ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 12, 2012

Mr. Michael Lee Garza
Assistant District Attorney
Hidalgo County
100 North Closner, Room 303
Edinburg, Texas 78539

OR2012-14507

Dear Mr. Garza:

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# 464813.

The Hidalgo County District Attorney's Office (the "district attorney's office") received a request for the district attorney's office's entire file regarding a specified case. You claim the submitted information is excepted from disclosure under sections 552.107, 552.108, and 552.111 of the Government Code, and privileged under section 30.006 of the Texas Civil Practice and Remedies Code and Texas Rule of Civil Procedure 192.5.[1] We have considered your arguments and reviewed the submitted information.

We note the submitted information includes a CR-3 report completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report).

[1]Although you raise section 552.101 of the Government Code in conjunction with rule 192.5 of the Texas Rules of Civil Procedure, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). We further note section 552.101 does not encompass other exceptions found in the Act. Additionally, we note the proper exception to raise when asserting attorney-client privilege for information subject to section 552.022 of the Government Code is Texas Rule of Evidence 503. *See* ORD 676 at 1-2.

Section 550.065(b) states, except as provided by subsection (c) or subsection (e), accident reports are privileged and confidential. *Id.* § 550.065(b). However, section 550.065(c)(4) provides for release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *Id.* § 550.065(c)(4). Under this provision, the Texas Department of Transportation or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute.[2] In this instance, the requestor has provided the district attorney's office with two of the three specified pieces of information pursuant to section 550.065(c)(4). We note the exceptions to disclosure found in the Act are generally not applicable to information another statute makes public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). *See, e.g.*, Open Records Decision Nos. 623 at 3 (1994) (exceptions in Act inapplicable to information statutes expressly make public), 613 at 4 (1993) (exceptions in Act cannot impinge on statutory right of access to information), 451 (1986) (specific statutory right of access provisions overcome general exception to disclosure under the Act). Accordingly, the submitted CR-3 report, which we have marked, must be released in its entirety pursuant to section 550.065(c)(4) of the Transportation Code.

We also note the submitted information contains medical records. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."[3] Gov't Code § 552.101. This section encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides, in part:

> (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
>
> (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

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[2]*See* Transp. Code § 550.0601 ("department" means Texas Department of Transportation).

[3]The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Id. § 159.002(b), (c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Medical records must be released on receipt of a signed, written consent, provided the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. The medical records of a patient who is now deceased may only be released on the signed written consent of the decedent's personal representative. *See id.* § 159.005(a)(5). Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* 159.002(c); Open Records Decision No. 565 at 7 (1990). Upon review, we have marked medical records that are confidential under the MPA. Although you seek to withhold this information under sections 552.107, 552.108, and 552.111 of the Government Code, the MPA's specific statutory right of access provision prevails over the Act's general exceptions to disclosure. *See* ORD 451 at 4. Accordingly, the marked medical records may only be released in accordance with the MPA.

Next, we note the submitted information includes court-filed documents. 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 court-filed documents under sections 552.107, 552.108, and 552.111 of the Government Code, these sections are discretionary exceptions that protect a governmental body's interests and do not make information confidential under the Act. *See id.* § 552.007; Open Records Decision Nos. 677 at 8 (2002) (attorney work product privilege under section 552.111 may be waived), 676 at 10-11 (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 586 (1991) (governmental body may waive section 552.108). Therefore, the district attorney's office may not withhold the court-filed documents, which we have marked, under sections 552.107, 552.108, or 552.111 of the Government Code. The Texas Supreme Court has held the Texas Rules of Evidence and 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 relates to a criminal case, the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure does not apply in this instance. Further, section 30.006 of the Civil Practice and Remedies Code is a civil discovery privilege under the Civil Practice and Remedies Code; it is not a discovery privilege found in either the Texas Rules of Civil Procedure or the Texas Rules of Evidence and therefore is not "other law" for purposes of section 552.022. Accordingly, we determine information subject to

section 552.022 may not be withheld from disclosure on the basis of section 30.006 of the Civil Practice and Remedies Code. However, we will consider the applicability of the attorney-client privilege under Texas Rule of Evidence 503, and we will also address your arguments for the remainder of the submitted information not subject to section 552.022 of the Government Code.

We now address the information subject to section 552.022(a)(17) of the Government Code. Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
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> > (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
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> > (B) between the lawyer and the lawyer's representative;
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> > (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
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> > (D) between representatives of the client or between the client and a representative of the client; or
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> > (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has

not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You argue the information subject to section 552.022(a)(17) consists of privileged communications. However, you have not explained, nor can we discern, how the court-filed documents at issue consist of privileged attorney-client communications. Accordingly, the information at issue may not be withheld under rule 503. As no further exceptions to disclosure are raised for this information, the court-filed documents, which we have marked, must be released to the requestor.

We next address your arguments against disclosure of the remaining information not subject to section 552.022. 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." 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); ORD 677 at 4-8. 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
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> (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 that 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.

The work product doctrine under section 552.111 of the Government Code is applicable to litigation files in criminal and civil litigation. *Curry v. Walker*, 873 S.W.2d 379, 381 (Tex. 1994); *see U.S. v. Nobles*, 422 U.S. 225, 236 (1975). In *Curry*, the Texas Supreme Court held that a request for a district attorney's "entire file" was "too broad" and, citing *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993), held that "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."[4] *Id.* at 380. Accordingly, if a requestor seeks an attorney's entire litigation file, and a governmental body demonstrates that the file was created in anticipation of litigation, we will presume that the entire file is excepted from disclosure under the attorney work product aspect of section 552.111. ORD 647 at 5; *see Nat'l Union*, 863 S.W.2d at 461 (organization of attorney's litigation file necessarily reflects attorney's thought processes).

You contend that the request for information encompasses the district attorney's office's entire file concerning this case. Upon review, we determine that the district attorney's office may withhold the remaining information at issue as attorney work-product under section 552.111 of the Government Code.[5]

In summary, the district attorney's office must release the information we have marked pursuant to section 552.022(a)(17) of the Government Code, and the CR-3 report we have marked pursuant to section 550.065 of the Transportation Code. The marked medical records may only be released in accordance with the MPA. The district attorney's office may withhold the remaining 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

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[4]We note, however, that the court in *National Union* also concluded that a specific document is not automatically considered to be privileged simply because it is part of an attorney's file. 863 S.W.2d at 461. The court held that 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.*; Open Records Decision No. 647 at 5 (1996).

[5]As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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,

Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/akg

Ref: ID# 464813

Enc. Submitted documents

c: Requestor
(w/o enclosures)