OPEN RECORDS DECISION NO. 677
(ORQ-41)

November 30, 2002

RE: Re-evaluation of Open Records Decision No. 647 (1996) regarding the scope of the attorney work product privilege under sections 552.103 and 552.111 of the Government Code in light of the repeal of Texas Rule of Civil Procedure 166(b) and the adoption of Texas Rule of Civil Procedure 192.5.

AUTHORITY

Under section 552.011 of the Government Code, we consider the scope of information excepted from disclosure under the Public Information Act (the "Act") as work product in light of the repeal of Texas Rule of Civil Procedure 166(b) and the adoption of Rule 192.5.

BACKGROUND

Under section 22.004 of the Government Code, the Texas Supreme Court effective January 1, 1999 repealed Rule 166(b) of the Texas Rules of Civil Procedure and adopted Rule 192. Rule 192.5(a) introduces and defines the term "work product."[1] A party's assertion in civil discovery that information constitutes work product is an assertion of privilege.[2] The work product privilege replaces the "attorney work product" and "party communication" privileges under former Rule 166(b).[3] We thus re-examine this office's treatment of "attorney work product" in the context of the Act.[4]

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[1]*See* TEX. R. CIV. P. 192.5(a).

[2]*Id.* 192.5(d).

[3]*See id.* 192, cmt. 8.

[4]Changes to the Texas Rules of Civil Procedure do not amend the Act and are not controlling with respect to the scope of information that may be excepted from disclosure in the context of the Act. *See* TEX. GOV'T CODE § 22.004(c). But such changes inform our analysis of the scope of information claimed to be privileged in the context of the Act. Importantly, this decision addresses the work product privilege under the Act only in the context of civil litigation, and does not apply to the criminal litigation context. *But see id.* § 552.108(a)(4), (b)(3).

WORK PRODUCT UNDER THE ACT

This office has previously concluded that attorney work product may be withheld under either section 552.103 or section 552.111 of the Government Code, but if litigation is concluded, only under section 552.111.[5] This has contributed to confusion about the distinct purposes of the work product privilege and the litigation exception. The tests for each differ significantly. For example, while the applicability of section 552.103 generally looks to the facts and circumstances present at the time information is requested, the applicability of the work product privilege generally looks to the facts and circumstances that existed at the time the information was created or acquired. As another example, section 552.103's protection is temporary, whereas the privilege for attorney work product is perpetual. For any particular record or information, each exception must be considered independently of the other. Under appropriate circumstances, one or both might apply to requested information. But in order properly to determine whether to assert only one, only the other, both, or neither, a governmental body must understand the differences between these two exceptions.[6]

Section 552.103

In relevant part, section 552.103, the litigation exception, excepts from required public disclosure "information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party . . . only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information."[7] The test for demonstrating this exception requires a showing that, as of the date that the request for information was received by the governmental body: (1) litigation involving the governmental body is pending or reasonably anticipated, and (2) the information relates to the litigation.[8] A governmental body asserting the exception carries the burden of clearly establishing both prongs of this test.

The plain language of section 552.103, quoted above, requires that the exception be shown as of the date of the request. Thus, a claim of anticipated litigation under the first prong of the section 552.103 test requires a governmental body to demonstrate reasonable anticipation

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[5]Open Records Decision No. 647 (1996).

[6]*See* Open Records Decision No. 665 at 4 (2000) (before governmental body may request decision of attorney general to withhold information, governmental body must have reasonable good faith belief that requested information may be excepted from disclosure).

[7]TEX. GOV'T CODE § 552.103(a), (c).

