



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 3, 2008

Mr. Loren B. Smith  
Olson & Olson, L.L.P.  
2727 Allen Parkway  
Houston, Texas 77019

OR2008-13608

Dear Mr. Smith:

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# 323638.

The City of Texas City (the "city"), which you represent, received a request for correspondence between named Texas City Fire Department (the "department") officials, any information related to the reassignment of the requestor, the requestor's performance evaluations since 1989, and information pertaining to Equal Employment Opportunity Commission (the "EEOC") complaints filed against the department and the city. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.111, 552.117, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.<sup>1</sup>

Initially, we note that a portion of the submitted information, which we have marked, is not responsive to the instant request because it was created after the date of this request. The city need not release non-responsive information in response to this request and this ruling will not address that information.

Next, we note that the remaining information contains three petitions filed with a court. Section 552.022 of the Government Code provides 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

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<sup>1</sup>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.

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

...

(17) information that is also contained in the public court record[.]

Gov't Code § 552.022(a)(17). Court-filed documents are expressly public under section 552.022(a)(17) of the Government Code. Such information must be released unless it is expressly confidential under other law. You claim the court-filed petitions are excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. However, sections 552.103, 552.107, and 552.111 are discretionary exceptions that protect a governmental body's interests and are therefore not "other law" for purposes of section 552.022(a)(17). *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. 677 at 10-11 (2002) (attorney work-product privilege under section 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). Furthermore, although rule 503 of the Texas Rules of Evidence, which protects information coming within the attorney-client privilege, constitutes "other law" for purposes of section 552.022, *see In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001), the privilege would be waived to the extent the otherwise privileged information is contained in a court filed document. *See* TEX. R. EVID. 511. Thus, the city may not withhold the court-filed petitions under sections 552.103, 552.107, 552.111 or rule 503.

The Texas Supreme Court also has held that the Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022. 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. ORD 677 at 9-10. 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 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). Upon review, we conclude that no portion of the court-filed documents at issue reflect the mental processes, conclusions, strategies, or legal theories of the city’s attorneys regarding anticipated litigation. Thus, the court-filed documents are not protected by rule 192.5, and the city may not withhold them on that basis. As you raise no other exceptions to the disclosure of the court-filed documents, they must be released to the requestor.

We now turn to your arguments for the remaining information that is not subject to section 552.022. Section 552.103 of the Government Code 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 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. *Id.*

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. 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. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). This office has also found that a pending EEOC complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982), 281 at 1 (1981). 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 first argue that the submitted information is excepted under section 552.103 because the city anticipates litigation from the requestor. You state and provide documentation showing that the requestor filed a complaint with the EEOC against the city. We note, and you acknowledge, however, that the present request was received by the city prior to the requestor's EEOC filing. Further, you do not provide any additional arguments as to how the city anticipated litigation from the requestor prior to the city's receipt of the request. Consequently, you have not established that the city reasonably anticipated litigation with the requestor when it received the request for information. Accordingly, the city may not withhold any of the submitted information under section 552.103 of the Government Code based on your contention that the city anticipated litigation with the requestor.

You also argue that the remaining information is excepted under section 552.103 because the city is involved in pending litigation or anticipates litigation with respect to all but two of the EEOC complaints submitted in response to this request for information. You state that all of the submitted EEOC discrimination charges except for two are either still pending with the EEOC or have resulted in litigation against the department and the city. Based on your representation and our review, we determine that the city was in pending litigation or reasonably anticipated litigation on the date that it received this request for information only with respect to some of the submitted EEOC complaints. Furthermore, upon review of the information at issue, we find that some of the submitted information relates to the pending or anticipated litigation.

We note, however, that the city seeks to withhold information that the opposing parties to the pending or anticipated litigation have already seen or had access to. This information includes the actual EEOC filings and correspondence to or from the opposing parties. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that relates to the litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). Thus, if the opposing party to pending or anticipated litigation has already seen or had access to information that relates to the litigation, through discovery or otherwise, there is no interest

in now withholding such information under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the submitted information that the opposing parties have already seen or had access to is not excepted under section 552.103, and the city must release it to the requestor. Additionally, you have not explained, nor can we discern how any of the remaining information that does not pertain to the pending or litigated EEOC complaints is related to the pending or anticipated litigation matters. Thus none of the remaining information, including the information relating to the requestor and to the two specified concluded EEOC complaints, may be withheld under section 552.103. However, the city may withhold the information we have marked under section 552.103.

We next address your argument under section 552.111 of the Government Code for the remaining information. Section 552.111 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.” Gov’t Code § 552.111. Section 552.111 encompasses the attorney work product privilege found at rule 192.5 of the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 192.5; *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). The analysis this office conducts to determine whether particular information falls under the attorney work product privilege under 552.111 is the same as we discussed above in our ruling under rule 192.5 for the information subject to section 552.022(a)(17). A governmental body that seeks to withhold information on the basis of the attorney work product privilege 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. You state that the remaining information consists of “drafts [of] ongoing work products.” However, you have not provided any further explanation as to how any of the remaining information constitutes material prepared or mental impressions developed, or communications made, in anticipation of litigation or for trial. Thus, the city has failed to demonstrate that the work product privilege is applicable to the remaining information and none of it may be withheld under section 552.111 on that basis.

Next, you claim that a portion of the remaining information 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 a 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). 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.*, 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).

We understand you to argue that a portion of the remaining information reveals communications between the city's attorneys and city employees. However, you have not identified which of the submitted documents you are claiming are excepted under section 552.107. In addition, you also do not provide representations that these communications were made for the purpose of facilitating the rendition of professional legal services or that the confidentiality of these communications has been maintained. Thus, we find that you have failed to demonstrate the applicability of section 552.107 to any of the remaining submitted information.

We next address your argument that a portion of the submitted information is excepted under section 552.117 of the Government Code. Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See Open Records Decision No. 530 at 5 (1989)*. Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential. You have not informed us that the employees whose information is at issue requested confidentiality pursuant to section 552.024. Accordingly, if the employees timely elected confidentiality, the city must withhold the information that

we marked under section 552.117(a)(1). If the employees did not timely elect, this information may not be withheld under section 552.117(a)(1).

Finally, we address your argument that some of the e-mail addresses in the remaining information are subject to section 552.137 of the Government Code. Section 552.137 states that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure. Gov't Code § 552.137(a)-(b). Section 552.137(c) excludes the e-mail addresses of a person who has a contractual relationship with a governmental body or its agent. *Id.* § 552.137(c)(1). Section 552.137 is also not applicable to an e-mail address that a governmental entity maintains for one of its officials or employees. We note that you have marked the e-mail address of the city's outside attorney, a contractor for the city, which is specifically excluded under subsection (c)(1). The remaining e-mail addresses you have marked belong to employees of a governmental body. Thus, the e-mail addresses you have marked may not be withheld under section 552.137.

In summary, the city may withhold the information we have marked under section 552.103 of the Government Code. If the employees whose information is at issue timely elected confidentiality under section 552.024 of the Government Code, the city must withhold the information that we marked under section 552.117(a)(1) of the Government Code. If the employees did not timely elect, the information we marked under section 552.117(a)(1) must be released. The remaining 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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 challenge 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,



Laura E. Ream  
Assistant Attorney General  
Open Records Division

LER/jb

Ref: ID# 323638

Enc. Submitted documents

c: Mr. Robert Baker  
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(w/o enclosures)