

The ruling you have requested has been amended as a result of litigation and has been attached to this document.



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

August 30, 2004

Ms. Maleshia B. Farmer  
Assistant City Attorney  
City of Fort Worth  
1000 Throckmorton Street  
Fort Worth, Texas 76102

OR2004-7374

Dear Ms. Farmer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 208725.

The City of Fort Worth (the "city") received a request for all documentation from January 1995 to June 2004 relating to any civil suits and/or current litigation filed against the city's Municipal Courts and City Marshal's office, "limited to any and all employee/employer relations." You state that you will release a portion of the responsive information. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

First, we will address your arguments for Exhibit D. Section 552.103 provides in 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). A governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. 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 information and (2) that the information at issue is related to that litigation. See *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *Univ. of Tex. Law Sch. v. Tex. 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.

You inform us and provide documentation showing that, prior to the city's receipt of this request, an individual filed suit against the city for damages related to an employment issue. Having considered your representations and the submitted petition, we find that you have established that litigation was pending on the date the city received this request. Furthermore, having reviewed your arguments and the submitted information, we find that Exhibit D is related to the pending proceeding for purposes of section 552.103. Thus, you have demonstrated the applicability of section 552.103.

We note, however, that some of the submitted documents within Exhibit D reflect on their face that they were obtained from or provided to the individual who filed suit against the city. This individual is also apparently the only opposing party in the pending litigation. Once information has been obtained by all parties to the litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). Therefore, to the extent the opposing party has had access to the information within Exhibit D, it may not be withheld under section 552.103 and must generally be released. We also note that the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

Next, you argue that Exhibit E is excepted from disclosure under section 552.107 of the Government Code, which protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the

purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “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).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein). Having considered your representations and reviewed the information at issue, we find that you have established that some of the documents within Exhibit E constitute privileged attorney-client communications that may be withheld pursuant to section 552.107. We have marked the documents the city may withhold under this exception. We find, however, that the city has failed to explain how the remainder of Exhibit E constitutes privileged attorney-client communications made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. Accordingly, the city may only withhold the information we have marked pursuant to section 552.107.

You further state, however, that the information in Exhibit E is excepted from disclosure pursuant to section 552.111 of the Government Code. Section 552.111 of the Government Code excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” This section encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Evidence. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. TEX. R. CIV. P. 192.5; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

a) 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 b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

*Nat'l Tank Co. 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; ORD 677 at 7.

You state that the documents submitted as Exhibit E constitute material prepared for or mental impressions developed in anticipation of trial. You state that "[a]ll of the submitted documents were created or prepared by the City's attorney of record for the trials during a time when suit had been filed and trial was pending." Upon review of your arguments and the submitted information, we find that you have demonstrated that the information we have marked was prepared for trial or in anticipation of litigation. Therefore, you may withhold this information under section 552.111 of the Government Code as attorney work product.

We now turn to your arguments for the remaining submitted information, as well as those portions of Exhibits D and E which were not disposed of above. The remaining submitted information contains medical records, access to which is governed by the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 provides in pertinent part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is

confidential and privileged and may not be disclosed except as provided by this chapter.

(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.

Occ. Code § 159.002(a) - (c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See* Open Records Decision Nos. 598 (1991). In addition, because hospital treatment is routinely conducted under the supervision of physicians, documents relating to diagnosis and treatment during a hospital stay also constitute protected medical records. *See* Open Decision Nos. 598 (1991), 546 (1990).

Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). Such 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). Based on our review of the remaining submitted information, we have marked the documents that are subject to the MPA and may only be released accordingly.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information other statutes make confidential. The remaining submitted information contains a declaration of psychological and emotional health made confidential by section 1701.306 of the Occupations Code, which provides in relevant part as follows:

(a) The [Texas Commission on Law Enforcement] may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. A declaration is not public information.

Occ. Code § 1701.306(a), (b). Thus, the city must withhold the confidential declaration under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

You also claim that some of the remaining submitted information is confidential under section 611.002 of the Health and Safety Code. Chapter 611 of the Health and Safety Code governs the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) provides 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 reviewed the remaining submitted information and conclude it does not contain any mental health records. Accordingly, none of the remaining submitted information is excepted from disclosure pursuant to section 552.101 in conjunction with section 611.002 of the Health and Safety Code.

You also claim that some of the responsive information is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with sections 402.083 of the Labor Code. Section 402.083, which pertains to records of the Texas Workers’ Compensation Commission (“TWCC”), provides in part:

(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.

Labor Code § 402.083(a). Section 402.083(a) makes confidential information in TWCC's claim files. *See* Open Records Decision No. 619 (1993). Section 402.086(a) essentially transfers this confidentiality to information that other parties obtain from TWCC's files. Section 402.086(a) provides:

(a) Information relating to a claim that is confidential under this subtitle remains confidential when released to any person, except when used in court for the purposes of an appeal.

Labor Code § 402.086(a). In Open Records Decision No. 533 (1989), this office determined that the predecessor provision to sections 402.083 and 402.086 protected information received from the Industrial Accident Board (now TWCC), but did not protect information regarding workers compensation claims that the governmental body did not receive from TWCC. You state that some of the submitted information is "derived from a worker's compensation claim" regarding employees. However, after carefully reviewing your arguments and the remaining responsive information, you do not state, nor does it appear, that this information was obtained from TWCC. *See* Open Records Decision No. 533 at 4 (1989). We therefore do not agree that sections 402.083 and 402.086 of the Labor Code apply in this instance. Accordingly, we conclude that the city may not withhold any portion of the remaining responsive information pursuant to section 552.101 of the Government Code in conjunction with section 402.083 or section 402.086 of the Labor Code.

