



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 10, 2010

Mr. David Daugherty
Assistant County Attorney
Harris County Attorney's Office
1019 Congress, 15th Floor
Houston, Texas 77002-1700

OR2010-17112

Dear Mr. Daugherty:

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# 399788 (C.A. File No. 10GEN1821).

The Harris County Tax Assessor Collector's Office (the "county") received a request for all documents regarding Houston Votes that were released to the public; all correspondence with other organizations regarding Houston Votes; all documents other than voter registration cards relating to Houston Votes; all correspondence sent to volunteer deputy registrars of Houston Votes; all video and audio recordings of a specified press conference; and the database of "all voter registration applications that received notices of rejection or incomplete with reason codes identified in 2010." You state you will release some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.111, 552.130, 552.137,

and 552.147 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative samples of information.²

Initially, we note a portion of the submitted information, which we have marked, is not responsive because it was created after the date the county received the request for information. This ruling does not address the public availability of any information that is not responsive to the request, and the county need not release non-responsive information.

Next, we note some of the submitted information was previously released to the public. The Act does not permit the selective disclosure of information to the public. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). Information that has been voluntarily released to a member of the public may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988). *But see* Open Records Decision Nos. 579 (1990) (exchange of information among litigants in "informal" discovery is not "voluntary" release of information for purposes of statutory predecessor to section 552.007), 454 at 2 (1986) (governmental body that disclosed information because it reasonably concluded that it had constitutional obligation to do so could still invoke statutory predecessor to section 552.108). Accordingly, the county may not withhold previously released information unless its release is expressly prohibited by law or the information is confidential by law. Although you raise sections 552.103, 552.107, 552.108, and 552.111 of the Government Code for this previously released information, these sections 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. 677 at 8 (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), 586 (1991) (governmental body may waive section 552.108), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111). Therefore, to the extent the county previously voluntarily released any of the responsive information to a member of the public, the county may not now withhold any such information under

¹Although you also initially raised sections 552.102, 552.110, 552.112, 552.115, 552.116, 552.117, 552.1175, 552.125, 552.127, 552.128, 552.129, 552.131, 552.132, 552.1325, 552.134, 552.135, 552.136, 552.138, 552.139, 552.142, 552.143, 552.145, 552.146, 552.151, and 552.305 of the Government Code, you have not submitted arguments explaining how these exceptions apply to the submitted information. Therefore, we presume you have withdrawn these exceptions. *See* Gov't Code §§ 552.301(e)(1)(A), .302.

²We assume the "representative examples" of records submitted to this office are 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 those records contain substantially different types of information than that submitted to this office.

sections 552.103, 552.107, 552.108, or 552.111 of the Government Code. We note, however, the county also claims sections 552.101, 552.130, and 552.137 of the Government Code. Because those exceptions are confidentiality provisions for purposes of section 552.007, we will address your claims under sections 552.101, 552.130, and 552.137 for the information that was previously released.

Next, we note some of the submitted information is made expressly public under section 552.022 of the Government Code, which provides in relevant part as follows:

(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:

...

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

...

(15) information regarded as open to the public under an agency's policies[.]

Gov't Code § 552.022(a)(3), (15). In this instance, the submitted information includes vouchers subject to section 552.022(a)(3) and press releases and information published on the county's website subject to section 552.022(a)(15). The county may only withhold the information subject to section 552.022(a)(3) or (a)(15) if it is confidential under other law. Although you raise sections 552.103, 552.107, 552.108, and 552.111 of the Government Code for this information, these sections are not "other law" for purposes of section 552.022(a)(3) and (a)(15). *See id.* § 552.007; *Dallas Area Rapid Transit*, 4 S.W.3d at 475-76; ORD 677 at 8, 676 at 10-11, 665 at 2 n.5, 586, 470 at 7. Therefore, the county may not withhold the information subject to section 552.022 under sections 552.103, 552.107, 552.108, or 552.111 of the Government Code. We note, however, the Texas Supreme Court has held the Texas Rules of Evidence and 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). We will therefore consider your assertions of the attorney-client privilege under rule 503 of the Texas Rules of Evidence and the attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure for the submitted information. Furthermore, because information subject to section 552.022 may be withheld under sections 552.101, 552.130, and 552.137 of the Government Code, we will address your claims under these exceptions. We will also consider your arguments under

sections 552.103, 552.107, 552.108, and 552.111 for the information not subject to section 552.022 that has not been previously released.

First, we address your claims for the information subject to section 552.022. Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) 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 it is 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).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state the information subject to section 552.022 of the Government Code consists of privileged communications you wish to withhold under rule 503. We find, however, the information at issue consists of vouchers, press releases, and information published on the county's website that do not constitute attorney-client communications for purposes of rule 503. Accordingly, we find you have failed to demonstrate how any of the information subject to section 552.022 of the Government Code falls within the scope of the attorney-client privilege. We therefore conclude the county may not withhold any of that information on the basis of rule 503 of the Texas Rules of Evidence.

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 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 the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney 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 the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp.*, 861 S.W.2d at 427.

You generally claim the information subject to section 552.022, which consists of vouchers, press releases, and information published on the county's website, is confidential under rule 192.5. However, you do not explain how this information reflects the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's

representative. Thus, we find the county has failed to demonstrate the applicability of the attorney work product privilege to the information at issue. Accordingly, the county may not withhold any of the information subject to section 552.022 of the Government Code under rule 192.5 of the Texas Rules of Civil Procedure.

