



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

February 28, 1997

Mr. Tracy Pounders  
Assistant City Attorney  
City of Dallas  
City Hall  
Dallas, Texas 75201

Ms. Riva T. Johnson  
Jenkins & Gilchrist  
Fountain Place  
1445 Ross Avenue, Suite 3200  
Dallas, Texas 75202

OR97-0440

Dear Mr. Pounders and Ms. Johnson:

You have each asked if certain information is subject to required public disclosure under chapter 552 of the Government Code. The various requests at issue were directed to the City of Dallas ("Dallas") and the Dallas Employees Retirement Fund ("ERF"). Mr. Rodney Acker, on behalf of the ERF, also made a request to the city for information. The different requests at issue seek information relating to the ERF and certain pension funding issues. Some of the requests are identical requests to both the city and the ERF. The requests to the city and the ERF were assigned ID# 103246.<sup>1</sup>

According to information supplied to this office, the ERF trustees have indicated that the ERF pension funds face a \$21 million annual shortfall, allegedly due in part to the actions and omissions of the former outside actuaries. The requestors have asked the city and the ERF for, among other things, information concerning funding, actuarial reports, background materials, and correspondence between the city and the ERF. It is our understanding that the city and the ERF have already released some documents to requestors. However, both the city and the ERF assert that the remaining documents are excepted from disclosure and have submitted sample records to this office for review.<sup>2</sup>

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<sup>1</sup>ID#s 104622 and 105026 were combined with ID#103246.

<sup>2</sup>We note that the city and the ERF submitted to this office various public documents. It is our understanding these documents are not at issue but were submitted as background information.

## REQUESTS MADE TO THE ERF

The attorney for the ERF states that the ERF has already released some documents responsive to the requests.<sup>3</sup> *See* Gov't Code § 552.007 (governmental body may voluntarily disclose information). This office has also been informed that the ERF does not have documents responsive to some of the requests for information. We note that the ERF is not obligated to provide information which is not in its possession. Open Records Decision No. 561 (1990) at 9 (governmental body does not have to obtain new information).

As to the remaining information, the ERF asserts that the records are protected from disclosure pursuant to section 552.103(a)<sup>4</sup>. Both the city and the ERF assert that the ERF is involved in settlement negotiations with its former outside actuaries concerning the possibility of the ERF pursuing claims against these former actuaries. The ERF has informed this office that if the ongoing settlement negotiations fail, the ERF will pursue its claims against the former actuaries. To show that section 552.103(a) is applicable, a governmental entity must show that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to the litigation. *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 (1990) at 4.

The ERF has demonstrated that it reasonably anticipates litigation. Our review of the sample documents submitted indicates that the documents at issue are related to the anticipated litigation. We note, however, that once information has been obtained by all parties to the litigation, no section 552.103(a) interest generally exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, the ERF may withhold from public disclosure records that the opposing parties to the anticipated litigation have not seen or had access to. The applicability of section 552.103(a) also ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

## REQUESTS MADE TO THE CITY

The ERF asserts that some of the information requested from the city has been disclosed to the public in a public meeting. To the extent that any information at issue

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We also assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision No. 499 (1988), 497 (1988). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

<sup>3</sup>We note that several sample documents provided by the city and the ERF as responsive to the requests are duplicates. This letter does not address whether documents already released by the ERF are duplicates of documents that the city asserts are protected from disclosure.

<sup>4</sup>The ERF also asserted that the information at issue is excepted from disclosure pursuant to sections 552.101, 552.107(1) and 552.111 of the Government Code, but did not provide arguments as to why these exceptions might be applicable, as required by section 552.301(b)(1).

has been publicly disclosed by the city, it may not now be withheld from disclosure. Gov't Code § 552.007 (information that is made public may not be selectively withheld from disclosure); Open Records Decision Nos. 551 (1990) at 2-3, 221 (1979) at 1 ("official records of the public proceedings of a governmental body are among the most open of records"). We note that the city indicates some records have been disclosed to requestors. We address the city's records to the extent that they have not been made public.

We note that a voluntary transfer of information between the city and the ERF can be made without waiving exceptions to public disclosure. See Attorney General Opinions H-917 (1976), H-242 (1974). However, the city and the ERF have opted to treat the ERF request for records as a request for public disclosure of documents. We thus address the city's arguments against disclosure. The city asserts that sections 552.103, 552.107(1), and 552.111 except from public disclosure the records requested by the ERF and the other requestors.<sup>5</sup> The city also asserts that section 552.117 makes some of the information requested confidential.

The city's attorneys have asserted that section 552.103(a) is applicable on the basis of the ERF's involvement in settlement negotiations with the former actuaries. The city and the ERF entered into a joint prosecution and confidentiality agreement concerning prosecution of claims against the former actuaries. The ERF has demonstrated to this office that litigation is reasonably anticipated because ERF is involved in settlement negotiations and intends to pursue its claims against the former actuaries. In correspondence to this office, however, the ERF asserts that the city does not have a litigation interest at stake. The city has not shown how the city reasonably anticipates litigation on the basis of the ERF settlement discussions and prosecution of its claims.

