



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 13, 2012

Mr. Stanton Strickland
Associate Commissioner
Legal Section, Mail Code 110-1A
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2012-09128

Dear Mr. Strickland:

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# 456451 (TDI# 126217).

The Texas Department of Insurance (the "department") received a request for all records relating to "Neptune Society, Inc." ("Neptune") and "Trident Society, Inc."¹ You state you have released some of the requested information. You claim a portion of the submitted information is privileged under Texas Rule of Civil Procedure 192.5. In addition, you state release of a portion of the submitted information may implicate the proprietary interests of Neptune. Accordingly, you state, and provide documentation showing, you notified Neptune of the request and of its right to submit arguments to this office as to why its information should not be released. Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the Act in certain circumstances). We have received comments from Neptune. We have considered the submitted arguments and reviewed the submitted information.

Initially, you inform us the submitted information consists of a portion of a completed investigation, which is subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides that a completed report, audit, evaluation, or investigation

¹We note Neptune is a d/b/a for Neptune Management Corporation and Neptune informs us that Trident Society, Inc. does not operate in Texas.

made of, for, or by a governmental body is public information and not excepted from required disclosure unless made confidential under the Act or other law. Gov't Code § 552.022(a)(1). You raise rule 192.5 of the Texas Rules of Civil Procedure and we understand Neptune to raise rule 552.110 of the Government Code for the submitted information. Section 552.110 makes information confidential under the Act. Further, the Texas Supreme Court has held the Texas Rules of Civil Procedure are "other law" that make information expressly confidential for purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your assertion of the attorney work product privilege under Texas Rule of Civil Procedure 192.5 and Neptune's arguments under section 552.110 for the submitted information.

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 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 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 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.*, 861 S.W.2d at 427.

You state the information at issue is from a closed investigative enforcement case file. You also state the notes you have marked were prepared by department attorneys and reveal their mental processes, conclusions, and legal theories regarding the litigation file and possible resolution. Based on your representations and our review, we agree the information you have

marked is protected core work product. Accordingly, the department may withhold the information you have marked under Texas Rule of Civil Procedure 192.5.

Section 552.110(b) of the Government Code excepts from disclosure “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.” Gov’t Code § 552.110(b). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

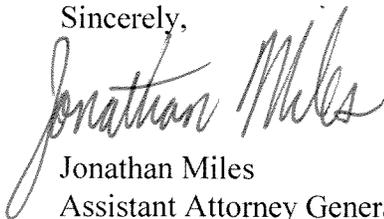
Upon review of the remaining information, we find Neptune has made only conclusory allegations that the release of any of the remaining information would result in substantial harm to its competitive position. *See* ORD 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). Accordingly, none of the remaining information may be withheld under section 552.110(b) of the Government Code.

In summary, the department may withhold the information you have marked under rule 192.5 of the Texas Rules of Civil Procedure. The remaining information must be released.

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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/bhf

Ref: ID# 456451

Enc. Submitted documents

c: Requestor
(w/o enclosures)

David Zavadil
General Counsel
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(w/o enclosures)