



September 5, 2001

Ms. Lisa Aguilar
Assistant City Attorney
City of Corpus Christi
P.O. Box 9277
Corpus Christi, Texas 78469-9277

OR2001-3947

Dear Ms. Aguilar:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 151512.

The City of Corpus Christi (the "city") received a request for 1) copies of every request for documentation that the city or the city's police department has received regarding complaints about city police department officers, and 2) additional documentation that would aid the requestor in his research of cases involving certain named individuals. You inform us that the information responsive to the first item is being provided to the requestor. We assume that you have released that information to the requestor. *See* Gov't Code §§ 552.301, .302. You claim that the remaining requested information, which you have marked as Exhibits C and D, is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first address some procedural matters. A review of the information you have marked as Exhibit C reveals the existence of videotapes that may be responsive to item number two of the request. Section 552.222(b) of the Government Code provides that if a governmental body is unable to determine the nature of the information being sought, it may ask the requestor to clarify the request so that the desired records may be identified. We therefore suggest that the city seek clarification from the requestor as to whether the request for documentation that would aid the requestor's research includes the videotapes.

Additionally, we note that the memorandum in Exhibit D recites that it contains four attachments.¹ Although the offense reports concerning Bobby Stuart are the subject of another decision from this office,² only two documents, which we discuss below, are annexed to the memorandum. To the extent that the city possesses information responsive to this request that it has not submitted to this office for review, or that is not the subject of another request for decision from this office, such information must be released to the requestor. *See* Gov't Code §§ 552.301, .302. We next address the city's claims.

Section 552.103 provides as follows:

(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.

The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University 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). The city must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452

¹The memorandum lists a department CAD report, a Resistance/Injury Report, an offense report, and supplementary reports.

²*See* Open Records Letter No. 2001-3919 (2001).

at 4 (1986). In Open Records Decision No. 638 (1996), this office stated that a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act ("TTCA"), chapter 101 of the Civil Practice and Remedies Code, or an applicable municipal ordinance. You inform us that the city received a notice conforming to the TTCA prior to its receipt of the information request. Thus, the city has demonstrated the first prong of the above test. After a review of the submitted information, we agree that it is related to the anticipated litigation. Therefore, we conclude that some of the submitted information may be withheld under section 552.103(a), with the exceptions noted below.

Some of the submitted information in Exhibit C, which we have marked, appears to be a communication from an investigator with the city's risk management section to counsels for the tort claimants, declining their respective claims. This office has determined that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, as information that has been provided to the opposing parties in the anticipated litigation, these communications are not excepted from disclosure under section 552.103(a).³

You also assert sections 552.107(1) and 552.111 for these marked communications to potential opposing counsel. As for section 552.107(1), in instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and the client's confidences made to the attorney. *See* Open Records Decision No. 574 (1990). Under section 552.111, a governmental body may withhold attorney work product from disclosure if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996). However, sections 552.107(1) and 552.111 are discretionary exceptions under the Public Information Act, and may be waived.⁴ Furthermore, the attorney-client privilege under Rule 503 is waived by voluntarily disclosing the information to a third party. *See* Texas Rule

³We further note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

⁴Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation, and does not itself make information confidential), 470 (1987) (statutory predecessor to section 552.111 is a discretionary exception), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

of Evidence 511. Because the communications were sent to *potential opposing counsel*, we conclude that the city thereby waived its claims under sections 552.107(1) and 552.111. Thus, the marked communications in Exhibit C may not be withheld under either section 552.107(1) or 552.111, and must be released to the requestor.

In addition, certain portions of Exhibits C and D are subject to section 552.022 of the Government Code, which states in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and are 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, except as provided by Section 552.108;

....

(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)(1), (3). As information in a completed report made by the city's police department, the information we have marked in Exhibit D is subject to section 552.022(a)(1). As information in a voucher or account, the information we have marked in Exhibit C is subject to section 552.022(a)(3). As noted above, sections 552.103, 552.107, and 552.111 are discretionary exceptions, and, as such, do not constitute "other law" that makes information "expressly confidential." Thus, the city may not withhold the information subject to section 552.022(a) under sections 552.103, 552.107, or 552.111. However, you also assert section 552.108 for the marked Exhibit D information, which we next address.

