



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 28, 2014

Ms. Heather Silver
Assistant City Attorney
Dallas City Attorney's Office
City of Dallas
1500 Marilla Street, Room 7DN
Dallas, Texas 75201

OR2014-03670

Dear Ms. Silver:

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# 516286.

The City of Dallas (the "city") received two requests from the same requestor for information pertaining to a specified incident and claim number. You state you will provide some of the requested information to the requestor. 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

Section 552.022(a)(1) of the Government Code provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]" unless it is excepted from disclosure under section 552.108 of the Government Code or is expressly made confidential under the Act or other law. *See* Gov't Code § 552.022(a)(1). You state the submitted information consists of the preliminary

¹We 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.

investigation of a claim filed by the requestor's client. The submitted information reflects the investigation was completed prior to the dates of the requests. Thus, the submitted information consists of a completed investigation subject to section 552.022(a)(1). Although you raise sections 552.103 and 552.111 of the Government Code for this information, these are discretionary exceptions to disclosure 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 section 552.103); Open Records Decision Nos. 677 at 10-11 (2002) (attorney work product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (governmental body may waive section 552.111). Therefore, the city may not withhold the submitted information under section 552.103 or section 552.111 of the Government Code. However, the attorney work product privilege is also found in rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court held the Texas Rules of Civil Procedure are other law within the meaning of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 337 (Tex. 2001). We will therefore consider your argument under Texas Rule of Civil Procedure 192.5 against disclosure of the submitted information.

Texas Rule of Civil Procedure 192.5 encompasses the attorney work product privilege. For 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. *See* ORD 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. *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 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 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 part of the work product test requires the governmental body to show that the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *See* 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.*, 861 S.W.2d at 427.

You inform us, prior to the city's receipt of the requests for information, the requestor's client filed a claim against the city seeking compensation for property damage resulting from the specified incident. You explain the submitted information was created by city employees in anticipation of a lawsuit resulting from that claim. In Open Records Decision No. 677, our office held information created in a governmental body's ordinary course of business may be considered to have been prepared in anticipation of litigation, and thus constitutes attorney work product, if the governmental body explains to this office the primary motivating purpose for the routine practice that gave rise to the information. *See* ORD 677 at 8; *see also Brotherton*, 851 S.W.2d at 206. You have not demonstrated the city's primary motivating purpose for the creation of the information at issue was anticipation of litigation. Thus, we find you have not demonstrated the city anticipated litigation when creating the submitted information. Further, you have not explained, and the information does not itself indicate, that any of the information at issue contains the mental impressions, opinions, conclusions, or legal theories of any city attorneys or their representatives. Therefore, we find the city has failed to establish the applicability of the core work product privilege to the submitted information, and none of it may be withheld under rule 192.5. As you provide no other arguments to withhold the submitted information, it must be released.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Michelle R. Garza
Assistant Attorney General
Open Records Division

MRG/eb

Ref: ID# 516286

Enc. Submitted documents

c: Requestor
(w/o enclosures)