[8]*Univ. of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990).

of litigation under circumstances that existed *on the date of the request*. If, at that time, litigation is neither reasonably anticipated nor pending, section 552.103 is not applicable.[9] In regard to such claims, this office has determined that mere conjecture that litigation may ensue is insufficient, that the mere chance of litigation does not demonstrate the first prong of the section 552.103 test,[10] and that the governmental body must provide this office with concrete evidence to show that litigation is realistically contemplated.[11] Under the totality of the circumstances, the first prong of the section 552.103 test may be triggered where particular steps towards filing suit have occurred.[12] However, this office has stated that the mere fact that the prospective plaintiff has hired an attorney who then makes a request under the Act is insufficient to trigger section 552.103.[13] Likewise, where a prospective plaintiff makes public threats to sue, but does not take further action toward litigation, this office has declined to apply section 552.103.[14]

The above two-pronged test is what determines whether the section 552.103 exception applies. The question of whether the exception protects information "is in no way conditioned on the applicability of any discovery privilege."[15] If the first prong of the section 552.103 test is met for information that may happen to be "privileged," this office then considers the second prong of the test, *i.e.*, whether the information is *related to* the litigation.[16] Information related to the litigation typically includes both privileged information and information that is discoverable. A governmental body may thus properly assert section 552.103 for privileged information, including work product. Such information

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[9]Open Records Decision Nos. 551 at 4 (1990), 350 (1982).

[10]Open Records Decision Nos. 518 at 5 (1989), 397 at 2 (1983), 361 at 2 (1983), 359 at 2 (1983).

[11]*Univ. of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d at 481; Attorney General Opinion JM-266 at 4 (1984); Open Records Decision Nos. 518 at 5 (1989), 328 at 2 (1982). This office has found that litigation was reasonably anticipated for purposes of section 552.103 when the prospective opposing party took the following steps toward litigation: hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, Open Records Decision No. 346 at 2 (1982); filed a complaint with the Equal Employment Opportunity Commission, Open Records Decision No. 336 at 1 (1982); and threatened to sue on several occasions and hired an attorney, Open Records Decision No. 288 at 2 (1981).

[12]*Univ. of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d at 482.

[13]Open Records Decision No. 361 at 2 (1983).

[14]Open Records Decision No. 331 at 1 (1982).

[15]Open Records Decision No. 551 at 4-5 (1990).

[16]"Ordinarily, the words 'related to' mean 'pertaining to,' 'associated with or connected with.'" *Univ. of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d at 483.

is excepted, however, only if *a governmental body otherwise meets the section 552.103 test.*[17] This does not mean that the governmental body must demonstrate both the section 552.103 test and the applicability of the work product privilege before work product may be withheld under section 552.103. There is no requirement under section 552.103 that a governmental body demonstrate the work product privilege in order to withhold work product under section 552.103. If, however, a governmental body seeks to withhold information *on the sole basis that the information is work product*, section 552.103 is not the proper exception to claim. Rather, such an assertion is properly made under the section 552.111 exception.

Section 552.111

Section 552.111 states: "An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency is excepted from [required public disclosure]."[18] Unlike section 552.103, section 552.111 is limited to information that would be privileged from civil discovery.[19] The original language of the statutory predecessor to section 552.111[20] was modeled after Exemption 5 of the federal Freedom of Information Act[21] (the "FOIA"), which federal courts had construed to incorporate into the FOIA the "deliberative process privilege" available under federal civil discovery.[22] By incorporating the language of Exemption 5 into the Act at section 552.111's predecessor provision, the legislature intended to adopt the settled federal construction given the exemption at the time the statutory predecessor to section 552.111 was adopted.[23] One

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[17]*See* Open Records Decision Nos. 647 at 2 (1996), 575 at 2 (1990), 574 at 8 (1990).

[18]TEX. GOV'T CODE § 552.111.

[19]*Lett v. Klein Indep. Sch. Dist.*, 917 S.W.2d 455, 457 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (section 552.111 protects information that would not be discoverable under former Rule 166(b)); *Texas Dep't of Public Safety v. Gilbreath*, 842 S.W.2d 408, 412 n.3, 413 (Tex. App.—Austin 1992, no writ) (section 552.111 protects information not available to opposing party in civil discovery context); Open Records Decision Nos. 615 at 1 (1993), 308 at 2 (1982), 251 at 2 (1980).

[20]The statutory predecessor to section 552.111 excepted from required public disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than one in litigation with the agency." Act of May 19, 1973, 63rd Leg., R.S., ch. 424, § 3, 1973 Tex. Gen. Laws 1112, 1114. In 1989, the legislature amended the language to its present form. Act of May 29, 1989, 71st Leg. R.S., ch. 1248, § 9, 1989 Tex. Gen. Laws 4996, 5024.