Section 552.108(a)(2) excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. Based on the information you provided, we understand you to assert that the requested information, held by the city's police department, pertains to a case that concluded in a result other than conviction or deferred adjudication. Therefore, we agree

that section 552.108(a)(2) is applicable, and conclude that the information we have marked as subject to section 552.022(a)(1) in Exhibit D may be withheld from disclosure under that section.

As for the information we have marked as subject to section 552.022(a)(3) in Exhibit C, you also assert the attorney-client privilege under Rule 503 of the Texas Rules of Evidence. Recently, the Texas Supreme Court held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *In re City of Georgetown*, No. 00-0453, 2001 WL 123933, at *8 (Tex. Feb. 15, 2001). Because you assert the applicability of Rule 503 and attorney work product privilege, we will next consider whether these raised privileges constitute “other law,” which makes the remaining information is confidential.

Rule 503(b)(1) provides:

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(b)(1). 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. *See* Tex. R. Evid. 503(a)(5).

Accordingly, 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). See *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ); see also Tex. R. Evid. 511 (waiver of privilege by voluntary disclosure).

You inform us that information subject to section 552.022(a)(3) in Exhibit C was prepared for the city attorney or the assistant city attorney in anticipation of litigation and in furtherance of the rendition of professional legal services. You also inform us that the documents were not intended to be disclosed to third parties. However, you do not explain how the information constitutes a confidential communication between privileged parties. Therefore, we conclude that the city may not withhold the information under Rule 503 of the Texas Rules of Evidence.

The attorney work product privilege is found in Rule 192.5 of the Texas Rules of Civil Procedure. 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). In order to withhold attorney core work product from disclosure under Rule 192.5, a governmental body must demonstrate that the material was (1) 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 second prong of the work product test requires the governmental body to show that the information 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 is confidential under Rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in Rule 192.5(c). *Pittsburg Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). After a review of the marked information that is subject to section 552.022(a)(3) in Exhibit C, we conclude that you have failed to demonstrate that the information was developed by an attorney or attorney representative. Therefore, the information may not be withheld under Rule 192.5 of the Texas Rules of Civil Procedure, and must be released to the requestor.

Finally, we have marked a bank account number in Exhibit C which is excepted from disclosure under section 552.136. The Seventy-seventh Legislature recently added section 552.136 to the Public Information Act.⁵ This new exception makes bank account numbers confidential and provides in relevant part as follows:

Sec. 552.136. CONFIDENTIALITY OF CREDIT CARD, DEBIT CARD, CHARGE CARD, AND ACCESS DEVICE NUMBERS.

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value;
or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Act of May 14, 2001, 77th Leg., R.S., S.B. 694, § 1 (to be codified at Gov't Code § 552.136). Thus, the city must withhold the bank account number that we have marked in Exhibit C under section 552.136 of the Government Code.

In summary, the city may withhold some of the submitted information from disclosure under section 552.103(a) of the Government Code. Information we have marked in Exhibit D may be withheld under section 552.108(a)(2). The city must withhold the bank account number we have marked in Exhibit C under section 552.136. The information that we have marked as subject to section 552.022(a)(3) in Exhibit C must be released pursuant to that section. The remaining marked information must be released to the requestor.

⁵The Legislature also enacted two other bills that added a section 552.136 to the Public Information Act. One is House Bill 2589, which makes certain e-mail addresses confidential. See Act of May 22, 2001, 77th Leg., R.S., H.B. 2589, § 5 (to be codified at Gov't Code § 552.136). The other is Senate Bill 15, which makes information maintained by family violence shelter centers confidential. See Act of May 14, 2001, 77th Leg., R.S., S.B. 15, § 1 (to be codified at Gov't Code § 552.136). In addition, Senate Bill 694 enacted the same language from House Bill 2589 regarding the confidentiality of e-mail addresses, but codified it as section 552.137 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).

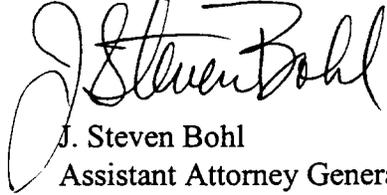
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

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,

A handwritten signature in black ink, appearing to read "J. Steven Bohl". The signature is written in a cursive style with a large initial "J" and "S".

J. Steven Bohl
Assistant Attorney General
Open Records Division

JSB/sdk

Ref: ID# 151512

Enc: Submitted documents

c: Mr. Michael C. F. White
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(w/o enclosures)