



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 8, 2012

Mr. Bill Delmore  
Chief, Legal Services Division  
9th Judicial District  
207 West Phillips Second Floor  
Conroe, Texas 77301

OR2012-03501

Dear Mr. Delmore:

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# 447283.

The District Attorney's Office for the 9th Judicial District (the "district attorney's office") received a request for the "District Attorney's file regarding all charges brought against [a named individual]" in connection with a traffic accident. You claim the requested information is excepted from disclosure under sections 552.108 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted.

We first note the submitted information includes a document filed with a court. Section 552.022 of the Government Code provides for required public disclosure of "information that is also contained in a public court record," unless the information is made confidential under the Act or other law. Gov't Code § 552.022(a)(17). Although the district attorney's office seeks to withhold the submitted court document under sections 552.108 and 552.111 of the Government Code, those sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See* Open Records Decision Nos. 677 at 8 (2002) (attorney work product privilege under Gov't Code

§ 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). As such, sections 552.108 and 552.111 do not make information confidential for purposes of section 552.022(a)(17). We note the attorney work product privilege also is found at 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 of the Government Code. See *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). However, the Texas Rules of Civil Procedure apply only to "actions of a civil nature." See TEX. R. CIV. P. 2. Thus, because the submitted information is related to a criminal case, the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure is not applicable in this instance. Therefore, the court document we have marked must be released pursuant to section 552.022(a)(17) of the Government Code.

Next, we address your claim under section 552.111 of the Government Code for the rest of the submitted 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." 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. See *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 as attorney work product under section 552.111 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 the information was developed or the communication was made in anticipation of litigation or for trial, 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.

The work product doctrine is applicable to litigation files in both criminal and civil litigation. *See Curry v. Walker*, 873 S.W.2d 379, 381 (Tex. 1994); *see also U.S. v. Nobles*, 422 U.S. 225, 236 (1975). In *Curry*, the Texas Supreme Court determined a request for a district attorney’s “entire file” was “too broad” and, citing *Nat'l Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993), held “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.”<sup>1</sup> *Id.* at 380. Accordingly, if a requestor seeks an attorney’s entire litigation file, and a governmental body demonstrates the file was created in anticipation of litigation or for trial, we will presume the entire file is excepted from disclosure under the attorney work product aspect of section 552.111. *See* Open Records Decision No. 647 at 5 (1996); *see also Nat'l Union*, 863 S.W.2d at 461 (organization of attorney’s litigation file necessarily reflects attorney’s thought processes). In this instance, we understand the district attorney’s office to contend the requestor seeks access to its entire file for a pending criminal prosecution. Based on your representations and our review, we conclude the district attorney’s office may withhold the rest of the submitted information as attorney work product under section 552.111 of the Government Code.<sup>2</sup>

In summary, the district attorney’s office (1) must release the marked court document pursuant to section 552.022(a)(17) of the Government Code and (2) may withhold the rest of the submitted information 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](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General’s Open Government Hotline, toll free,

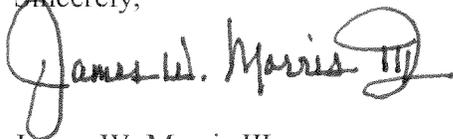
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<sup>1</sup>We note the court also concluded in *National Union* that a specific document is not automatically considered to be privileged simply because it is part of an attorney’s file. *See* 863 S.W.2d at 461. The court held an opposing party may request specific documents or categories of documents that are relevant to the case without implicating the attorney work product privilege. *Id.*; *see* ORD 647 at 5.

<sup>2</sup>As we are able to make this determination, we need not address the other exception you claim.

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,

A handwritten signature in black ink that reads "James W. Morris III". The signature is written in a cursive style with a large initial "J" and a stylized "M".

James W. Morris III  
Assistant Attorney General  
Open Records Division

JB/dls

Ref: ID# 447283

Enc. Submitted documents

c: Requestor  
(w/o enclosures)