[21]5 U.S.C. § 552(b)(5).

[22]*See Nat'l Labor Relations Bd. v. Sears Roebuck, Inc.*, 421 U.S. 132, 149 (1975); *Dow Jones & Co. v. Dep't of Justice*, 917 F.2d 571, 573 (D.C. Cir. 1990).

[23]*Texas Dep't of Public Safety v. Gilbreath*, 842 S.W.2d at 413.

aspect of the exception thus applies to information shown to be protected by the deliberative process discovery privilege.[24] But the exception is not limited to this privilege.

Section 552.111's plain language contemplates that it protects other information that would be privileged were it sought in civil litigation. The Third Court of Appeals has stated that section 552.111 "excepts those documents . . . normally privileged in the civil discovery context."[25] In 1996, this office accordingly incorporated into the section 552.111 exception the former "attorney work product" privilege that was then found in Rule 166(b) of the Texas Rules of Civil Procedure.[26]

Under Rule 192.5, what was formerly "attorney work product" is now "core work product."[27] Thus, we now conclude that a governmental body may assert section 552.111 for "core work product" as defined in Rule 192.5.[28] Core work product is basically the same as what was "attorney work product" under the former rule.[29] Core work product "is not discoverable."[30] The privilege for it is absolute and perpetual in duration.[31] But the protection of core work product does not generally extend to facts.[32] This office will continue to apply its established analysis for the former "attorney work product" privilege in determining the extent of section 552.111's protection of core work product. That is, regardless of the status of the litigation, section 552.111 excepts core work product, but generally, the protection of core work product does not extend to factual information.[33] A notable exception is when a request

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[24]*See id.*; *see also* Open Records Decision No. 615 (1993).

[25]*Texas Dep't of Public Safety v. Gilbreath*, 842 S.W.2d at 413.

[26]Open Records Decision No. 647 at 3 (1996).

[27]*In re Monsanto Co.*, 998 S.W.2d 917, 927 (Tex. App.—Waco 1999, orig. proceeding).

[28]This office previously held that the "attorney work product" aspect of section 552.111 excepted information only to the extent it implicated what is now the "core work product" aspect of Rule 192.5. *See* Open Records Decision No. 647 (1996); *see also* TEX. RULE CIV. P. 192.5(a), (b)(1).

[29]*In re Monsanto Co.*, 998 S.W.2d at 930.

[30]TEX. R. CIV. P. 192.5(b)(1). The former "attorney work product" privilege (now core work product) is of continuing duration, such that the privilege removes from discovery in subsequent litigation the attorney work product from prior litigation. *Owens-Corning Fiberglass v. Caldwell*, 818 S.W.2d 749, 752 (Tex. 1991).

[31]*Occidental Chemical Corp. v. Banales*, 907 S.W.2d 488, 490 (Tex. 1995).

[32]*Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 202-03 n.11 (Tex. 1993) (attorney work product privilege does not extend to facts acquired); *see also Leede Oil & Gas, Inc. v. McCorkle*, 789 S.W.2d 686, 687 (Tex. App.–Houston [1st Dist.] 1990, no writ) ("neutral recitals" of fact may not be withheld as attorney work product).

[33]Open Records Decision No. 647 at 4 (1996).

is made for an attorney's entire litigation file, in which case the governmental body may assert the file is excepted from disclosure in its entirety because such a request implicates what is now the core work product aspect of the privilege.[34]

DEMONSTRATING WORK PRODUCT UNDER SECTION 552.111

A governmental body in the open records ruling process generally carries the burden of providing to this office relevant facts to demonstrate the applicability of a claimed exception.[35] An essential element of work product is that the information be made or developed "in anticipation of litigation or for trial."[36] Construing former Rule 166(b)(3), the Texas Supreme Court announced a two-part test for assessing this element.[37] This office adopted this test for assertions of attorney work product under the Act.[38] A court of appeals explains:

> Litigation is "anticipated" when two tests are met: (1) whenever the circumstances would indicate to a reasonable person that there is a substantial chance of litigation, and (2) the party now asserting the privilege had a good faith belief that litigation would ensue. A party may reasonably anticipate suit being filed and prepare for the expected litigation before anyone manifests an intent to sue. Actual notice of a potential lawsuit is not required for a party to anticipate litigation. To determine when a party reasonably anticipates or foresees litigation, the trial court must look to the totality of the circumstances and decide whether a reasonable person in the party's position would have anticipated litigation and whether the party actually did anticipate litigation.

