



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 22, 2014

Ms. Barbara S. Nicholas  
Assistant District Attorney  
County of Dallas  
411 Elm Street, 5th Floor  
Dallas, Texas 75202-3317

OR2014-19014

Dear Ms. Nicholas:

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# 542500.

The Dallas County District Attorney's Office (the "district attorney's office") received a request for information pertaining to accidents involving a named district attorney for 2007 and 2008. The district attorney's office claims the requested information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.130 of the Government Code or privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the district attorney's office only submitted a memorandum and notes pertaining to an accident. We assume, to the extent any additional responsive information existed when the district attorney's office received the request for information, the district attorney's office has released it to the requestor. If not, then the district attorney's office must do so immediately. *See Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000).*

We next note the submitted information consists of a completed investigation that is subject to section 552.022(a)(1) of the Government Code, which reads as follows:

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 unless made confidential under this chapter or 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). You assert the submitted information is excepted from release under sections 552.107 and 552.111 of the Government Code. However, these sections are discretionary and do not make information confidential under the Act. *See* Open Records Decision Nos. 677 at 10 (2002) (governmental body may waive attorney work product privilege under section 552.111), 676 at 6 (2002) (section 552.107 is not other law for purposes of section 552.022); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the district attorney's office may not withhold the submitted information under section 552.107 or 552.111. However, the Texas Supreme Court has held the Texas Rules of Evidence and Texas Rules of Civil Procedure are "other law" that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your arguments under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. In addition, sections 552.101 and 552.130 of the Government Code make information confidential under the Act. Accordingly, we will consider the applicability of these sections to the submitted information.

Texas Rule of Evidence 503(b)(1) provides the following:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

Tex. R. Evid. 503(b)(1). A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must do the following: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

You explain Exhibit B is an attorney-client memorandum to the Dallas County Commissioners Court (the “court”) from a claims adjuster in the Civil Division of the district attorney’s office, who we understand was acting as a lawyer representative in providing advice to the court relating to a claim for damages. You state this communication was made in furtherance of the rendition of professional legal services. You also assert the communication was intended to be confidential and its confidentiality has been maintained. Based on these representations and our review of the information at issue, we find you have demonstrated the applicability of the attorney-client privilege to this information. Therefore, the district attorney’s office may withhold Exhibit B under Texas Rule of Evidence 503.<sup>1</sup>

For the purpose of section 552.022, information is confidential under rule 192.5 of the Texas Rules of Civil Procedure only to the extent the information implicates the core work product aspect of the work product privilege. 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. 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)

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<sup>1</sup>As our ruling is dispositive, we do not address your other arguments to withhold this information.

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. *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 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 the documents at issue contain the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. 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 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, orig. proceeding).

You inform us Exhibit C consists of investigation notes of the claims adjuster noted above from his investigation of the claim at issue on behalf of the Civil Division. You state a reasonable person could conclude litigation may ensue and the notes and investigation were made in anticipation of litigation and reflect the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. Having considered your representations and reviewed the information at issue, we find you have demonstrated this information constitutes core work product that the district attorney's office may withhold under rule 192.5.<sup>2</sup>

To conclude, the district attorney's office may withhold Exhibit B under Texas Rule of Evidence 503. The district attorney's office may also withhold Exhibit C under Texas Rule of Civil Procedure 192.5.

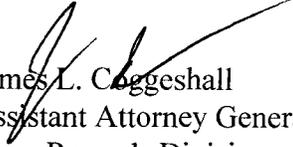
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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<sup>2</sup>As our ruling is dispositive, we do not address your other arguments to withhold this information.

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](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,



James L. Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/cbz

Ref: ID# 542500

Enc. Submitted documents

c: Requestor  
(w/o enclosures)