



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 10, 2015

Ms. Aimee Alcorn
Assistant City Attorney
Legal Department
City of Corpus Christi
P.O. Box 9277
Corpus Christi, Texas 78469-9277

OR2015-14003

Dear Ms. Alcorn:

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# 570952 (ORR# 445).

The City of Corpus Christi (the "city") received a request for all documents from cases involving settlement agreements of lawsuits between the city and any parties that included a confidentiality provision, spanning from a specific date range.¹ The city states it will release some information. The city claims the submitted information is excepted from disclosure under sections 552.101, 552.110, 552.111, and 552.117 of the Government Code

¹The city states it sought and received clarification of the request. See Gov't Code § 552.222(b) (providing that if request for information is unclear, governmental body may ask requestor to clarify the request); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). The city informs us it sent the requestor an estimate of charges pursuant to section 552.2615 of the Government Code. See Gov't Code § 552.2615.

and privileged under Texas Rule of Civil Procedure 192.5.² Additionally, the city states release of some of this information may implicate the privacy interests of multiple third parties. Accordingly, the city states, and provides documentation showing, it notified these third parties of the request for information and of their right to submit arguments to this office as to why the information at issue should not be released.³ *See* Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released). We have considered the city's arguments and reviewed the submitted representative samples of information.⁴

Initially, we note the submitted 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;

...

(18) a settlement agreement to which a governmental body is a party.

Id. § 552.022(a)(1), (18). In this instance, the submitted information includes a completed investigation subject to section 552.022(a)(1). The city must release this information subject to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 or is expressly confidential under other law. The submitted information also includes settlement agreements to which the city is a party subject to section 552.022(a)(18). The city must release the information that is subject to section 552.022(a)(18) unless it is expressly confidential under the Act or other law. The city raises section 552.111 of the Government

²Although the city does not cite to section 552.117 of the Government Code in its brief, we understand the city to raise this exception based on its markings. Although the city also raises section 552.101 of the Government Code in conjunction with Texas Rule of Civil Procedure 192.5, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

³As of the date of this letter, we have not received comments from any of the third parties.

⁴We assume the "representative sample" of records 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 that submitted to this office.

Code for the completed investigation. However, section 552.111 is a discretionary exception to disclosure that protects a governmental body's interests and does not make information confidential under the Act. *See* Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.111). Therefore, the city may not withhold the information at issue under section 552.111. However, the Texas Supreme Court has held 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 the city's assertion of the attorney work product privilege for the completed investigation under Texas Rule of Civil Procedure 192.5. The city also claims some of the information is protected from disclosure under sections 552.101, 552.110, and 552.117 of the Government Code. As sections 552.101, 552.110, and 552.117 can make information confidential, we will also address the city's claims under these exceptions.

Texas Rule of Civil Procedure 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 it implicates the core work product aspect of the work product privilege. *See* ORD 677 at 9-10. 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 that 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's 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. 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. ORD 677 at 5-6. Thus, in such a situation, if the governmental body demonstrates the file was created for trial or in anticipation of litigation, this office will presume the entire file is within the scope of the privilege. 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").

The city asserts Exhibits D, E, and F are representative of the entirety of a litigation file created in preparation for Cause No. 07-61826-00-1 in the County Court at Law No. 1 in Nueces County, Texas. The city states the file was prepared in anticipation of civil litigation and release of the information will necessarily reveal the attorney's mental processes, conclusions, and legal theories. Based on the city's representations and our review, we agree the information at issue encompasses the entirety of an attorney's litigation file, and this file was created in anticipation of litigation. Accordingly, we conclude the city may withhold Exhibits D, E, and F as core work product under rule 192.5 of the Texas Rules of Civil Procedure.⁵

The city raises section 552.110 of the Government Code for the remaining information. We note, however, that section 552.110 is designed to protect the interests of third parties, not the interests of a governmental body. Therefore, the city may not withhold any of the remaining information under section 552.110 of the Governmental Code.

In summary, the city may withhold Exhibits D, E, and F as core work product under rule 192.5 of the Texas Rules of Civil Procedure. The city must release the remaining information.

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.

⁵As our ruling is dispositive, we need not address the city's remaining arguments against disclosure of this information.

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,



Rahat Huq
Assistant Attorney General
Open Records Division

RSH/som

Ref: ID# 570952

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Rose Marie Gaona
6209 Preakness Circle
Corpus Christi, Texas 78417
(w/o enclosures)

Mr. Charles C. Smith
615 North Upper Broadway, Suite 1710
Corpus Christi, Texas 78401
(w/o enclosures)

Mr. Charles M. Tryon
4217 Snowbird
Corpus Christi, Texas 78413
(w/o enclosures)

Mr. Phillip Westergren
1750 Sante Fe
Corpus Christi, Texas 78404
(w/o enclosures)