



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 13, 2013

Mr. Gerard A. Calderon  
Assistant Criminal District Attorney  
Bexar County Criminal District Attorney's Office  
300 Dolorosa, Fifth Floor  
San Antonio, Texas 78205-3030

OR2013-04240

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# 481156.

The Bexar County District Attorney's Office (the "district attorney's office") received a request for the entire file related to two specified cases. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.111 of the Government Code, and privileged under rule 503 of the Texas Rules of Evidence. We have considered your arguments and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we note portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

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<sup>1</sup>We assume the "representative sample" of information 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 those submitted to this office.

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(17). The information you seek to withhold contains court-filed documents that are subject to subsection 552.022(a)(17), which must be released unless they are made confidential under the Act or other law. *See id.* § 552.022(a)(17). You seek to withhold the information subject to subsection 552.022(a)(17) under sections 552.103, 552.108, and 552.111 of the Government Code. However, sections 552.103, 552.108, and 552.111 are discretionary exceptions and do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); *see also* Open Records Decision Nos. 677 (2002) (governmental body may waive attorney work product privilege under section 552.111), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). Therefore, the marked court-filed documents may not be withheld under section 552.103, section 552.108, or section 552.111 of the Government Code. We note the attorney work product privilege is also found in Texas Rule of Civil Procedure 192.5. Additionally, you raise Texas Rule of Evidence 503. The Texas Supreme Court has held the Texas Rules of Evidence and Texas Rules of Civil Procedure are “other law” within the meaning of section 552.022. *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. However, we will consider your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the court-filed documents. Additionally, section 552.101 makes information confidential under the Act. Therefore, we will also address section 552.101 for the court-filed documents.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. However, you have not directed our attention to any law, nor are we aware of any law, under which any of the submitted information is considered to be confidential for purposes of section 552.101 of the Government Code. *See* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, the district attorney's office may not withhold the court-filed documents under section 552.101 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:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(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;

(D) between representatives of the client or between the client and a representative of the client; or

(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 assert the court-filed documents should be withheld under rule 503. Upon review, we find you have not demonstrated the court-filed documents represent an attorney-client communication for the purposes of rule 503. Accordingly, the court-filed documents may not be withheld under rule 503.

You claim section 552.111 of the Government Code for the remaining information not subject to section 552.022. Section 552.111 excepts from disclosure "[a]n 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. Section 552.111 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

(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 the information was made or developed in anticipation of litigation, we must be satisfied

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 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”).

You state the request encompasses the district attorney's office's entire litigation file. You indicate the remaining information was prepared by the district attorney's office in anticipation of or in the course of preparing for criminal litigation. Upon review, we find the attorney work product privilege is applicable to the remaining information. Accordingly, the district attorney's office may withhold the remaining information under section 552.111 of the Government Code.<sup>2</sup>

In summary, the district attorney's office must release the court-filed documents we have marked under section 552.022(a)(17) of the Government Code. The remaining information may be withheld 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, 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,



Nicholas A. Ybarra  
Assistant Attorney General  
Open Records Division

NAY/ac

Ref: ID# 481156

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure.