



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 10, 2009

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City of Dallas  
1500 Marilla Street, Room 7DN  
Dallas, Texas 75201

Ms. Heather Silver  
Assistant City Attorney  
City of Dallas  
1500 Marilla Street, Room 7DN  
Dallas, Texas 75201

OR2009-11067

Dear Ms. Silver and Mr. Ernst:

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# 351529.

The City of Dallas (the "city") received two requests for information from the same requestor related to the Dallas Fire-Rescue Department, fire and medical statements and billings, ethics complaints, and complaint filed with the city auditor during a specified time period. You state that some responsive information will be provided to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.111, 552.116, 552.117, 552.136, and 552.137 of the Government Code, and privileged under rule 192.5 of the Texas Rules of Civil Procedure.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

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<sup>1</sup>Although you also raised section 552.107 of the Government Code, you have provided no arguments explaining how this exception is applicable to the submitted information. Thus, the city has waived its claim under section 552.107. *See* Gov't Code § 552.301(e) (governmental body must provide comments explaining why exceptions raised should apply to information requested); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general).

<sup>2</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.

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code, which states 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 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, except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). Exhibits I and K are subject to section 552.022(a)(1) of the Government Code and Exhibit E-1 is subject to section 552.022(a)(3). The city may only withhold the information subject to section 552.022(a)(1) if it is excepted from disclosure under section 552.108 of the Government Code or is expressly made confidential under other law.<sup>3</sup> *See id.* The city may only withhold the information subject to section 552.022(a)(3) if it is confidential under other law. Although you raise sections 552.103 and 552.111 of the Government Code for this information, these sections are discretionary exceptions that protect a governmental body's interest 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); *see also* Open Records Decision Nos. 677 at 8 (2002) (attorney work product privilege may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, these sections are not "other law" that make information confidential for the purposes of section 552.022. Therefore, the city may not withhold the information subject to section 552.022 under sections 552.103 or 552.111 of the Government Code. However, because information subject to section 552.022 may be withheld under section 552.101, we will consider your arguments for this exception with respect to the information subject to section 552.022, along with your arguments for the information that is not subject to section 552.022. Further, the Texas Supreme Court has held the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney work product privilege is also found under rule 192.5 of the Texas Rules of Civil Procedure. Accordingly, we will consider your assertion of this privilege under rule 192.5 for the information subject to section 552.022.

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<sup>3</sup>We note that the city does not raise section 552.108 for this information.

Information subject to section 552.022 is “expressly confidential” for purposes of that section under Rule 192.5 only to the extent the information implicates the core work product aspect of the privilege. *See* 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).

In order to withhold attorney 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. ORD 677 at 6-7. 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 contains 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 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*, 861S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state the information in Exhibit E-1, which is subject to section 552.022(a)(3), was prepared and developed by the city’s consultant in anticipation of trial in a pending lawsuit styled *Leanne Siri v. City of Dallas*, Cause No. 09-04875, filed in the District Court of Dallas County, Texas, A-14th Judicial District. Upon review, we find that Exhibit E-1 is work product of the city’s consultant that is protected by rule 192.5. Accordingly, the city may withhold Exhibit E-1 on the basis of core work product for purposes of Texas Rule of Civil Procedure 192.5.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes. Section 552.101 encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. *See* Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in part:

(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.

*Id.* § 159.002(b)-(c). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Medical records may only be released in accordance with the MPA. *See* ORD 598. Upon review, we find that Exhibit B consists of medical records that may only be released in accordance with the MPA.

Section 552.101 also encompasses the Family Medical Leave Act (the "FMLA"), section 2654 of title 29 of the United States Code. Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 states that

[r]ecords and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements[], except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). You indicate that Exhibit C consists of a medical certification specifically provided for FMLA purposes. Accordingly, we find that Exhibit C is

confidential under section 825.500 of title 29 of the Code of Federal Regulations. Further, we find that none of the release provisions of the FMLA applies to the information. Thus, we conclude that the city must withhold Exhibit C under section 552.101 of the Government Code in conjunction with the FMLA.

Section 552.101 also encompasses the common-law right of privacy, which protects information that is 1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and 2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976).

