



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 6, 2016

Mr. Ryan Mitchell
Assistant City Attorney
City of Arlington
P.O. Box 90231
Arlington, Texas 76004-3231

OR2016-26977

Dear Mr. Mitchell:

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# 636529 (City ORR 29957).

The City of Arlington (the "city") received a request for a specified complete internal affairs investigation file concerning the requestor. You state the city will release most of the requested information. You claim the submitted information is excepted from disclosure under section 552.111 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note a portion of 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[.]

Gov't Code § 552.022(a)(1). The submitted information contains documents from a completed investigation subject to section 552.022(a)(1). This information must be released unless it is excepted from disclosure under section 552.108 or made confidential under the Act or other law. *See id.* Although the city raises section 552.111 of the Government Code for the entirety of the submitted information, this section is a discretionary exception to disclosure and does not make information confidential under the Act. *See* Open Records Decision Nos. 677 at 8 (2002) (attorney work product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the information from the completed investigation, which we have marked, may not be withheld under section 552.111 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Civil Procedure are “other law” that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will consider the city’s assertion of the attorney work product privilege under Texas Rule of Civil Procedure 192.5 for the information subject to section 552.022(a)(1) of the Government Code. Further, we will address your argument under section 552.111 of the Government Code for the remaining information.

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* 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 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 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).

You state the information at issue was created by city attorneys, paralegals, and staff in anticipation of litigation, and reveals the mental impressions of city attorneys with respect to the relevant issues. You further state the information at issue was not intended to be, and has not been, released publicly or shared with individuals other than city staff or outside counsel. Based on your representations and our review, we find the city has demonstrated the applicability of the core work product privilege to the information. Accordingly, the city may withhold the information subject to section 552.022 of the Government Code, which we have marked, under Texas Rule of Civil Procedure 192.5.

We now address your argument for the information not subject to section 552.022(a)(1) of the Government Code. Section 552.111 of the Government Code 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. ORD 677 at 4-8; *see City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 377 (Tex. 2000). The elements of and test for the attorney work product privilege under section 552.111 are the same as those outlined above for rule 192.5. You state the remaining information was created by city attorneys, paralegals, and staff in anticipation of litigation, and reveals the mental impressions of city attorneys with respect to the relevant issues. You further state the information at issue was not intended to be, and has not been, released publicly or shared with individuals other than city staff or outside counsel. Upon review, we find the city has demonstrated the applicability of the attorney work product privilege to the remaining information. Therefore, the city may withhold the remaining information under section 552.111 of the Government Code as attorney work product.

In summary, the city may withhold information subject to section 552.022 of the Government Code, which we have marked, under Texas Rule of Civil Procedure 192.5. The city 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 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,

A handwritten signature in black ink, appearing to read 'Ian Lancaster', written in a cursive style.

Ian Lancaster
Assistant Attorney General
Open Records Division

IML/akg

Ref: ID# 636529

Enc. Submitted documents

c: Requestor
(w/o enclosures)