The city's attorneys assert that the city reasonably anticipates litigation because the city would be required to indemnify the ERF trustees if suit is brought against them. The city does not indicate that claims have been made against the trustees. Litigation cannot be regarded as reasonably anticipated unless there is concrete evidence that the claim that litigation is anticipated is more than mere conjecture. Open Records Decision No. 452 (1986) at 4. Litigation has been found to be reasonably anticipated when an individual has hired an attorney who demands damages and also threatens to sue the governmental entity. Open Records Decision No. 551 (1990) at 2. However, in this situation the city has not demonstrated that litigation involving the city is reasonably anticipated. Open Records Decision No. 518 (1989) at 5 (governmental body must show that litigation involving a specific matter is realistically contemplated). Thus, the records at issue may not be withheld from disclosure on the basis of section 552.103(a).

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<sup>5</sup>We note that one of the requestors has asserted the city did not comply with section 552.301 of the Government Code, which provides that if a governmental body believes information is excepted from disclosure it must seek a decision from this office not later than the 10th calendar day *after* the date of receipt of the request. The city received this particular request December 23, 1996, and timely sought a decision from this office on January 2, 1997, ten days after receipt of the request. See Gov't Code § 552.308 (timeliness of request may be determined by post office cancellation mark).

The city asserts that section 552.117 makes confidential any information that would reveal the beneficiaries of an employee. Sections 552.024 and 552.117 of the Government Code provide that a public employee or official can opt to keep private his or her home address, home telephone number, social security number, or information that reveals that the individual has family members. The sample information submitted as responsive to one of the requests reveals whether public employees have family members and the names of family members. Pursuant to section 552.117, the city would be required to maintain as confidential the beneficiary information for employees who, as of the time of the request for the information, had elected to keep the information private. Open Records Decision Nos. 530 (1989) at 5, 482 (1987) at 4, 455 (1987). However, all of the beneficiary information at issue is protected from disclosure under the common-law privacy provisions encompassed in sections 552.101 and 552.102 of the Government Code. Open Records Decision No. 600 (1992) at 11 (retirement fund beneficiary designations are confidential); see *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 930 (1977); *Hubert v. Harte-Hanks Texas Newspapers Inc.*, 652 S.W.2d 546 (Tex. App.-Austin 1983, writ ref'd n.r.e.). Thus, the city may not disclose any of the beneficiary designation information.

The city also asserts that sections 552.107(1) and 552.111 are applicable to the records at issue. Section 552.107(1) protects from disclosure information that reveals client confidences to an attorney or that reveals the attorney's legal advice, opinion, and recommendation. See Open Records Decision No. 574 (1990). Section 552.111 excepts from disclosure inter-agency or intra-agency communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body. See *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ); Open Records Decision No. 615 (1993) at 5. Section 552.111 excepts from required public disclosure preliminary drafts of documents related to policymaking matters, since drafts represent the advice, opinion, and recommendation of the drafter as to the form and content of the final documents. See Open Records Decision No. 559 (1990). We agree that sections 552.107(1) and 552.111 are applicable to some of the information at issue. We have marked some of the documents as samples to show what type of information is excepted from disclosure.

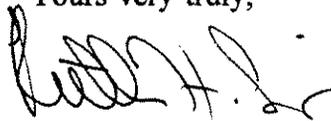
In Open Records Decision No. 647 (1996), this office determined that section 552.111 also excepts from disclosure attorney work product that was created in anticipation of civil litigation and consists of or tends to reveal an attorney's mental processes, conclusions, and legal theories. Open Records Decision No. 647 (1996). On this basis, this office concluded that if a requestor asks for an attorney's entire work file regarding particular litigation, such a request can be denied. *Id.* at 5. However, if a requestor asks for specific documents, the governmental body has the burden of explaining to this office how (1) the information was created in anticipation of civil litigation under the test set forth in *National Tank v. Brotherton*, 851 S.W.2d 193, 200 (Tex. 1993), and (2) the information at issue consists of or tends to reveal the attorney's mental processes, conclusions, and legal theories. Open Records Decision No. 647 (1996). The city has asserted that certain information prepared by outside consultants is protected attorney work product, but has not met its burden of showing the applicability of the attorney

work product doctrine to these documents, as set out in Open Records Decision No. 647 (1996).

We note that this office was informed that the city and the ERF may wish to voluntarily disclose some of the information for which the entities have asserted exceptions. A governmental body may voluntarily choose to release information that is not made confidential by law. Gov't Code § 552.007(a). Thus, the city or the ERF could disclose information that may otherwise be protected under sections 552.103(a), 552.107(1), or 552.111.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy  
Assistant Attorney General  
Open Records Division

RHS/ch

Ref.: ID# 103246

Enclosures: Submitted Documents

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