



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 29, 2007

Mr. James T. Jeffrey, Jr.
Law Offices of Jim Jeffrey
For the North Texas Municipal Water District
2214 Park Springs Blvd.
Arlington, Texas 76013

OR2007-03467

Dear Mr. Jeffrey:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 274530.

The North Texas Municipal Water District (the "district"), which you represent, received a request for eleven categories of information relating to a claim involving the requestor. You state that you will release the information in categories 8 and 11 of the request, but claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107,¹ and 552.111² of the Government Code and Texas Rule of Civil Procedure 192.5.³ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the district has not submitted information responsive to item 9 of the request. To the extent this information existed on the date the district received this request,

¹You refer to the "party investigation or party communication privilege." We understand you to assert the attorney-client communication privilege. The correct exception to raise is section 552.107.

²You assert the attorney work-product privilege. The correct exception to raise is section 552.111.

³Although you raise section 552.101 of the Government Code, you do not explain how this exception applies to the submitted information. Therefore, the district may not withhold any part of the submitted information under section 552.101. See Gov't Code § § 552.301, .302.

we assume you have released it. If you have not released any such information, you must do so at this time.⁴ See Gov't Code § 552.301(a), .302; see also Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we note that pages 1 through 54 of the submitted information are subject to required public disclosure under section 552.022 of the Government Code, which provides in relevant part:

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[.]

Id. § 552.022(a)(1). Pages 1 through 54 of the submitted information consist of a completed investigation. Therefore, pursuant to section 552.022, the district must release the completed investigation unless it is confidential under other law. The district raises sections 552.103, 552.107, and 552.111 for this information, but sections 552.103, 552.107, and 552.111 are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103, 552.107, and 552.111 do not qualify as "other law" that make information confidential for the purposes of section 552.022. Therefore, the district may not withhold pages 1 through 54 under section 552.103, 552.107, or 552.111 of the Government Code.

The Texas Supreme Court has held, however, that the Texas Rules of Evidence and the Texas Rules of Civil Procedure are other laws within the meaning of section 552.022. See *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney work product privilege is found at Texas Rule of Civil Procedure 192.5, and the attorney-client privilege is found at Texas Rule of Evidence 503. Accordingly, we will consider your assertion of these privileges under rule 192.5 and rule 503 with respect to the information subject to section 552.022.

⁴We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

For the purpose of section 552.022, information is confidential under rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. Open Records Decision No. 677 at 9-10 (2002). 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 was (1) created for trial or in anticipation of litigation when the governmental body received the request for information 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 Nat'l 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. 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). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App—Houston [14th Dist.] 1993, no writ). We find, after reviewing pages 1 through 54, that none of it consists of core work product because it does not contain the mental impressions, opinions, conclusions, or legal theories of an attorney or his representative. Some of this information consists of correspondence to and from the claimant, and therefore is not privileged. Thus, no part of this information may be withheld under rule 192.5.

Rule 503 of the Texas Rules of Evidence, which encompasses the attorney-client privilege, 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(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. *Id.* 503(a)(5). Although you assert that pages 1 through 54 are subject to the attorney-client privilege, you do not provide any arguments supporting this claim. *See* Gov't Code §552.301(e). As stated above, some of this information consists of correspondence to and from the claimant, and therefore is not privileged. Accordingly, pages 1 through 54 may not be withheld under rule 503.

We now address the district's arguments for the remaining information, pages 55 through 100, not subject to section 552.022. Section 552.103 provides in relevant part 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 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 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 was pending or reasonably anticipated on the date that the governmental body received the

request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

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 demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.⁵ Open Records Decision No. 555 (1990); see Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). In Open Records Decision No. 638 (1996), this office stated that, when a governmental body receives a notice of claim letter, it can meet its burden of showing that litigation is reasonably anticipated by representing that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act (the "TTCA"), Civil Practice & Remedies Code, chapter 101, or an applicable municipal ordinance. If a governmental body does not make this representation, the claim letter is a factor that this office will consider in determining whether a governmental body has established that litigation is reasonably anticipated based on the totality of the circumstances. On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. See Open Records Decision No. 331 (1982).

You inform us that the requestor has made a claim under the TTCA and that this claim is evidenced by the instant request and documents contained in the submitted information. We note, however, that you have not represented that this notice of claim meets the requirements of the TTCA. Therefore, we will only consider the notice of claim as a factor in determining whether the district reasonably anticipated litigation over the incident in question. Based on your representations and our review of the submitted information, we find that litigation was not reasonably anticipated on the date the request was received because the claimant has not taken any concrete steps toward litigation other than filing a claim letter. Accordingly, the

⁵In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, see Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, see Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, see Open Records Decision No. 288 (1981).

district may not withhold the information in pages 55 through 100 under section 552.103 of the Government Code.

Section 552.102 of the Government Code excepts from public disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” Gov’t Code § 552.102(a). Section 552.102(a) protects private information that relates to public officials and employees. The privacy analysis under section 552.102(a) is the same as the test for common-law privacy under section 552.101 of the Government Code. See *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref’d n.r.e.) (addressing statutory predecessor). Therefore, we will determine whether any of the information that you seek to withhold under section 552.102(a) is protected by common-law privacy under section 552.101.

Section 552.101 of the Government Code 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 the common law right of privacy, which protects information if it (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 types 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. We conclude the information in pages 55 through 100 is not highly intimate or embarrassing. Furthermore, there is a legitimate public interest in a public employee’s work performance. See Open Records Decision No. 444 at 5-6 (1986) (public has interest in public employee’s qualifications, work performance, and circumstances of employee’s resignation or termination). Accordingly, the district may not withhold any of the information on pages 55 through 100 on the basis of common-law privacy.

We note that some of the information is confidential under sections 552.130 and 552.137.⁶ Section 552.130 of the Government Code excepts from disclosure information that “relates to . . . a motor vehicle operator’s or driver’s license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state.” Gov’t Code § 552.130. We note that the requestor has a right of access to his own Texas motor vehicle record information. See *id.* § 552.023 (person or person’s authorized representative has special right of access to records that contain information relating to the person that are

⁶The Office of the Attorney General will raise mandatory exceptions like sections 552.130 and 552.137 of the Government Code on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

protected from public disclosure by laws intended to protect that person's privacy interests). The district must withhold the Texas motor vehicle record information we have marked in the submitted information.

Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection(c). *See id.* § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. This section does not protect the e-mail address of an employee of an entity with which a governmental body has a contractual relationship. *Id.* § 552.137(c)(1). Section 552.137 also does not apply to the general e-mail address of a business. In addition, the requestor has a right of access to his own e-mail address under subsection (b). The district must withhold the e-mail addresses we have marked under section 552.137 unless it receives consent for their release.

In summary, the district must withhold the Texas motor vehicle record information and e-mail addresses that we have marked under sections 552.130 and 552.137 of the Government Code, respectively. 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll

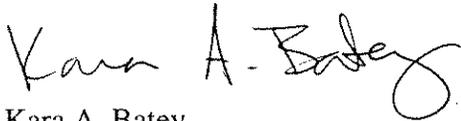
free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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 Office of the Attorney General 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,



Kara A. Batey
Assistant Attorney General
Open Records Division

KAB/krl

Ref: ID# 274530

Enc. Submitted documents

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