



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

April 12, 2019

Ms. Jelain Chubb  
Director, Archivist and Information Services Division  
Texas State Library and Archives Commission  
P.O. Box 12927  
Austin, Texas 78711-2927

OR2019-09903

Dear Ms. Chubb:

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# 759099 (ORR# 19-9109).

The Texas State Library and Archives Commission ("TSLAC") received a request for the Office of the Attorney General's (the "OAG") file on a specified case and other cases of a specified type. You state TSLAC will release some information. Although TSLAC takes no position as to the disclosure of the submitted information, you state that release of the submitted information may implicate the interests of the OAG. Accordingly, you state you notified the OAG of the request and of its right to submit comments to this office as to why its information should not be released to the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from the OAG. We have considered the submitted arguments and have reviewed the submitted information.

Section 552.111 of the Government Code exempts 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[.]" *Id.* § 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); Open Records Decision No. 677 at 4-8 (2002). 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. TEX. R. CIV. P. 192.5; 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.

The work product doctrine under section 552.111 of the Government Code is applicable to litigation files in criminal and civil litigation. *Curry v. Walker*, 873 S.W.2d 379, 381 (Tex. 1994); see *United States v. Nobles*, 422 U.S. 225, 236 (1975). In *Curry*, the Texas Supreme Court held that a request for a district attorney's "entire file" was "too broad" and, quoting *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993) (orig. proceeding), held "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."<sup>1</sup> *Curry*, 873 S.W.2d at 380 (internal quotations omitted) (quoting *National Union Fire Ins. Co.*, 863 S.W.2d at 460). Accordingly, if a requestor seeks an attorney's entire litigation file, and a governmental body demonstrates the file was created in anticipation of litigation, we will presume the entire file is excepted from disclosure under the attorney work product aspect of section 552.111. Open Records Decision No. 647 at 5 (1996); see *Nat'l Union Fire Ins. Co.*, 863 S.W.2d at 461 (organization of attorney's litigation file necessarily reflects attorney's thought processes).

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<sup>1</sup>We note, however, that the court in *National Union* also concluded that a specific document is not automatically considered to be privileged simply because it is part of an attorney's file. 863 S.W.2d at 461. The court held that an opposing party may request specific documents or categories of documents that are relevant to the case without implicating the attorney work product privilege. *Id.*; Open Records Decision No. 647 at 5 (1996).

The OAG states the requestor seeks its entire litigation file concerning the case at issue. The OAG also states the submitted information “was created or compiled by OAG attorneys and staff for trial during the process of defending the state.” The OAG further states release of the submitted information “necessarily reveals the mental impressions and opinions of [its attorneys].” Based on the OAG’s representations and our review, we find the instant request constitutes a request for an “entire” litigation file for purposes of the *Curry* decision. Thus, we agree TSLAC may withhold the submitted information in its entirety under section 552.111 of the Government Code on behalf of the OAG.<sup>2</sup>

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](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,



Patrick P. Mehaffy  
Assistant Attorney General  
Open Records Division

PPM/mo

Ref: ID# 759099

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Third Party  
(w/o enclosures)

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<sup>2</sup>As our ruling is dispositive, we need not address the OAG’s remaining argument against disclosure of the submitted information.

REF ID# 759099

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