



August 3, 2001

Mr. John Steiner
Division Chief
Law Department
City of Austin
P.O. Box 1546
Austin, Texas 78767-1546

OR2001-3369

Dear Mr. Steiner:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 150267.

The City of Austin (the "city") received a request from a former employee for the following information:

- (1) A copy of any and all documents relating to your review of my complaint.
- (2) A copy of your final report.
- (3) A letter indicating that the City of Austin found no violations by NHCD, AHFC relating to termination of my employment.
- (4) A letter indicating that my employment with the City of Austin will not be reinstated based on the results of your review and internal investigation.
- (5) A copy of any and all documents relating to any personnel actions, complaints or allegations made by any and all persons against me, both during and after my employment with the City of Austin.

You inform this office that the city has no information that is responsive to items 2, 3, and 4 of this request. Chapter 552 of the Government Code does not require a governmental body to disclose information that did not exist when the request for the information was received. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). You state that responsive information to which the requestor previously has had access

will be made available to her. You claim that other responsive information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted. We also received comments from the requestor. *See* Gov't Code § 552.304.

We first note that some of the submitted information falls within the scope of section 552.022 of the Government Code. Section 552.022(a) provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[.]

Gov't Code § 552.022(a)(1) (emphasis added). You indicate that much of the information at issue relates to the city's investigation of a complaint made by the requestor. The requestor provided this office with a copy of a letter dated May 4, 2001, that the requestor received from Kim Peterson, Employee Relations Manager. The letter states that "the fact-finding investigation conducted in response to your complaint has been concluded." Therefore, we find that section 552.022(a)(1) requires the release of the submitted information that relates to this completed investigation, unless the information is expressly confidential under other law.

Sections 552.103, 552.107, and 552.111 of the Government Code are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived. As such, these exceptions are not other law that makes information confidential for the purposes of section 552.022(a). *See* Open Records Decision No. 665 at 2 n.5 (2000) (discussing discretionary exceptions under Gov't Code ch. 552). Therefore, information relating to the completed investigation may not be withheld from disclosure under sections 552.103, 552.107(1), or 552.111. *See also Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.-Dallas 1999, no pet.) (stating that governmental body may waive section 552.103); Open Records Decision Nos. 542 at 4 (1990) (litigation exception does not implicate third-party rights and may be waived by governmental body), 630 at 7 (1994) (governmental body may waive attorney-client privilege under section 552.107(1)), 470 at 7 (1987) (statutory predecessor to section 552.111 may be waived).

The attorney-client privilege also is found, however, in rule 503 of the Texas Rules of Evidence. The Texas Supreme Court recently held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *See In re City of Georgetown*, No. 00-0453, 2001 WL 123933, at *8 (Tex. Feb. 15, 2001). Therefore, we will consider whether any of the information relating to the investigation for which you claim the attorney-client privilege is confidential under rule 503.

Rule 503(b)(1) provides as follows:

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. 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).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that 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 that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the document containing privileged information is confidential under rule 503 provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You assert that some of the documents that are subject to section 552.022(a) contain privileged attorney-client communications. We find that some of these records are protected by the attorney-client privilege under Texas Rule of Evidence 503. We have marked the information that the city may withhold under rule 503.

You also assert the attorney work product privilege with regard to some of the records that are subject to section 552.022(a). The attorney work product privilege also is found in rule 192.5 of the Texas Rules of Civil Procedure. Therefore, we will consider whether any of the information for which you claim this privilege is confidential under rule 192.5.

An attorney's core work product is confidential under rule 192.5. 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 that the material (1) was 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 that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate (1) that 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) that 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 National 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 that the documents at issue contains 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 that the information does not fall within the purview 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).

You assert that the information for which you claim the attorney work product privilege "was prepared by the City Attorney's office for the purpose of providing legal services to its client, with an eye toward possible litigation." We find that some of this information constitutes confidential attorney work product under Texas Rule of Civil Procedure 192.5. We have marked the information that the city may withhold under rule 192.5.

We next note that section 552.117 of the Government Code may protect some of the information that is subject to section 552.022(a)(1). Section 552.117(1) excepts from disclosure the home address, home telephone number, and social security number of a current or former employee of a governmental body, as well as information revealing whether the employee has family members, *if the current or former employee requested that this information be kept confidential under section 552.024.* *See Open Records*

Decision Nos. 622 (1994), 455 (1987). But you may not withhold this information in the case of a current or former employee who made the request for confidentiality under section 552.024 after the request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. See Open Records Decision No. 530 at 5 (1989). We have marked information that the city must withhold under section 552.117(1) if the current or former employee to whom the information pertains made a proper election under section 552.024. We note that the requestor has a special right of access to her own section 552.117 information under section 552.023 of the Government Code.¹

Lastly, we consider your claim under section 552.103 of the Government Code with regard to the submitted information that is not governed by section 552.022(a)(1). Section 552.103, the "litigation exception," provides in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) 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.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to requested information. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for the information *and* (2) that the requested information is related to the litigation. See *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. – Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. – Houston [1st Dist.] 1984, writ ref'd n.r.e.); see also Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

¹Section 552.023(a) provides that "[a] person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests."

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, the governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* This office has stated that a pending complaint before the Equal Employment Opportunity Commission ("EEOC") indicates that litigation is reasonably anticipated. *See* Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). You state that the requestor has filed an EEOC complaint against the city with regard to her termination. You provided a copy of the complaint. You assert that the remaining information at issue relates to the requestor's complaint and to her termination. Based on your representations and our review of the complaint, we find that the city reasonably anticipated litigation on the date of its receipt of the request for information. We also find that the remaining information relates to the anticipated litigation. We therefore conclude that section 552.103 exempts this information from disclosure at this time.

We have marked the information that the city may withhold under section 552.103. In reaching this conclusion, we assume that none of this information has been made available to an opposing party to the anticipated litigation. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain the information through the discovery process. *See* Open Records Decision No. 551 at 4-5 (1990). If an opposing party to anticipated litigation has seen or had access to information relating to the litigation, through discovery or otherwise, then there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Furthermore, the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the responsive records relating to the city's completed investigation of the requestor's complaint must be released under section 552.022(a)(1) of the Government Code, with the following exceptions. These records contain information that is confidential under rule 503 of the Texas Rules of Evidence or under rule 192.5 of the Texas Rules of Civil Procedure. The city may withhold this information under rules 503 and 192.5. The records relating to the investigation also contain information that the city may be required to withhold under section 552.117 of the Government Code. The remaining records that do not relate to the investigation may be withheld at this time under section 552.103 of the Government Code.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If

the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

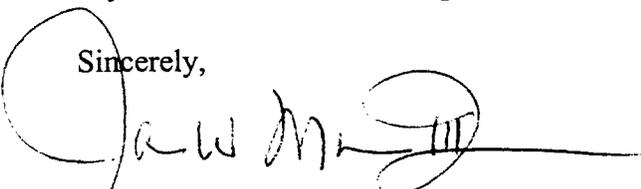
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 150267

Enc: Marked documents

c: Ms. Stephanie R. Day
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(w/o enclosures)