Next, we address your claims under sections 552.101, 552.130, and 552.137 for any information previously released and for the information subject to section 552.022. 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 information protected by other statutes. Chapter 13 of the Election Code pertains to voter qualifications and registration. You raise section 552.101 in conjunction with section 13.004 of the Election Code, which provides in pertinent part:

(a) The registrar may not transcribe, copy, or otherwise record a telephone number furnished on a registration application.

...

(c) The following information furnished on a registration application is confidential and does not constitute public information for purposes of [the Act]:

- (1) a social security number;
- (2) a Texas driver's license number;
- (3) a number of a personal identification card issued by the Department of Public Safety;
- (4) an indication that an applicant is interested in working as an election judge; or
- (5) the residence address of the applicant, if the applicant is a federal judge or state judge, as defined by Section 13.0021, or the spouse of a federal judge or state judge, and included an affidavit with the registration application under Section 13.0021 or the registrar has received an affidavit submitted under Section 15.0215.

...

(d) The voter registrar or other county official who has access to the information furnished on a registration application may not post the following information on a website:

- (1) a telephone number;
- (2) a social security number;
- (3) a driver's license number or a number of a personal identification card;
- (4) a date of birth; or
- (5) the residence address of a voter who is a federal judge or state judge, as defined by Section 13.0021, or the spouse of a federal judge or state judge, if the voter included an affidavit with the application under Section 13.0021 or the registrar has received an affidavit submitted under Section 15.0215.

Elec. Code § 13.004(a), (c), (d). The county must therefore withhold the social security, Texas driver's license, and personal identification numbers, an indication that applicants are interested in working as an election judge, and the residence address of any applicants who are federal or state judges or spouses of federal or state judges, from the submitted registration applications under section 552.101 of the Government Code in conjunction with section 13.004 of the Election Code.³ We note you also have redacted some voters' telephone numbers. However, for information to be confidential under section 552.101, the provision of law must explicitly require confidentiality. A confidentiality requirement will not be inferred from a provision's structure. *See* Open Records Decision Nos. 658 at 4 (1998) (stating that statutory confidentiality provision must be express and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (stating that, as general rule, statutory confidentiality requires express language making information confidential), 465 at 4-5 (1987). Section 13.004(a) prohibits the county from transcribing, copying, or recording a voter's telephone number. *See* Elec. Code § 13.004(a). Section 13.004(d) prohibits the posting of certain specified information on a website. *See id.* § 13.004(d). Because neither section 13.004(a) or section 13.004(d) explicitly provides that information is confidential, we find the county may not withhold the telephone numbers of voters from the requestor under section 552.101 of the Government Code in conjunction with section 13.004 of the Election Code.

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

You raise section 552.137 of the Government Code for the e-mail addresses you have marked. 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* Gov’t Code § 552.137(a)-(c). We note, however, one of the e-mail addresses you have marked belongs to the requestor. Therefore, pursuant to section 552.137(b), the county may not withhold the requestor’s e-mail address from him under section 552.137(a). *See id.* § 552.137(b). The county must withhold the remaining e-mail addresses you have marked, and the additional e-mail addresses we have marked, under section 552.137 of the Government Code, unless the owners have affirmatively consented to their public disclosure.

Next, we address your claim under section 552.108 of the Government Code for the information not subject to section 552.022 that has not been previously released. Section 552.108(a)(1) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body must reasonably explain how and why section 552.108 is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by the proper custodian of information relating to a pending investigation or prosecution of criminal conduct. *See* Open Records Decision No. 474 at 4-5 (1987). Where a non-law enforcement agency has custody of information that would otherwise qualify for exception under section 552.108 as information relating to the pending case of a law enforcement agency, the custodian of the records may withhold the information if it provides this office with a demonstration that the information relates to the pending case and a representation from the law enforcement agency that it wishes to have the information withheld.

You provide an affidavit from the Harris County District Attorney’s Office stating it objects to disclosure of the information at issue because its release would interfere with a pending criminal investigation. Based on this representation, we conclude the county may withhold the information not subject to section 552.022 that has not been previously released under section 552.108(a)(1) of the Government Code. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests present in active cases).

In summary, the county must release the information subject to section 552.022(a)(3) and section 552.022(a)(15) of the Government Code, which we have marked. In releasing this information, the county must withhold the social security, Texas driver’s license, and personal identification numbers, indications that applicants are interested in working as an election judge, and the residence address of any applicants who are federal or state judges

or spouses of federal or state judges, from the submitted registration applications under section 552.101 of the Government Code in conjunction with section 13.004 of the Election Code. The county must withhold the e-mail addresses you have marked, except for the e-mail address of the requestor, and the additional e-mail addresses we have marked, under section 552.137 of the Government Code, unless the owners have affirmatively consented to their public disclosure. The county may withhold the remaining information that has not been released under section 552.108(a)(1) of the Government Code. The remaining responsive information must be released. As we are able to make these determinations, we need not address your remaining arguments.

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,



Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/em

Ref: ID# 399788

Enc. Submitted documents

c: Requestor
(w/o enclosures)