



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 26, 2012

Mr. Gerard A. Calderon
Assistant Criminal District Attorney
Bexar County
300 Dolorosa, Fifth Floor
San Antonio, Texas 78205

OR2012-01320

Dear Mr. Calderon:

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# 443958.

The Bexar County District Attorney's Office (the "district attorney") received a request for information used to make the decision not to prosecute a named individual. You claim that the submitted information is excepted from disclosure under sections 552.108 and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant request for information because it was created after the date the request was received. This ruling does not address the public availability of non-responsive

¹Although you also raise section 552.101 of the Government Code as an exception to disclosure, you have provided no arguments regarding the applicability of this section. Since you have not submitted arguments concerning section 552.101, we assume you no longer claim this exception. *See* Gov't Code §§ 552.301(b), (e), .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.

information, and the district attorney is not required to release non-responsive information in response to this request.

Section 552.111 of the Government Code 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); 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. 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. *Id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that:

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.

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 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 indicate the request for information encompasses the district attorney's entire prosecution file concerning the case at issue. You assert the responsive information was prepared by counsel representing the State in the course of preparing for criminal litigation and that disclosure of this information would disclose the counsel's thought processes. Based on these representations and our review, we conclude the district attorney may withhold the responsive information as attorney work product 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,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/ag

Ref: ID# 443958

Enc. Submitted documents

c: Requestor
(w/o enclosures)