



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 4, 2008

Ms. Molly Shortall
Assistant City Attorney
City of Arlington
P.O. Box 90231
Arlington, Texas 76004-3231

OR2008-16522

Dear Ms. Shortall:

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# 329159.

The City of Arlington (the "city") received requests from four requestors for information relating to an investigation involving a named assistant police chief. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.111, 552.117, and 552.1175 of the Government Code.¹ We have considered the exceptions you claim and reviewed the information you submitted. We note that one of the requestors also seeks access to the assistant chief's date of hire, salary, disciplinary record, and commendations. As you have not submitted any of those types of records, we assume that they have been released, to the extent that responsive records existed when the city received

¹Although you also initially raised sections 552.102 and 552.107 of the Government Code, you have submitted no arguments in support of the applicability of those exceptions. Therefore, this decision does not address sections 552.102 and 552.107. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must submit written comments stating why claimed exceptions are applicable to information at issue).

the request. If not, then you must release any such records immediately.² See Gov't Code §§ 552.221, .301, .302; Open Records Decision No. 664 (2000).

We next note that the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]" unless the information is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law.³ Gov't Code § 552.022(a)(1). In this instance, the submitted information consists of a completed investigation made by the city. Although you seek to withhold the submitted information under sections 552.103 and 552.111 of the Government Code, those sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. See *id.* § 552.007; *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 Gov't Code § 552.103); Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under Gov't Code § 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (statutory predecessor to Gov't Code § 552.111 subject to waiver). As such, sections 552.103 and 552.111 are not other law that makes information confidential for the purposes of section 552.022(a)(1). Therefore, the city may not withhold any of the submitted information under section 552.103 or section 552.111.

The Texas Supreme Court has held, however, that the Texas Rules of Civil Procedure are "other law" 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, which you claim under section 552.111, also is found at Texas Rule of Civil Procedure 192.5. Therefore, we will consider whether the city may withhold any of the submitted information under rule 192.5. We also will consider your claims under sections 552.101, 552.117, and 552.1175 of the Government Code, which are confidentiality provisions for the purposes of section 552.022(a)(1).

Information is confidential under Texas Rule of Civil Procedure 192.5 for the purposes of section 552.022 only to the extent that the information implicates the core work product aspect of the work product privilege. See ORD 677 at 9-10. Rule 192.5 defines core work product as the work product of an attorney or an attorney's representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney's representative. See TEX. R.

²We 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).

³We note that the city does not claim an exception to disclosure under section 552.108.

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 the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *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 part of the work product test requires the governmental body to show that the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney's or an attorney's representative. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both parts of the work product test is confidential under rule 192.5, provided that the information does not fall within the scope 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).

You state that the submitted investigation was conducted by an assistant city attorney "[b]ecause of the potential for litigation stemming from the [related] complaint[.]" You have not demonstrated, however, that the information at issue was created in anticipation of litigation. We therefore conclude that the city may not withhold any of the submitted information under Texas Rule of Civil Procedure 192.5.

Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. You raise section 552.101 in conjunction with constitutional and common-law privacy. Constitutional privacy protects two types of interests. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain decisions related to the "zones of privacy," pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that the U.S. Supreme Court has recognized. *See Fado v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. The second type of privacy interest is in freedom from public disclosure of certain personal matters. *See Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. *See* ORD 455 at 7. Constitutional privacy is

reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492).

Common-law privacy protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined that other types of information also are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private).

In this instance, the submitted information involves officials and employees of the city's police department and their conduct in the workplace. As this office has frequently stated, information relating to public employees and public employment is generally a matter of legitimate public interest. *See, e.g.*, Open Records Decision Nos. 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 444 at 6 (1986) (public has genuine interest in information concerning law enforcement employee's qualifications and performance and circumstances of his termination or resignation). We therefore find that the public has a legitimate interest in most of the submitted information. We have marked a small amount of medical information that is intimate or embarrassing and not a matter of legitimate public interest. The city must withhold that information under section 552.101 in conjunction with common-law privacy. We conclude that the rest of the submitted information is not protected by constitutional or common-law privacy and may not be withheld on either of those grounds under section 552.101. *See also* Open Records Decision Nos. 562 at 10 (1990) (personnel information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 473 at 3 (1987) (fact that public employee received less than perfect or even very bad evaluation not private), 329 at 1-2 (1982) (reasons for public employee's resignation ordinarily not protected by constitutional or common-law privacy).

You also raise section 552.117 of the Government Code. Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 or 552.1175 of the Government Code. Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. To the extent that the information that we have marked under section 552.117 is related to peace officers, the city must withhold the marked information under section 552.117(a)(2).

Section 552.117(a)(1) 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. 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. To the extent that the information that we have marked under section 552.117 is not related to peace officers, the marked information must be withheld under section 552.117(a)(1) to the extent that the employees concerned timely requested confidentiality for the information under section 552.024.

We note that the remaining information at issue includes a personal e-mail address. Section 552.137 of the Government Code 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.⁴ Gov't Code § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked a personal e-mail address that the city must withhold under section 552.137 unless the owner of the e-mail address has affirmatively consented to its public disclosure.

In summary: (1) the city must withhold the information that we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (2) to the extent that the information that we have marked under section 552.117 of the Government Code is related to peace officers, the marked information must be withheld under section 552.117(a)(2); (3) to the extent that the information that we have marked under section 552.117 is not related to peace officers, the marked information must be withheld under section 552.117(a)(1) to the extent that the employees concerned timely requested confidentiality for the information under section 552.024 of the Government Code; and (4) the city must withhold the marked e-mail address under section 552.137 of the Government

⁴Unlike other exceptions to disclosure under the Act, this office will raise section 552.137 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, 352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

Code unless the owner has consented to its disclosure.⁵ The rest of the submitted 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 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).

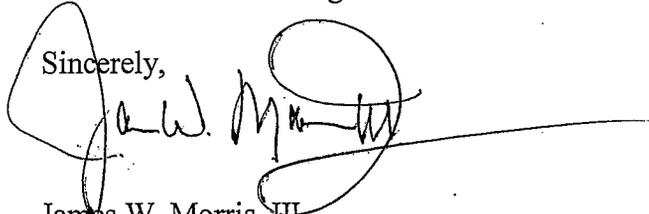
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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.

⁵As we are able to make these determinations, we need not address your claim under section 552.1175 of the Government Code.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is written in a cursive style with a large, prominent initial "J" and "M".

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/jh

Ref: ID# 329159

Enc: Submitted documents

c: 4 Requestors
(w/o enclosures)