



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 2, 2022

Mr. Matthew Entsminger
Assistant County Attorney
Travis County
P.O. Box 1748
Austin, Texas 78767

OR2022-37325

Dear Mr. Entsminger:

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# 987583 (Ref. No. 1078084-1).

The Travis County Attorney's Office (the "county attorney's office") received a request for the entire case file pertaining to a specified case. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.111 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 contains court-filed documents subject to section 552.022(a)(17) of the Government Code. Section 552.022(a)(17) of the Government Code provides for required public disclosure of "information that is also contained in a public court record," unless the information is made confidential under the Act or other law. Gov't Code § 552.022(a)(17). Although you seek to withhold this information under sections 552.103 and 552.111 of the Government Code, these sections are discretionary exceptions and do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); 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 county attorney's

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

office may not withhold the court-filed documents subject to section 552.022(a)(17) under either section 552.103 or section 552.111. However, the Texas Supreme Court has held the Texas Rules of Civil Procedure are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will address your attorney work product claim under rule 192.5 of the Texas Rules of Civil Procedure for the information subject to section 552.022. We will also consider your arguments for the information not subject to section 552.022.

Rule 192.5 of the Texas Rules of Civil Procedure encompasses the attorney work product privilege. Rule 192.5(a) 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.*; 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.

In *Curry v. Walker*, 873 S.W.2d 379, 381 (Tex. 1994), the Texas Supreme Court held that a request for a district attorney’s “entire file” was “too broad” and, quoting *Nat’l 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.” *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 within the scope of the attorney work product 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.*, 863 S.W.2d at 461)); see also *Curry*, 873 S.W.2d at 380.

You state the submitted information consists of the entire litigation file of the county attorney's office regarding the civil litigation at issue. You also state the information at issue "was created or assembled by a prosecutor [of the county attorney's office] in anticipation of or in the course of preparing for civil litigation." Further, you state release of the information at issue "would reveal the mental impressions or legal reasoning of . . . prosecutors [of the county attorney's office]." Based on your representations and our review, we find the present request constitutes a request for an "entire" litigation file for purposes of the *Curry* decision. Accordingly, the county attorney's office may withhold the information subject to section 552.022 of the Government Code under rule 192.5 of the Texas Rules of Civil Procedure.

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. This section encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. See *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); ORD 677 at 4-8. As noted above, rule 192.5 defines work product and 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(a); ORD 677 at 6-8. The test for determining whether information was created or developed in anticipation of litigation is the same as that discussed above concerning rule 192.5. See *Nat'l Tank Co.*, 851 S.W.2d at 207.

As previously noted, we conclude the present request constitutes a request for an "entire" litigation file for purposes of the *Curry* decision. Accordingly, the county attorney's office may withhold the remaining information under section 552.111 of the Government Code.²

In summary, the county attorney's office may withhold the information subject to section 552.022 of the Government Code under rule 192.5 of the Texas Rules of Civil Procedure. The county attorney's office may withhold the remaining information under section 552.111 of the Government Code.

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open

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

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,

Blake Brennan
Assistant Attorney General
Open Records Division

BBX/pt

Ref: ID# 987583

Enc. Submitted documents

c: Requestor
(w/o enclosures)