



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

May 17, 2010

Ms. Sharon E. Haynie
Vice President & General Counsel
Houston Housing Authority
2640 Fountain View Drive, Suite 409
Houston, Texas 77057

Ms. Ellen H. Spalding
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5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2010-07064

Dear Ms. Haynie and Ms. Spalding:

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# 379502.

The Houston Housing Authority (the "authority"), which you represent, received a request for 22 categories of information pertaining to the authority and its employees. You state the authority has released some information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

¹We 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 portions of the submitted information are subject to section 552.022 of the Government Code, which provides in pertinent 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[.]

Gov't Code § 552.022(a)(1). The submitted information contains an investigation completed for the authority by a law firm hired by the authority, as well as employee performance evaluations completed by the authority. Pursuant to section 552.022(a)(1) of the Government Code, these records are expressly public unless they are either excepted under 552.108 of the Government Code or expressly confidential under other law. Although you raise sections 552.103 and 552.111 of the Government Code for this information, these 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); Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived); 665 at 2 n.5 (2000) (discretionary exceptions generally), 552 (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). As such, sections 552.103 and 552.111 do not constitute other law that makes information confidential for the purposes of section 552.022(a)(1). Consequently, the information at issue, which we have marked, may not be withheld under section 552.103 or section 552.111 of the Government Code. However, we note the attorney work product privilege is also found in rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *In re City of Georgetown*, 53 S.W.3d 328, 337 (Tex: 2001). Therefore, we will consider your argument that a portion of the information subject to section 552.022(a)(1) is privileged work product under rule 192.5 of the Texas Rules of Civil Procedure. Additionally, we will address your claims under sections 552.103 and 552.111 for the remaining information that is not subject to section 552.022(a)(1).

Rule 192.5 of the Texas Rules of Civil Procedure encompasses the attorney work product privilege. For purposes of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent that the information implicates the core work product aspect of the work product privilege. *See* Open Records Decision No. 677 at 9-10 (2002). 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. 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).

The information subject to section 552.022(a)(1) that you seek to withhold under rule 192.5 consists of an exhibit to the authority's response to an Equal Employment Opportunity Commission ("EEOC") complaint. Thus, the information that the authority seeks to withhold as attorney work product was disclosed to the EEOC. We note the attorney work product privilege can be waived if privileged information is voluntarily disclosed in a non-privileged context. *See Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 554 (Tex. 1990); *Carmona v. State*, 947 S.W.2d 661, 663 (Tex. App.—Austin 1997, no writ); *Arkla, Inc. v. Harris*, 846 S.W.2d 623, 630 (Tex. App.—Houston [14th Dist.] 1993, no writ); *State v. Peca*, 799 S.W.2d 426, 431 (Tex. App.—El Paso 1990, no writ). Therefore, because you provided this information to the EEOC, the work product privilege has been waived for this information. Accordingly, the authority may not withhold pages 35 through 37 under Texas Rule of Civil Procedure 192.5. As you raise no other exceptions against the disclosure of this information or any of the remaining information subject to section 552.022(a)(1), it must be released.

Next, you raise section 552.103 of the Government Code for the remaining information not subject to section 552.022(a)(1). 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 to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation is pending or reasonably anticipated on the date the governmental body receives the request for information, and (2) 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, 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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). See ORD 551 at 4.

You inform us, and provide documentation demonstrating, that the information at issue relates to a pending lawsuit styled *Evette Hester v. Ernie Etuk and the Houston Housing Authority*, Civil Action No. 10-553, which is currently pending in the U.S. District Court for the Southern District of Texas. You further inform us the information at issue and the lawsuit both involve the same issues regarding allegations of discrimination on the basis of sex, retaliation, and sexual harassment brought against the authority. You state, and provide supporting documentation showing, that this lawsuit was filed prior to the authority's receipt of the instant request. Based on your representations and our review, we agree that the submitted information relates to pending litigation for purposes of section 552.103. Accordingly, the authority may generally withhold the remaining information under section 552.103 of the Government Code.²

We note, however, the opposing party in the litigation has seen or had access to some of the information at issue. The purpose of section 552.103 is to enable a governmental body to

²As our ruling is dispositive, we do not address your remaining argument against disclosure.

protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. See ORD 551 at 4-5. Therefore, if the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. See Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, the portions of the remaining information that the opposing party in the litigation has seen or had access to, which we have marked, may not be withheld under section 552.103. As you raise no further exceptions to disclosure for this information, it must be released. However, the authority may withhold the remaining information that is not subject to section 552.022(a)(1) under section 552.103.³ We note the applicability of this exception ends once the litigation has been concluded or is no longer pending. See Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the authority must release the information we have marked under section 552.022(a)(1) of the Government Code. With the exception of the information the requestor has seen, which we have marked for release, the authority may withhold the remaining information under section 552.103 of the Government Code.

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, 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, toll free, at (888) 672-6787.

Sincerely,



James McGuire
Assistant Attorney General
Open Records Division

JM/dls

³As our ruling is dispositive, we need not address your remaining arguments against the disclosure of this information.

Ref: ID# 379502

Enc. Submitted documents

c: Requestor
(w/o enclosures)