



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

March 19, 2003

Ms. Susan Combs
Commissioner
Texas Department of Agriculture
P.O. Box 12847
Austin, Texas 78711

OR2003-1885

Dear Ms. Combs:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 178146 by this office, and tracking number TDA-PIR-03-0216 by your office.

The Texas Department of Agriculture (the "department") received a request for all documents related to department incident number 2424-01-02-0035. You claim that some of the responsive information is excepted from disclosure under sections 552.101, 552.103, 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that you only seek a decision from this office regarding the submitted staff recommendation. Therefore, we assume that you have released any remaining responsive information that exists to the requestor. If you have not released any such information, you must release it to the requestor at this time. *See* Gov't Code §§ 552.301(a), .302.

We next note that the requested information is subject to section 552.022 of the Government Code. Section 552.022 provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The department must release the completed investigation under section 552.022(a)(1), unless those records are expressly confidential under other law or excepted from disclosure under section 552.108.¹ Sections 552.103, 552.107, and 552.111 are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived. As such, these exceptions are not other law that makes information confidential for the purposes of section 552.022.² Therefore, the completed investigation may not be withheld under section 552.103, 552.107, or 552.111. However, you also claim that the submitted information is protected under Rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court has held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). This office has determined that when the work product privilege is claimed for information that is subject to release under section 552.022, the proper analysis is whether the information at issue is excepted under Texas Rule of Civil Procedure 192.5 (work product). Open Records Decision No. 677 at 8-9 (2002). We will therefore consider whether the information subject to section 552.022 is excepted under this rule.

Rule 192.5 of the Texas Rules of Civil Procedure 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). Accordingly, in order to withhold attorney work product from disclosure under Rule 192.5, a governmental body must demonstrate that the material, communication, or mental impression was created for trial or in anticipation of litigation. *Id.* To show that the information at issue was created in anticipation of litigation, a governmental body must demonstrate that 1) 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 2) the party resisting discovery believed in good faith

¹Because you do not raise section 552.108, we do not consider the applicability of this exception.

²Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 522 at 4 (1989) (discretionary exceptions in general), 473 (1987) (governmental body may waive section 552.111).

that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See National 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. Information that meets the work product test is confidential under Rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in Rule 192.5(c). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). Here, you have demonstrated that the submitted information was created in anticipation of litigation by or for a party or a party’s representative.³ Consequently, the department may withhold the submitted information under Rule 192.5 as attorney work product. As this rule is dispositive, we need not address your remaining arguments.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

³We note here that contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, constitute litigation for purposes of the Public Information Act. *See Open Records Decision No. 588 at 7 (1991).*

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Heather Pendleton Ross
Assistant Attorney General
Open Records Division

HPR/sdk

Ref: ID# 178146

Enc: Submitted documents

c: Mr. William H. Hughes
7525 Highway 277 South
Abilene, Texas 79606
(w/o enclosures)