



February 27, 2015

Ms. Kathlyn Wilson
Director
Office of Agency Counsel
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2015-03988

Dear Ms. Wilson:

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# 555489 (TDI #157225).

The Texas Department of Insurance (the "department") received a request for information related to a complaint pertaining to a named individual. You state you have released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code, and privileged under Texas Rule of Civil Procedure 192.5.¹ We have considered the raised arguments and reviewed the submitted information.

Initially, we note, and you acknowledge, some of the submitted information is part of a completed investigation that is subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides that a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is public information and not excepted from required disclosure unless made confidential under the Act or other law. Gov't Code

¹Although you also raise section 552.107 of the Government Code, you have provided no arguments in support of this exception. Accordingly, we assume you no longer assert section 552.107. *See* Gov't Code §§ 552.301, .302.

§ 552.022(a)(1). However, the Texas Supreme Court has held the Texas Rules of Civil Procedure are “other law” that make information confidential for purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your assertion of the attorney work product privilege under Texas Rule of Civil Procedure 192.5 for the information subject to section 552.022(a)(1) of the Government Code. Additionally, we will consider the exceptions you raised for the information not subject to section 552.022(a)(1) of the Government Code.

Rule 192.5 encompasses the attorney work product privilege. For purposes of section 552.022 of the Government Code, information may be withheld under rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. *See Open Records Decision No. 677 at 9–10 (2002)*. 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 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. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

The department claims the information subject to section 552.022(a)(1) is privileged under Texas Rule of Civil Procedure 192.5. You explain this information pertains to an investigation that was conducted for the purpose of preparing for administrative action against the named individual. You state the documents were prepared by a department attorney, and you indicate the documents reveal the attorney’s mental impressions,

conclusions, and legal theories regarding the file. Based on your representations and our review, we agree the information you marked is protected core work product. Accordingly, the department may withhold the information you have marked under Texas Rule of Civil Procedure 192.5.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses information made confidential by other statutes. Section 4001.206 of the Insurance Code states:

(a) On termination of the appointment of an agent for cause, the insurer or agent shall immediately file with the department a statement of the facts relating to the termination of the appointment and the date and cause of the termination. On receipt of the statement, the department shall record the termination of the appointment of that agent to represent the insurer in this state.

(b) A document, record, statement, or other information required to be made or disclosed to the department under this section is a privileged and confidential communication and is not admissible in evidence in a court action or proceeding except under a subpoena issued by a court of record.

(c) A person, including an insurer or an employee or agent of an insurer, who provides without malice information required to be disclosed under this section is not liable for providing the information.

Ins. Code § 4001.206. Some of the submitted information consists of an appointment cancellation form and supporting information submitted to the department. Upon review, we find the records you have marked are confidential, and must be withheld in their entirety under section 552.101 of the Government Code in conjunction with section 4001.206 of the Insurance Code.

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref’d n.r.e.); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v.*

Gilbreath, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). See ORD 615. We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. See *id.* at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; see also *City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. See Open Records Decision No. 631 at 3 (1995).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); see ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. See Open Records Decision No. 313 at 3 (1982).

You state the remaining information consists of advice, opinions, and recommendations relating to policymaking matters of the department. However, upon review, we find the information at issue relates to general administrative and purely factual information or does not pertain to policymaking. Thus, we find you have failed to demonstrate how any of the information at issue consists of advice, opinions, or recommendations on policymaking matters. Accordingly, no portion of the remaining information may be withheld under section 552.111 of the Government Code.

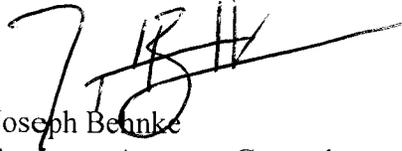
In summary, the department may withhold the information you have marked under Texas Rule of Civil Procedure 192.5. The department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 4001.206 of the Insurance Code. The department must release the remaining information.

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,

A handwritten signature in black ink, appearing to read 'JB' with a long horizontal stroke extending to the right.

Joseph Beunke
Assistant Attorney General
Open Records Division

JB/som

Ref: ID# 555489

Enc. Submitted documents

c: Requestor
(w/o enclosures)