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ATTORNEY GENERAL OF TEXAS

July 27, 2017

Mr. David Wheelus
Public Information Coordinator
Open Records Office
General Counsel Division
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2017-16939

Dear Ms. Beaver:

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# 668138 (TDI# 184044).

The Texas Department of Insurance (the "department") received a request for information pertaining to specific insurance policies and a specified violation.¹ You state you have released some information. You claim the submitted information is privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the submitted information.

As you acknowledge, the submitted information consists of a completed investigation subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body" unless the information is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under the Act or "other law[.]" Gov't Code § 552.022(a)(1). The Texas Supreme Court has held the Texas Rules

¹We note the department sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

of Evidence and the Texas Rules of Civil Procedure are “other law” for the purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 337 (Tex. 2001). Accordingly, we will consider your claims under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5.

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 inform us the submitted information consists of "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." You also explain these enforcement proceedings are governed by the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code. Thus, you state the submitted case file was created by attorneys, legal staff, and other department representatives in anticipation of litigation. *Cf.* Open Record Decision No. 588 (1991) (contested case under APA constituted litigation for purposes of statutory predecessor to Gov't Code § 552.103). Based on your representations, we conclude the department may withhold the submitted information as core attorney work product under Texas Rule of Civil Procedure 192.5.²

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,



D. Michelle Case
Attorney
Open Records Division

DMC/sdk

Ref: ID# 668138

Enc. Submitted documents

c: Requestor
(w/o enclosures)

²As our ruling is dispositive, we need not consider your remaining argument against disclosure.