In re Monsanto Co., 998 S.W.2d 917, 923-924 (Tex. App.—Waco 1999, no pet.) (citations omitted). The first part of this test, which is objective, looks to "the totality of the circumstances" to determine whether a reasonable person would have concluded that a substantial chance of litigation existed at the time the governmental body created or acquired

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[34]*Id.* at 5.

[35]TEX. GOV'T CODE § 552.301(e)(1)(A) (governmental body must submit to the attorney general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld).

[36]TEX. R. CIV. P. 192.5(a).

[37]*See Nat'l Tank Co. v. Brotherton*, 851 S.W.2d at 207. We note that this test continues to be utilized by courts in analyzing the work product privilege under Rule 192.5. *See, e.g., In re Monsanto* Co., 998 S.W.2d at 927.

[38]*See* Open Records Decision No. 647 at 4 (1996).

the information.[39] In addressing this part of the test, a governmental body should explain the relevant facts and circumstances that existed *at the time the specific records at issue were created or acquired.* The second part of the test looks to the subjective good faith belief of the party resisting discovery.[40] A governmental body should thus explain whether the agent or entity that created or obtained the information for it believed that litigation would ensue, *at the time the information was created or acquired.*[41] Notably, the words "substantial chance of litigation" do not refer to any statistical probability that litigation will occur, nor do they require that a party engage in some action indicating an intent to sue.[42] Thus, litigation can be reasonably anticipated for purposes of the work product privilege even in instances where no steps towards filing suit have occurred.[43] And as noted, unlike section 552.103, the test for work product looks to whether litigation was reasonably anticipated *at the time the information at issue was created or acquired.*

Information created in the ordinary course of business may nevertheless qualify as work product. In evaluating whether such information was prepared in anticipation of litigation so as to be protected by the privilege, Texas courts looks to the "primary motivating purpose underlying the ordinary business practice" that caused the information to be created.[44] In the open records ruling process, this office will accordingly have no basis for concluding that information created in a governmental body's ordinary course of business was prepared in anticipation of litigation so as to constitute work product unless the governmental body explains to this office the primary motivating purpose for the routine practice that gave rise to the information. For information prepared according to a provision of law or an administrative or procedural rule or policy, the governmental body is obligated to advise this office of the relevant law, or the applicable rule or policy, and explain its primary motivating purpose.

To be work product, information must be prepared "by or for a party or a party's representatives."[45] If the information consists of a communication, the communication must

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[39]*Nat'l Tank Co. v. Brotherton*, 851 S.W.2d at 204.

[40]*Id.* at 205.

[41]If properly submitted pursuant to section 552.301(e)(1) of the Act, this office will, of course, examine the information at issue with respect to both prongs of the work product test. However, because of the test's subjective element, the information itself will not necessarily reveal whether the test is met.

[42]*Nat'l Tank Co. v. Brotherton*, 851 S.W.2d at 204.

[43]*Nat'l Tank Co. v. Brotherton*, 851 S.W.2d at 206.

[44]*Id.*

[45]TEX. R. CIV. P. 192.5(a)(1).

be "between a party and the party's representatives."[46] A governmental body must accordingly identify the parties or potential parties to the litigation. Additionally, as to each record at issue, a governmental body must inform this office of the identity and role of each person or entity that prepared the information, as well as with whom, if anyone, the information has been shared.

Rule 192.3 excludes from the work product privilege a "witness statement," defined as "a written statement signed or otherwise adopted or approved in writing by the person making it," a "recording of a witness's oral statement," or a "substantially verbatim transcription of such a recording."[47] Information that meets this definition, requested under the Act, is not excepted from disclosure on the basis of an assertion of work product. Rule 192.5(c) also provides that five enumerated categories of information described in the rule are not work product.[48] If information submitted to this office for review appears to meet any of these categories, then absent an explanation of how the information is nevertheless subject to the privilege, this office will have no basis for concluding it comprises work product.

