ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 20, 2009

Mr. Reg Hargrove
Assistant Attorney General
Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2009-14855

Dear Mr. Hargrove:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 358915 (PIR No. 09-25709).

The Office of the Attorney General (the "OAG") received a request for "all information related to any discussions, decisions, conversations, or materials between the Office of the Attorney General of Texas and Oppenheimer Funds [("Oppenheimer")] with respect to 529 Plans and or Texas Higher Education, or the Texas College Savings Plan." The OAG claims the information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. The OAG also notified Oppenheimer of the request. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released). We have received comments from Oppenheimer, considered all parties' arguments against disclosure, and reviewed the submitted sample of information.[1]

[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.

Initially, we note some of the documents are subject to section 552.022 of the Government Code, which provides in part:

> (a) Without limiting the amount or kind of information that is public information under this chapter, 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:
>
> . . .
>
> (17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(17). The court-filed documents are subject to section 552.022(a)(17) and are excepted from disclosure only if they are confidential under other law. Although the OAG raises sections 552.107 and 552.111 of the Government Code, these exceptions are discretionary in nature and thus may be waived. Accordingly, sections 552.107 and 552.111 do not constitute other laws for purposes of section 552.022. *See* Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 676 at 11-12 (2002) (attorney-client privilege under section 552.107 may be waived), 665 at 2 n.5 (2000)(discretionary exceptions generally). Therefore, the OAG may not withhold the court-filed documents under sections 552.107 and 552.111. However, the Texas Supreme Court has held the Texas Rules of Civil Procedure and the Texas Rules of Evidence are other laws 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 whether the OAG may withhold the court-filed documents subject to section 552.022(a)(17) under Texas Rule of Civil Procedure 192.5 and Texas Rule of Evidence 503.

Rule 192.5 encompasses the attorney work product privilege. For the purposes of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. ORD No. 677 at 9-10. Rule 192.5 defines core work product as the work product of an attorney or an attorney's representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney's representative. 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 the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *Id.*

The first prong of the work product test, which requires a governmental body to show the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate (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 there was a substantial chance 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 part of the work product test requires the governmental body to show the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney's or an attorney's representative. Tex. R. Civ. P. 192.5(b)(1). A document containing core work product information that meets both parts of the work product test is confidential under rule 192.5, provided the information does not fall within the scope 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).

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 core work product aspect of the privilege. ORD No. 677 at 5-6. Thus, in such a situation, if the governmental body demonstrates the file was created for trial or in anticipation of litigation, this office will presume the entire file is within the scope of the privilege. Open Records Decision No. 647 at 5 (1996) (citing *Nat'l Union Fire Ins. Co. v. Valdez*, 863 S.W.2d 458, 461 (Tex. 1993)) (organization of attorney's litigation file necessarily reflects attorney's thought processes); *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 OAG states its entire Oppenheimer litigation file is responsive to the request for all information related to discussions, decisions, or materials concerning Oppenheimer and the 529 or Texas College Savings Plans. Furthermore, the OAG explains it prepared this file in anticipation of litigation it may file against Oppenheimer for possible breach of contract and breach of fiduciary duty. Based on the OAG's representations and our review, we agree the present request encompasses the OAG's entire Oppenheimer litigation file, and the OAG created the file in anticipation of litigation. Accordingly, we conclude the OAG may withhold the information subject to section 552.022 as core work product under rule 192.5 of the Texas Rules of Civil Procedure.[2]

Next, we address the remaining information in the OAG's litigation file that is not subject to section 552.022. Section 552.111, which excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency," encompasses the attorney work product privilege in rule 192.5. *City of*

[2]Because rule 192.5 is dispositive, we do not address the OAG's attorney-client privilege assertion.

Garland v. Dallas Morning News, 22 S.W.3d 351, 360 (Tex. 2000); ORD No. 677 at 4-8. Section 552.111 protects work product as defined in rule 192.5(a) 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 the work product aspect of section 552.111 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. The test to determine whether information was created or developed in anticipation of litigation is the same as that discussed above concerning rule 192.5. Again, 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 protected from disclosure as attorney work product. ORD No. 647 at 5 (1996) (citing *Valdez*, 863 S.W.2d 458, 461) (organization of attorney's litigation file necessarily reflects attorney's thought processes).

As noted above, the OAG represents the request encompasses its entire litigation file. Furthermore, the OAG demonstrated it created the file in anticipation of litigation. Based on the OAG's representations and our review, we conclude the OAG may withhold the information that is not subject to section 552.022 as attorney work product under section 552.111 of the Government Code. As section 552.111 is dispositive, we need not address the OAG's or Oppenheimer's remaining arguments against disclosure.

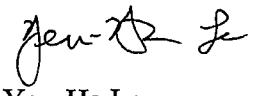
In summary, the OAG may withhold the information that is subject to section 552.022 under Texas Rule of Civil Procedure 192.5 and the remaining information that is not subject to section 552.022 under section 552.111 of the Government Code.

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 http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877)

673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/sdk

Ref: ID# 358915

Enc: Submitted documents

c: Requestor
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