



February 25, 2002

Ms. Elaine S. Hengen
Assistant City Attorney
City Of El Paso
2 Civic Center Plaza
El Paso, Texas 79901-1196

OR2002-0902

Dear Ms. Hengen:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 159502.

The City of El Paso (the "city") received a request for all documentation regarding two chiefs in the El Paso Police Department for the past six months, and documents regarding the amount paid to these employees. You inform us that the requestor clarified the second part of the request to include payroll records for only the previous six months. You state that some responsive information has been released to the requestor. You claim that a portion of the requested information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative samples of information.¹

You assert that a portion of the requested information is confidential under the Medical Practice Act (the "MPA"). Some of the records at issue are medical records, access to which is governed by the MPA, chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

¹In reaching our conclusion here, we 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 Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

The medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). For your convenience, we have marked the documents in Exhibit L to show which are medical records subject to the MPA.

We find that the release of the remaining submitted information in Exhibit L is governed by chapter 611 of the Health and Safety Code, which provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) reads as follows:

Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Health & Safety Code § 611.002. Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). We have marked the mental health records that the city may release only as provided by sections 611.004 and 611.0045 of the Health and Safety Code.

Attorney fee bills, such as the one submitted in Exhibit F, are subject to section 552.022(a) of the Government Code, which provides in pertinent part as follows:

(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 not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

....

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege.

Gov't Code § 552.022(a)(16). Under section 552.022, fee bills must be released unless they are expressly confidential under other law. Section 552.111 of the Government Code, which excepts information within the attorney work product privilege, is also a discretionary exception under the Public Information Act and does not constitute "other law" for purposes of section 552.022. *See* Open Records Decision No. 473 (1987) (governmental body may waive section 552.111). However, the attorney work product privilege is also found in Rule 192.5 of the Texas Rules of Civil Procedure. 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*, 53 S.W.3d 328 (Tex. 2001). Thus, we will determine whether the fee bill information 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. *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 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 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 that 1) 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) 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 contain the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *See* 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 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).

After reviewing your arguments and the attorney billing statement submitted to this office, we believe that you have demonstrated that the highlighted entry contained therein constitutes attorney core work product. The city may, therefore, withhold the highlighted information in Exhibit F pursuant to Rule 192.5.²

You argue that the document submitted in Exhibit K is confidential under section 552.101 of the Government Code, in conjunction with sections 402.083 and 402.092 of the Labor Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 402.083 (a) of the Labor Code reads as follows:

(a) Information in or derived from a claim file regarding an employee is confidential and may not be disclosed by the commission except as provided by this subtitle.

This provision makes confidential information in the files of the Texas Workers' Compensation Commission (the "commission"). Likewise, section 402.092 provides that information maintained in the investigation files of the commission is confidential as provided in section 402.083. Labor Code § 402.092(c). The document in Exhibit K which you seek to withhold is a form that was apparently prepared on the city's behalf by its workers' compensation insurance carrier. The document at issue was not obtained from the commission. See Open Records Decision No. 533 at 4 (1989). We, therefore, do not believe that the Labor Code provisions apply to the workers' compensation form in Exhibit K. Those two pages may not be withheld under section 552.101 in conjunction with either section 402.083 or section 402.092 of the Labor Code.

Section 552.101 also encompasses common-law privacy. You assert that portions of the information in Exhibits C, H, I, and K are excepted under section 552.101 in conjunction with common-law privacy. Common-law privacy excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

²As Rule 192.5 is dispositive, we do not address your section 552.107 claim regarding Exhibit K.

Prior decisions of this office have found that financial information relating to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. Open Records Decision Nos. 545 (1990), 373 (1983). A public employee's allocation of his salary to a voluntary investment program offered by his employer is a personal investment decision, and information about it is excepted from disclosure by a common-law right of privacy. Open Records Decision No. 545 (deferred compensation plan). Information revealing that an employee participates in a group insurance plan funded partly or wholly by the governmental body is not excepted from disclosure. Open Records Decision No. 600 at 10 (1992). For example, this office has held that an employee's participation in the Texas Municipal Retirement System or in a group insurance plan funded by the governmental body is not excepted from disclosure under common-law privacy. *Id.*; Open Records Decision No. 480 (1987). The employee's optional coverages will generally be funded by the employee and not the state. An employee's decision to enroll for optional coverages is a personal financial decision to allocate part of his compensation to optional benefits, and, therefore, the related information is excepted from disclosure by a right of privacy.

You have explained the various deductions on the police department payroll reports. After reviewing the submitted information and your arguments, we agree that the information in Exhibit C that you have highlighted or underlined comprises optional coverages and deductions that are not funded by the city and, therefore, are personal financial decisions of the police officer. Further, we find that a portion of the information in Exhibits H, I, and K is also private, and must not be released. Thus, you must withhold the highlighted and underlined information in Exhibits C, H, and I, and the information which we have marked in Exhibit K, under section 552.101 in conjunction with common-law privacy.

The requested records contain information that is excepted from disclosure under section 552.117(2). Section 552.117(2) provides that information that relates to the home address, home telephone number, social security number, or family member information of a peace officer as defined in article 2.12 of the Texas Code of Criminal Procedure must be withheld regardless of whether the officer complied with section 552.024 of the Government Code. The city must withhold those portions of the records that reveal the officers' home addresses, home telephone numbers, social security numbers, and family member information. *See also* Open Records Decision No. 670 (2001) (providing that a governmental body may withhold information under section 552.117(2) without requesting a decision from this office).

In conclusion, medical records may be released only as provided under the MPA, while mental health records may be released only as provided by sections 611.004 and 611.0045 of the Health and Safety Code. The city must withhold the highlighted and underlined information in Exhibits C, H, and I, and the information which we have marked in Exhibit K, under section 552.101 in conjunction with common-law privacy. The highlighted

information contained in Exhibit F may be withheld under Rule 192.5. The city must withhold those portions of the records that reveal the officers' home addresses, home telephone numbers, social security numbers, and family member information under section 552.117(2). The remainder of the submitted information must be released to the requestor.

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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/seg

Ref: ID# 159502

Enc. Submitted documents

c: Ms. Larae Malooly
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(w/o enclosures)