APPLYING WORK PRODUCT UNDER THE ACT

Applying the work product privilege in the context of the Act presents certain special considerations not present in the litigation discovery context. First, we address information that is subject to section 552.022 of the Government Code. Then, we consider the privilege with respect to section 552.302 of the Government Code. Finally, we discuss how the privilege will be applied to records requested under the Act.

Section 552.022

Section 552.022 provides that the eighteen categories of information described in the provision are generally subject to "required public disclosure under [the Act] unless they are expressly confidential under other law[.]"[49] Section 552.111 is an exception under the Act and, as such, is not "other law" for purposes of section 552.022. Therefore, the work product aspect of section 552.111 does not protect section 552.022 information.

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[46]*Id.* 192.5(a)(2).

[47]*Id.* 192.3(h)(1), (2). We note that the definition does not encompass notes taken during a conversation or interview with a witness. *Id.*

[48]*See id.* 192.5(c)(1) - (5).

[49]*See* TEX. GOV'T CODE § 552.022(a).

However, the Texas Supreme Court has held that the "Texas Rules of Civil Procedure . . . are 'other law' within the meaning of section 552.022."[50] Thus, a governmental body may assert Rule 192.5 to withhold section 552.022 information. As noted, the work product privilege aspect of section 552.111 does not protect such information. Thus, in regard to a claim of work product, section 552.111 is the appropriate exception to assert for information that is not subject to section 552.022, and Rule 192.5 is the appropriate law to claim in regard to information that is subject to section 552.022.

In regard to section 552.022 information, however, the language of section 552.022 also requires that the "other law" make the information "expressly confidential." As noted earlier in this decision, what is now "core work product" as defined in rule 192.5 is not discoverable and the duration of the privilege is perpetual. Accordingly, we conclude that rule 192.5 makes core work product expressly confidential for purposes of section 552.022.

In addition to core work product, however, rule 192.5 also references "other work product."[51] We are thus presented with the question of whether rule 192.5 makes "other work product" information that is subject to section 552.022 "expressly confidential" for purposes of section 552.022. We find guidance in the above-referenced Texas Supreme Court case. The court states that the Texas Rules of Civil Procedure "provide that *certain types of work product* do not have to be disclosed, which means they are confidential [for purposes of section 552.022]."[52] The implication is that not *all* work product is "expressly confidential" for purposes of section 552.022. Rule 192.5 states that "other work product" "is *discoverable* only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the material by other means."[53] Thus, under appropriate circumstances in civil litigation, other work product *is discoverable*. Some suggest that a requestor under the Act be required to demonstrate the circumstances stated in Rule 192.5 for discovery of "other work product." We disagree.

We note that a governmental body is legally enjoined from requiring a requestor under the Act to demonstrate the circumstances set forth in rule 192.5 for discovery of other work product.[54] In addition, the Act must be "liberally construed in favor of granting a request for

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[50]*In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001).

[51]TEX. R. CIV. P. 192.5(b)(2).

[52]*In re City of Georgetown*, 53 S.W.3d at 334.

[53]TEX. R. CIV. P. 192.5(b)(2) (emphasis added).

[54]*See* TEX. GOV'T CODE § 552.222 (generally prohibiting "an inquiry of a requestor" by a governmental body, and specifically forbidding a governmental body from inquiring "into the purpose for which information will be used").

information."[55] We therefore conclude that information subject to section 552.022 is "expressly confidential" for purposes of that section under Rule 192.5 *only to the extent the information implicates the core work product aspect of the privilege.* Information that is purely other work product and subject to section 552.022 may not be withheld on the basis of Rule 192.5.

