KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 11, 2015

Mr. Mark LaForge
Assistant District Attorney
Fort Bend County District Attorney's Office
301 Jackson, Room 101
Richmond, Texas 77469

OR2015-26104

Dear Mr. LaForge:

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# 591224.

The Fort Bend County District Attorney's Office (the "district attorney's office") received a request for information regarding contracts and agreements between the district attorney's office and third parties for criminal prosecutions.[1] The district attorney's office claims the submitted information is excepted from disclosure under sections 552.108 and 552.111 of the Government Code and privileged under Texas Rule of Civil Procedure 192.5. We have considered the arguments and reviewed the submitted information.

Initially, we note a portion of the information submitted by the district attorney's office is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part, the following:

[1]You state the district attorney's office sought and received clarification of the request for information. *See* Gov't Code §552.222(b) (stating that if information requested is unclear to governmental body or if a large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

> (a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:
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> . . .
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> (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). Some of the information submitted by the district attorney's office consists of information in an account, voucher, or contract relating to the receipt or expenditure of funds by a governmental body that is subject to section 552.022(a)(3). The district attorney's office must release this information pursuant to section 552.022, unless it is made confidential under the Act or other law. *See id.* Although the district attorney's office raises sections 552.108 and 552.111 of the Government Code for this information, these exceptions are discretionary in nature and do not make information confidential under the Act. *See* Open Records Decision Nos. 677 at 8-10 (2002) (governmental body may waive attorney work product privilege under section 552.111), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). Therefore, the district attorney's office may not withhold any of the information subject to section 552.022 under section 552.108 or section 552.111. However, the Texas Supreme Court has held the Texas Rules of Civil Procedure are "other law" that make information expressly confidential for purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will consider the district attorney's office's assertion of the attorney work product privilege under Texas Rule of Civil Procedure 192.5.

Rule 192.5 of the Texas Rules of Civil Procedure 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 there was a substantial chance 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 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 district attorney's office claims the information subject to section 552.022 consists of attorney core work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. The district attorney's office states this information was created in anticipation of litigation. It further states this information reflects attorneys' mental impressions, conclusions, or legal theories. Upon review, we find the district attorney's office has not demonstrated any of the information at issue contains the mental impressions, opinions, conclusions, or legal theories of an attorney or the attorney's representative that were developed in anticipation of litigation or for trial. We therefore conclude the district attorney's office may not withhold the information subject to section 552.022 under Texas Rule of Civil Procedure 192.5.

Next, we address the district attorney's arguments against disclosure of its remaining submitted information, which is not subject to section 552.022 of the Government Code. Section 552.108 of the Government Code states, in pertinent part, the following:

> (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime [is excepted from required public disclosure] if:
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> . . .
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> (4) it is information that:
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> > (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

> (B) reflects the mental impressions or legal reasoning of an attorney representing the state.
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> . . .
>
> (b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:
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> . . .
>
> (3) the internal record or notation:
>
> (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or
>
> (B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(4), (b)(3). A governmental body must reasonably explain how and why section 552.108 is applicable to the information at issue. *See id.* § 552.301(e)(1)(A). The district attorney's office raises subsections 552.108(a)(4) and 552.108(b)(3) for the remaining information that is not subject to section 552.022. The district attorney's office generally asserts the information at issue "was prepared in contemplation of continuous litigation in a proposed Truancy Court the Fort Bend County officials were considering funding for[.]" Upon review, we find the district attorney's office has failed to demonstrate the information at issue was prepared by an attorney representing the state or that it reflects the mental impressions or legal reasoning of an attorney representing the state. *See id.* § 552.108(a)(4), (b)(3). Therefore, the district attorney's office may not withhold any of the information at issue under subsection 552.108(a)(4) or subsection 552.108(b)(3) of the Government 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[.]" *See id.* § 552.111. This section 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). We determined section 552.111 excepts from disclosure only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 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).

Further, section 552.111 does not generally except from disclosure facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157; 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).

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *See* Open Records Decision Nos. 631 at 2 (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). For section 552.111 to apply, the governmental hody must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561 at 9.

The district attorney's office argues the deliberative process privilege is applicable to the information not subject to section 552.022. The district attorney's office states the information at issue consists of communications between district attorney's office employees containing advice, opinions, and recommendations about the funding of a proposed Truancy Court. The district attorney's office informs us the communications also include employees of Fort Bend Independent School District who share a common deliberative process with the district attorney's office with regard to the proposed Truancy Court Program. Upon review, we find the district attorney's office may withhold the information we marked under seetion 552.111 of the Government Code. However, we find the remaining information at issue consists of routine administrative information or purely factual information. The

district attorney's office has failed to establish that any portion of the remaining information at issue constitutes advice, opinions, recommendations, or other material reflecting the policymaking processes of the district attorney's office. Accordingly, the district attorney's office may not withhold any portion of the remaining information at issue under the deliberative process privilege of section 552.111 of the Government Code.

Section 552.111 of the Government Code also encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351. 360 (Tex. 2000); ORD 677 at 4-8. Rule 192.5 defines work product as:

> (1) [M]aterial 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 this exception 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.

As previously noted, the district attorney's office asserts the remaining information not subject to section 552.022 pertains to anticipated litigation. Upon review, we find the district attorney's office has failed to establish the applicability of the attorney work product privilege to the information at issue. Therefore, the district attorney's office may not withhold any of the remaining information as attorney work product under section 552.111 of the Government Code.

In summary, the district attorney's office may withhold the information we marked under section 552.111 of the Government Code. The district attorney's office 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,

Britni Ramirez
Assistant Attorney General
Open Records Division

BR/bhf

Ref: ID# 591224

Enc. Submitted documents

c: Requestor
(w/o enclosures)