We also note that title I of the Americans with Disabilities Act of 1990 (the "ADA") provides that information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. Information obtained in the course of a "fitness for duty examination," conducted to determine whether an employee is still able to perform the essential functions of his or her job, also is to be treated as a confidential medical record. *See* 42 U.S.C. §§ 12101 *et seq.*; 29 C.F.R. § 1630.14(c); Open Records Decision No. 641 (1996). Furthermore, the federal Equal Employment Opportunity Commission (the "EEOC") has determined that medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). We have marked information that the city must withhold under section 552.101 in conjunction with the ADA.

Section 552.101 also encompasses the common law right to privacy. Information is protected by common-law privacy when the information (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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. *Id.* at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common law privacy: an individual's criminal history when compiled by a governmental body, *see* Open Records Decision No. 565 (citing *U. S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)); personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). We have reviewed the remaining submitted documents and marked information that must be withheld under section 552.101 in conjunction with common law privacy.

Finally, we note that some of the information in Exhibit D which may not be withheld under section 552.103, as well as the remaining submitted documents, contain information which may be confidential under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that this information be kept confidential under section 552.024. Section 552.117(a)(2) protects the same information regarding a peace officer regardless of whether the officer made an election under section 552.024 or section 552.1175 of the Government Code.<sup>1</sup> Thus, to the extent the submitted information contains any of the listed information regarding a peace officer, or of a current or former employee who elected to restrict access to this information under section 552.024 prior to the date the city received this request, the city must withhold such information. We have marked the information that must be withheld under section 552.117 if that exception applies.

In summary, we conclude: (1) except for the information to which the opposing party has had access, Exhibit D is excepted under section 552.103 of the Government Code; (2) we have marked the documents in Exhibit E that may be withheld pursuant to sections 552.107 and 552.111 of the Government Code; (3) we have marked the medical records that may only be released in accordance with the MPA; (4) the city must withhold the confidential declaration we have marked under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code; (5) the city must withhold the information we have marked under section 552.101 in conjunction with the ADA; (6) the city must

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<sup>1</sup>"Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

withhold the information we have marked under section 552.101 in conjunction with common law privacy; and (7) we have marked the information that may be excepted from disclosure pursuant to section 552.117 of the Government Code. The remaining information must be released.

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 Dep't of Pub. 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,

A handwritten signature in black ink, appearing to read "Sarah Swanson", with a long horizontal flourish extending to the right.

Sarah I. Swanson  
Assistant Attorney General  
Open Records Division

SIS/krl

Ref: ID# 208725

Enc. Submitted documents

c: Mr. Bill Leonard  
Attorney at Law  
6211 Airport Freeway  
Fort Worth, Texas 76117  
(w/o enclosures)

CITY OF FORT WORTH AND CHARLES BOSWELL, IN HIS OFFICIAL CAPACITY AS INTERIM CITY MANAGER AND AS OFFICER FOR PUBLIC INFORMATION, Plaintiffs,

V.

GREG ABBOTT, ATTORNEY GENERAL OF TEXAS, Defendant.

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IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

201<sup>ST</sup> JUDICIAL DISTRICT

**AGREED FINAL JUDGMENT**

On this date, the Court heard the parties' motion for entry of an agreed final judgment. Plaintiffs City of Fort Worth and Charles Boswell, in his official capacity as Interim City Manager and as Officer for Public Information, (collectively, referred to as the City), and Defendant Greg Abbott, Attorney General of Texas, appeared, by and through their respective attorneys, and announced to the Court that all matters of fact and things in controversy between them had been fully and finally compromised and settled. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code ch. 552. The parties represent to the Court that, in compliance with Tex. Gov't Code § 552.325(c), the requestor, Bill Leonard, was sent reasonable notice of this setting and of the parties' agreement that the City may withhold the information at issue; that the requestor was also informed of his right to intervene in the suit to contest the withholding of this information; and that the requestor has not informed the parties of his intention to intervene. Neither has the requestor filed a motion to intervene or appeared today. After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

**FILED**

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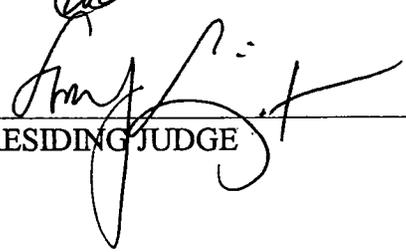
*Herminia Rodriguez-Benitez*

DISTRICT CLERK  
TRAVIS COUNTY, TEXAS

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. A letter to the mediator, dated March 3, 2003, is confidential under Tex. Civ. Prac. & Rem. Code § 154.073(a), and, thus, excepted from disclosure under Tex. Gov't Code § 552.101, and notes of the City's attorney concerning the mediation in a particular lawsuit, are attorney work product and excepted from disclosure under Tex. Gov't Code § 552.111.
2. The City may withhold from the requestor these two documents.
3. All costs of court are taxed against the parties incurring the same;
4. All relief not expressly granted is denied; and
5. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendant and is a final judgment.

SIGNED this the 3<sup>rd</sup> day of January, 2007<sup>5</sup>

  
\_\_\_\_\_  
PRESIDING JUDGE

APPROVED:

  
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