Section 552.302

If a governmental body fails to properly comply with section 552.301 of the Government Code, section 552.302 provides that the information "must be released unless there is a compelling reason to withhold the information." This office has long held that such a "compelling reason" is demonstrated when the asserted exception is "mandatory," *i.e.*, the information at issue is confidential by law and the governmental body therefore is prohibited from releasing it, or if the release of the information implicates third party interests.[56] Although the Texas Supreme Court has concluded that certain types of work product are "confidential" under Rule 192.5 *for purposes of section 552.022 of the Act*, the court in the case did not have occasion to consider work product with respect to section 552.302.

As already noted, a governmental body may assert work product under section 552.111 for information that is not subject to section 552.022, and Rule 192.5 may be asserted for core work product that is subject to section 552.022. In its discretion, the governmental body is also free to release the information rather than claim the privilege.[57] As such, information protected under either type of assertion does not implicate the Act's prohibition against the release of confidential information.[58] Thus, neither demonstrates a "compelling reason" under section 552.302 on that basis.

However, as we have noted, a separate basis for demonstrating a compelling reason under section 552.302 is that the release of the information implicates third party interests.[59] Thus, although the decision to claim the privilege is discretionary and the governmental body's own interests do not provide a compelling reason, a compelling reason under section 552.302 may be demonstrated for work product *if it is shown that the release of the information*

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[55]*Id.* § 552.001(b).

[56]*See, e.g.*, Open Records Decision No. 150 (1977).

[57]*See* TEX. GOV'T CODE § 552.007(a).

[58]Open Records Decision No. 470 at 2 (1987); *see also* TEX. GOV'T CODE § 552.352 (providing for criminal penalties for the distribution of confidential information).

[59]*See, e.g.*, Open Records Decision No. 586 (1991) (although discretionary exception, need of another governmental body to withhold information subject to the exception demonstrated a compelling reason under predecessor to section 552.302).

would harm a third party. Where section 552.302 is triggered, the governmental body carries the burden of demonstrating such a compelling reason, and this office must decide the issue on a case-by-case basis.

Applying the Privilege

Although "public information" under the Act includes information recorded on various media,[60] information asserted to be work product is typically in document form. In the litigation discovery context, Texas courts protect the entirety of such documents containing privileged information.[61] We believe this case law must inform our analysis in the context of the Act. We note that the incidental withholding of otherwise unprivileged information in a privileged document would not vitiate the availability of public information under the Act, especially when that information is also contained in records that are not subject to the privilege. We thus conclude that, generally, where a document is demonstrated to contain work product that may be withheld under the standards discussed in this decision, this office in the open records ruling process may authorize the governmental body to withhold the entire document.

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[60]*See* TEX. GOV'T CODE § 552.002.

[61]*See, e.g., Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Bloomfield Mfg Co.*, 977 S.W.2d 389, 392 (Tex. App.—San Antonio 1998, orig. proceeding) (privilege extends to entire document); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to the complete communication, including factual information); *Osborne v. Johnson*, 954 S.W.2d 180, 190 (Tex. App.—Waco 1997, orig. proceeding) (if document contains information that is discoverable together with privileged information, entire document is protected); *Marathon Oil Co. v. Moye*, 893 S.W.2d 585, 589 (Tex. App.—Dallas 1994, orig. proceeding) (privilege attaches to the complete communication); *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 425 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding) (privilege extends to entire document and not merely the specific portions relating to advice, opinion, or analysis).

SUMMARY

Section 552.111 is the appropriate exception under the Act for an assertion of the work product privilege as defined in Texas Rule of Civil Procedure 192.5, but section 552.111 does not protect information that is subject to section 552.022. However, information subject to the categories in section 552.022(a) is confidential under Rule 192.5, for purposes of that section, to the extent the information implicates the core work product aspect of the privilege. A governmental body has the discretion of whether to assert the work product privilege aspect of section 552.111, or in the case of information subject to section 552.022, Rule 192.5. Neither demonstrates a compelling reason under section 552.302 except where third party interests are at stake. The governmental body asserting the privilege carries the burden of demonstrating such a compelling reason, which this office must decide on a case-by-case basis. A governmental body has the burden of providing relevant facts to demonstrate that the information is subject to the privilege. Depending on the circumstances, an entire document or record containing privileged information may be excepted from disclosure.

Yours very truly,

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