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Id.* at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.* Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released under *Ellen*, along with the statement of the accused, but the identities of the victims and witnesses of the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. See Open Records Decision Nos. 393 (1983), 339 (1982). We also note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

Exhibits I, J, and K relate to an investigation into an alleged sexual harassment. Upon review, we determine that Exhibit I consists of an adequate summary of the alleged sexual harassment investigation. The summary is not confidential under section 552.101 in conjunction with common-law privacy; however, information within the summary identifying the victim and witnesses must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. See *Ellen*, 840 S.W.2d at 525. Therefore, pursuant to section 552.101 in conjunction with common-law privacy and the ruling in *Ellen*, the marked summary in Exhibit I is not confidential, but the information in Exhibits J and K, along with the identifying information of the victim and witnesses in Exhibit I, which we have marked, must be withheld.

We next address your claim under section 552.103 of the Government Code for Exhibits E and G, which are 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 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 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 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).

You state, and provide documentation showing, that prior to the city's receipt of this request, Cause Nos. 09-04875 and 08-13000 were filed.<sup>4</sup> Accordingly, we find that litigation was pending when the city received this request for information. Furthermore, you explain the lawsuits relate to the information at issue because the information pertains to claims in the lawsuits. Based on these representations and our review, we agree the information at issue relates to the pending litigation. Therefore, section 552.103 is generally applicable to the information in Exhibits E and G.

However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You claim that some of the remaining information is excepted from disclosure under section 552.116 of the Government Code. Section 552.116 provides as follows:

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<sup>4</sup>Cause No. 09-04875, *Leanne Siri v. City of Dallas*, was filed in the District Court of Dallas County, Texas, A-14th Judicial District, on April 24, 2009. Cause No. 08-13000, *Helen Watts v. City of Dallas*, was filed in the same court on October 7, 2008.

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, or a joint board operating under Section 22.074, Transportation Code, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You state that the records at issue consist of information prepared or maintained by the city auditor (the "auditor") in conducting an audit pursuant to chapter IX, section 3 of the Dallas City Charter and City Council Resolution Nos. 92-0779 and 98-0751. You explain that the auditor is appointed by the city council and is responsible for conducting audits. You state that the information at issue consists of audit working papers pertaining to an audit of a complaint received by the auditor through its fraud, waste, and abuse hotline. Based on your arguments and our review, we agree that the information at issue constitutes audit working papers that may be withheld under section 552.116 of the Government Code. We have marked this information accordingly.

Next, you claim the information you have highlighted in yellow is excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the current and former home addresses, telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. *Id.* § 552.117(a)(1). Whether a particular piece of information is protected under section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Thus, to the extent that the employee at issue made a timely election to keep the information confidential, then the city must withhold the yellow-highlighted information under section 552.117(a)(1) of the Government Code. However, if the employee at issue did not make a timely election to keep

the information confidential, the city may not withhold this information under section 552.117(a)(1).

Section 552.130 of the Government Code provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). Therefore, the city must withhold the Texas motor vehicle information you have highlighted in green, as well as the additional information we have marked, under section 552.130 of the Government Code.

Section 552.136(b) states "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *Id.* § 552.136(b). You explain that an employee's identification number is also used as an employee's credit union bank account number. Thus, the city must withhold the information you have highlighted in blue under section 552.136 of the Government Code.

Next, we address your assertion that the information you have highlighted in pink is excepted from disclosure under section 552.137 of the Government Code. Section 552.137 requires a governmental body to withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See id.* § 552.137(b). You do not inform us that the owner of the e-mail address at issue has affirmatively consented to its release. Therefore, the city must withhold the e-mail address you have highlighted in pink under section 552.137 of the Government Code.

In summary, the city may withhold Exhibit E-1 pursuant to rule 192.5 of the Texas Rules of Civil Procedure. The city may only release the medical records in Exhibit B in accordance with the MPA. The city must withhold Exhibit C under section 552.101 of the Government Code in conjunction with the FMLA. The information in Exhibits J and K, along with the information we have marked in Exhibit I, must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. Exhibits E and G may be withheld under section 552.103 of the Government Code. The city may withhold the information we have marked under section 552.116 of the Government Code. To the extent that the employee at issue made a timely election to keep the information confidential, the city must withhold the information you have highlighted in yellow under section 552.117(a)(1) of the Government Code. The city must also withhold (1) the Texas motor vehicle information you have highlighted in green, as well as the additional information we have marked, under section 552.130 of the Government Code; (2) the information you have highlighted in blue under section 552.136 of the Government Code,

and (3) the pink-highlighted information under section 552.137 of the Government Code. The remaining information must be released.<sup>5</sup>

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/dls

Ref: ID# 351529

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>5</sup>We note the remaining information contains a social security number. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.