



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 29, 2003

Ms. Jennifer Soldano
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2003-9326

Dear Ms. Soldano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 193281.

The Texas Department of Transportation (the "department") received a request for information pertaining to a specified automobile accident. You claim that some of the requested information or portions thereof are excepted from disclosure pursuant to sections 552.103, 552.111, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we note that the department only submitted a responsive "Vehicular Incident Summary" document to us for review. We, therefore, presume that the department has already provided the requestor with all other responsive information to the extent that it existed on the date of the department's receipt of this request. If not, then the department must do so at this time. *See* Gov't Code §§ 552.006, .301, .302; *see also* Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances).

Next, we note that the submitted "Vehicular Incident Summary" document constitutes a completed report made of, for, or by the department that is subject to section 552.022 of the Government Code. *See* Gov't Code § 552.022(a)(1). Section 552.022(a)(1) provides that "a completed report, audit, evaluation, or investigation made of, for, or by a governmental

body,” is public and may not be withheld, unless it is expressly confidential under other law or excepted from disclosure by section 552.108 of the Government Code. *See id.* You do not claim that any portion of this report is excepted from disclosure under section 552.108. Although the department claims that this report is excepted from disclosure pursuant to sections 552.103 and 552.111 of the Government Code, we note that these exceptions to disclosure are discretionary exceptions to disclosure under the Public Information Act (the “Act”) that do not constitute “other law” for purposes of section 552.022 of the Government Code.¹ Accordingly, we conclude that the department may not withhold any portion of this document under section 552.103 or 552.111 of the Government Code. However, we note that the Texas Supreme Court has recently held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *See In re City of Georgetown*, 53 S.W.3d 328, 336 (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 protected from disclosure under rule 192.5 of the Texas Rules of Civil Procedure. *See Open Records Decision No. 677 at 8-9 (2002)*. Therefore, we will determine whether any portion of this document is protected from disclosure under rule 192.5 or is excepted from disclosure under sections 552.117 or 552.130 of the Government Code.

Rule 192.5 provides in part:

(a) Work Product Defined. Work product comprises:

- (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.

¹ Discretionary 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 which implicates 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 statutory predecessor to section 552.111); *see also 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 section 552.103). Discretionary exceptions, therefore, do not constitute “other law” that makes information confidential.

TEX. R. CIV. P. 192.5(a). For the purpose of section 552.022, information is confidential under rule 192.5 only to the extent it implicates the core work product aspect of the work product privilege. *See* Open Records Decision No. 677 at 9-10 (2002). Core work product is defined as the work product of an attorney or an attorney's representative developed in anticipation of litigation or for trial that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *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 that the material was 1) created for trial or in anticipation of litigation and 2) consists of an attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *See id.*

The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. 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 that there was a substantial chance that 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 prong of the work product test requires the governmental body to show that the documents at issue contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *See* Tex. R. Civ. P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test is confidential under rule 192.5 provided that the information does not fall within the purview 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, no writ).

In this instance, the submitted information pertains to an accident between a department employee and a member of the public. You argue that the primary purpose of creating the document at issue is to make a record in case of future litigation. However, after carefully reviewing your arguments and the submitted information, we find that the department has not adequately demonstrated that a reasonable person would have concluded from the totality of the circumstances surrounding the creation of this document that there was a substantial chance that litigation would ensue, or that the department believed in good faith that there was a substantial chance that litigation would ensue and created the document for the purpose of preparing for such litigation. Accordingly, we conclude that the department may not withhold any portion of the submitted information under rule 192.5 of the Texas Rules of Civil Procedure.

However, you also claim that a portion of the submitted information is excepted from disclosure pursuant to section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code § 552.117(a)(1)*. Whether a particular piece of information is protected by section 552.117 must be determined at the time that the request for information is received by the governmental body. *See Open Records Decision No. 530 at 5 (1989)*. Accordingly, the department must withhold the social security number of the department employee that is contained within the submitted information pursuant to section 552.117(a)(1) of the Government Code, but only if the employee with whom the number is associated timely made a request for confidentiality for it prior to the date that the department received this request for information.

Nevertheless, this social security number may be excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with federal law.² A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See Open Records Decision No. 622 (1994)*. These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that this social security number is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from disclosure under section 552.101 on the basis of that federal provision. We caution the department, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing this social security number, the department should ensure that it was not obtained or is not maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.

Finally, you claim that portions of the submitted information are excepted from disclosure pursuant to section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

² Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See Gov't Code § 552.101*. Section 552.101 encompasses information that is protected from disclosure by other statutes.

(2) a motor vehicle title or registration issued by an agency of this state[.]

Gov't Code § 552.130. Accordingly, we conclude that the department must withhold the information that we have marked pursuant to section 552.130 of the Government Code.

In summary, the department must withhold the social security number of the department employee that is contained within the submitted information pursuant to section 552.117(a)(1) of the Government Code, but only if the employee with whom the number is associated timely made a request for confidentiality for it prior to the date that the department received this request for information. Nevertheless, the social security number may be confidential under federal law. The department must withhold the information that we have marked pursuant to section 552.130 of the Government Code. The department must release the remaining submitted information to the requestor.

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).

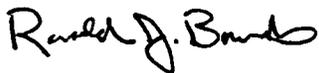
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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).

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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/sdk

Ref: ID# 193281

Enc. Marked documents

cc: Mr. Jim S. Adler
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