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ATTORNEY GENERAL OF TEXAS

July 2, 2019

Mr. William Overton
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342-4004

OR2019-18203

Dear Mr. Overton:

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# 773542 (OGC No. PP0114).

The Texas Department of Criminal Justice (the "department") received a request for information pertaining to a specified investigation involving the requestor. You claim the submitted information is excepted from disclosure under sections 552.107, 552.111, 552.117, 552.136, and 552.139 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released).

Initially, we note 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." *Id.* § 552.022(a)(1). Although you seek to withhold this information under sections 552.107 and 552.111 of the Government Code, these sections are discretionary in nature and do not make information confidential under the Act. *See* Open Records Decision Nos. 677

¹Although the you also raise section 552.1175 of the Government Code, we note section 552.117 is the proper exception to raise for information held in an employment context.

(2002) (governmental body may waive attorney work product privilege under section 552.111), 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the information subject to section 552.022 may not be withheld under section 552.107 or section 552.111 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Civil Procedure and the Texas Rules of Evidence 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). Therefore, we will consider your assertion of the attorney-client privilege under rule 503 and the attorney work product privilege under rule 192.5. Additionally, because sections 552.117, 552.136, and 552.139 of the Government Code make information confidential under the Act, we will consider your arguments under these sections.

Texas Rule of Evidence 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

(A) between the client or the client's representative and the client's lawyer or the lawyer's representative;

(B) between the client's lawyer and the lawyer's representative;

(C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;

(D) between the client's representatives or between the client and the client's representative; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made to further the rendition of professional legal services to the client or reasonably necessary to transmit the communication. *Id.* 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is

confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under rule 503, provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

You assert the submitted information consists of a privileged attorney-client communication. You explain the information at issue was communicated between attorneys for the department and department employees for the purpose of facilitating the rendition of professional legal services to the department, and this communication has remained confidential. Based on your representations and our review, we find the information subject to section 552.022(a)(1) consists of a communication protected by the attorney-client privilege. *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 238 (Tex. App.-Austin 2000, pet. denied) (concluding attorney's entire investigation report was protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney for purpose of providing legal services and advice). Accordingly, the department may generally withhold the submitted information under rule 503 of the Texas Rules of Evidence.²

We note, however, some of the information at issue consists of documents communicated with an individual whom the department has not demonstrated is a privileged party. Furthermore, if these documents are removed from the communication to which they are attached and stand alone, they are responsive to the request for information. Therefore, if the non-privileged documents, which we have marked, are maintained by the department separate and apart from the otherwise privileged communication to which they are attached, then the department may not withhold these documents under rule 503 of the Texas Rules of Evidence. In that instance, we will address your remaining arguments against disclosure of the information at issue.

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

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

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").

Upon review, we find you have not demonstrated any of the remaining information at issue, which was shared with a non-privileged party, consists of mental impressions, opinions, conclusion, or legal theories of an attorney or an attorney's representative that were created for trial or in anticipation of trial. Therefore, the department may not withhold any of the remaining information at issue under rule 192.5 of the Texas Rules of Civil Procedure.

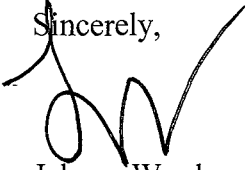
Section 552.117(a)(3) of the Government Code excepts from public disclosure the home address and telephone number, emergency contact information, social security number, and family member information of current or former employees of the department or any division of the department, regardless of whether the current or former employee complies with section 552.1175 of the Government Code. Gov't Code § 552.117(a)(3). Upon review, we find the department must withhold the information we have marked pursuant to section 552.117(a)(3) of the Government Code.

In summary, the department may generally withhold the submitted information under rule 503 of the Texas Rules of Evidence. However, if the department maintains these non-privileged documents, which we marked, separate and apart from the otherwise privileged communication in which they appear, the department may not withhold them under rule 503 of the Texas Rules Evidence. In that instance, the department must withhold the information we have marked under section 552.117(a)(3) of the Government Code and release the remaining information.³

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,



Jahna Ward
Assistant Attorney General
Open Records Division

JW/mo

Ref: ID# 773542

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³In this instance, we note the requestor has a right of access to some of the information being released that is confidential with respect to the general public. See Gov't Code § 552.023(a) (governmental body may not deny access to person to whom information relates, or that party's representative, solely on grounds that information is considered confidential by privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Because such information is confidential with respect to the general public, if the department receives another request for this information from a different requestor, then the department should again seek a ruling from this office.