



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 10, 2020

Ms. Emily Johnson-Liu
Assistant State Prosecuting Attorney
Office of the State Prosecuting Attorney
P.O. Box 13046
Austin, Texas 78711

OR2020-28336

Dear Ms. Johnson-Liu:

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# 853552.

The Office of the State Prosecuting Attorney (the "state prosecuting attorney's office") received a request for all records pertaining to a specified case number. You state you have released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.103, 552.108, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information, which you indicated, is not responsive to the instant request for information because it does not pertain to the specified case number. This ruling does not address the public availability of any information that is not responsive to the request and the state prosecuting attorney's office is not required to release such information in response to this request.

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. *City of*

¹ Although you also raise Texas Rule of Civil Procedure 192.5, we note the proper exception to raise when asserting the work product privilege for information not subject to section 552.022 of the Government Code, as in this case, is section 552.111 of the Government Code. *See* Open Records Decision No. 677 at 1 (2002).

Garland v. Dallas Morning News, 22 S.W.3d 351, 360 (Tex. 2000); ORD 677. Rule 192.5 defines work product as:

(1) material prepared or mental impressions developed in anticipation of litigation or for trial 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's representative. *Id.*; 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.

You assert the responsive information consists of attorney work product under section 552.111 of the Government Code. You state the responsive information reflects the mental impressions, conclusions, or legal theories of an attorney representing the state and an attorney representative in anticipation of or in the course of preparing for litigation. Upon review, we find you have demonstrated the information at issue was prepared in anticipation of litigation. Accordingly, the state prosecuting attorney's office may withhold the responsive information under the attorney work product privilege of section 552.111 of the Government Code.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.

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

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 <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

KK/gw

Ref: ID# 853552

Enc. Submitted documents

c: Requestor
(w/o enclosures)