



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 7, 2020

Ms. Elizabeth Stevens
Assistant General Counsel
Harris County District Attorney's Office
500 Jefferson Street, Suite 600
Houston, Texas 77002

OR2020-25159

Dear Ms. Stevens:

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# 846976 (Internal Tracking No. 2020.07-0030).

The Harris County District Attorney's Office (the "district attorney's office") received a request for (1) certain information, including the complete investigative file, pertaining to four specified cause numbers; (2) a specified agreement; and (3) certain information pertaining to asset forfeiture funds during a defined period of time. You state you will make some information available to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.111, 552.130, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note the submitted information is subject to section 552.022 of the Government Code, which provides, in relevant part, as follows:

¹ We 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 that those records contain substantially different types of information than that submitted to this office.

(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, excepted as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted information consists of completed investigations that are subject to section 552.022(a)(1). The district attorney's office must release the completed investigations pursuant to section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or are made confidential under the Act or other law. *See id.* The district attorney's office seeks to withhold the information subject to section 552.022 under section 552.111 of the Government Code. However, section 552.111 is discretionary in nature and does not make information confidential under the Act. *See Open Records Decision Nos. 677 (2002) (governmental body may waive attorney work product privilege under section 552.111), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions).* Therefore, the information at issue 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 is "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your assertion of the attorney work product privilege under Texas Rule of Civil Procedure 192.5 for the submitted information. In addition, as information subject to section 552.022(a)(1) may be withheld under section 552.108 of the Government Code, we will consider your arguments under section 552.108 for the submitted information. Further, as sections 552.101 and 552.130 of the Government Code can make information confidential under the Act, we will consider your arguments under these sections against disclosure of the submitted information.

Rule 192.5 encompasses the attorney work product privilege. 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). 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. *Id.* 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 that

- 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.

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 attorney work product 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").

The district attorney's office argues the present request for information encompasses the entirety of the litigation files for the cases at issue, which were compiled by attorneys for the district attorney's office in the course of preparing for pending litigation. The district attorney's office further states the information at issue reflects the mental impressions or legal reasoning of the attorneys. Upon review, we find the district attorney's office has demonstrated the information at issue constitutes attorney work product. Therefore, we conclude the district attorney's office may withhold the submitted information 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

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

responsibilities, please visit our website at <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Kimbell Kesling
Assistant Attorney General
Open Records Division

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Ref: ID# 846976

c: Requestor