and reviewed the submitted representative sample of information.⁴

Initially, we note the submitted information is part of a completed investigation 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 it is excepted by section 552.108 of the Government Code or expressly confidential under “other law.” Gov’t Code § 552.022(a)(1). Although you raise sections 552.107, 552.111, and 552.116 of the Government Code, these are discretionary exceptions to disclosure that protect only a governmental body’s interests and may be waived. *See* Open Records Decision Nos. 677 at 10-11 (work-product privilege under section 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). As such, sections 552.107, 552.111, and 552.116 are not “other law” that makes information confidential for purposes of section 552.022(a)(1), and the city may not withhold any of the information at issue under these sections. However, the Texas Supreme Court has held the Texas Rules of Civil Procedure and the Texas Rules of Evidence are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your assertions of the attorney-client privilege under Texas Rule of Evidence 503 and the attorney work product privilege under Texas Rule of Civil Procedure 192.5.

Texas Rule of Civil Procedure 192.5 encompasses the attorney work product privilege. For purposes of section 552.022 of the Government Code, information is confidential under

a decision from the attorney general. *See* Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, §§ 22, 27 (to be codified at Gov’t Code §§ 552.130(c) and 552.136(c)). If a governmental body redacts such information, it must notify the requestor in accordance with sections 552.130(e) and 552.136(e). *See* Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, §§ 22, 27 (to be codified at Gov’t Code §§ 552.130(d)-(e) and 552.136(d)-(e)). Thus, the statutory amendments to sections 552.130 and 552.136 of the Government Code superceded Open Records Decision No. 684 on September 1, 2011. Therefore, a governmental body may only redact information subject to subsections 552.130(a)(1) and (a)(3) and 552.136(b) in accordance with sections 552.130 and 552.136, not Open Records Decision No. 684.

³Although you also raise section 552.101 in conjunction with Texas Rule of Civil Procedure 192.5, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

⁴We 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.

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 confidential 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. 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. 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 "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").

The present request seeks all information concerning litigation involving the named individuals. You state the submitted information consists of the city's entire litigation file relating to the case at issue, which involves the named individuals. You also indicate the file

was created by city attorneys in anticipation of, and in the course of, the litigation. Based on your representations and our review, we agree the litigation file at issue was created by city attorneys in furtherance of litigation. Accordingly, the city may withhold the submitted litigation file as core work product under Texas Rules of Civil Procedure 192.5.⁵

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,



Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/agn

Ref: ID # 430687

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁵Because our ruling is dispositive, we do not address your remaining argument against disclosure.