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ATTORNEY GENERAL OF TEXAS

September 20, 2016

Mr. David Wheelus
Open Records Attorney
Legal Section MC110-1C
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2016-21198

Dear Mr. Wheelus:

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# 627390 (TDI# 174386).

The Texas Department of Insurance (the "department") received a request for information pertaining to administrative actions against a named individual. You state you will release some information. You state you will redact account numbers pursuant to section 552.136 of the Government Code and e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ You claim portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code as well as privileged under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure. We have considered the submitted arguments and reviewed the submitted information.

¹Section 552.136(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See id.* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e). Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684.

Initially, you state some of the submitted information is not responsive because it does not consist of information pertaining to the specified administrative actions. This ruling does not address the public availability of any information that is not responsive to the request and the department is not required to release that information in response to the request.

Next, you acknowledge the responsive information is 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:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The responsive information is part of a completed investigation that is subject to section 552.022(a)(1). The department must release the responsive information pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or are made confidential under the Act or other law. *See id.* You raise section 552.101 of the Government Code, which protects information made confidential under law. You also seek to withhold portions of the information at issue under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure. 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. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider your arguments under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure, as well as the applicability of section 552.101.

Rule 192.5 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 there was a substantial chance litigation would ensue and (2) the party resisting discovery believed in good faith there was a substantial chance 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 that the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). See *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

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. 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) (organization of attorney's litigation file necessarily reflects attorney's thought processes (citing *Nat'l Union Fire Ins. Co. v. Valdez*, 863 S.W.2d 458, 461 (Tex. 1993))); 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 assert, and we agree, the instant request for information encompasses the entire litigation file compiled by attorneys for the department in the course of preparing for an anticipated contested case before the State Office of Administrative Hearings, which is governed by the Administrative Procedures Act, chapter 2001 of the Government Code. See Open Records Decision No. 588 at 7 (1991) (finding contested case under the Administrative Procedures Act constitutes litigation). You state the information at issue reflects the mental impressions or legal reasoning of the attorneys. Upon review, we find you have demonstrated the responsive information in Exhibit A constitutes core attorney work product. Therefore, we conclude the department may withhold the responsive information in Exhibit A under Texas Rule of Civil Procedure 192.5.²

²As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

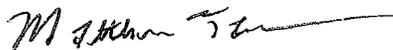
Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has found personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. See Open Records Decision Nos. 600 (1992), 545 (1990). Upon review, we agree the information the department has marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the department must withhold the information it has marked under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, the department may withhold the responsive information in Exhibit A under Texas Rule of Civil Procedure 192.5. The department must withhold the information it has marked under section 552.101 of the Government Code in conjunction with common-law privacy. 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Matthew Taylor
Assistant Attorney General
Open Records Division

MHT/dls

Ref: ID# 627390

Enc. Submitted documents

c: Requestor
(w/o enclosures)