



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 18, 2011

Ms. Laura Pfefferle  
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Texas Department of State Health Services  
P.O. Box 149347  
Austin, Texas 78714-9347

OR2011-00830

Dear Ms. Pfefferle:

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# 406217 (DSHS File 18216-2011).

The Texas Department of State Health Services (the "department") received a request for any complaints, citations, responses, actions, or penalties regarding a named inspector; information regarding "complaints, responses and action taken by the State [of Texas]" pertaining to two named entities; "all notification of mold remediation work performed[,] . . . any site visits by the State of Texas Inspectors[,] and written reports" pertaining to a specified address; and "any written findings by members of the review board" regarding the aforementioned named inspector and named entities. We note that, in a clarification, the requestor excluded any information regarding the complaint the requestor filed and of which the requestor was in possession.<sup>1</sup> You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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<sup>1</sup>You indicate the department sought and received clarification of the request for information. See Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if a large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date the request is clarified or narrowed).

Initially, we note one document is subject to section 552.022 of the Government Code, which provides in pertinent part:

(a) [T]he 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). One of the submitted documents is a completed "Chronology Report" that falls within the purview of section 552.022(a)(1). The department may withhold the information subject to section 552.022(a)(1) only if it is excepted from disclosure under section 552.108 of the Government Code or is expressly made confidential under other law. *See id.* Although the department raises sections 552.103 and 552.111 of the Government Code for this information, these sections are discretionary in nature and, thus, may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 439, 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), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111 deliberative process). As such, sections 552.103 and 552.111 do not constitute other law that make information expressly confidential for the purposes of section 552.022. Therefore, the department may not withhold the submitted completed report under section 552.103 or section 552.111. However, we note that the Texas Supreme Court has held "[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, 336 (Tex. 2001). We will therefore consider your assertion of the attorney work product privilege under Texas Rule of Civil Procedure 192.5 for the information subject to section 552.022. You also raise section 552.101 of the Government Code for portions of this information. Section 552.101 constitutes other law that makes information confidential for the purposes of section 552.022; thus, we will also consider your argument under section 552.101 for this information and the information that is not subject to section 552.022 for which you raise section 552.101. We will also address your arguments under sections 552.103, 552.107, and 552.111 for the remaining submitted information not subject to section 552.022.

You claim that some of the submitted information is protected under section 552.103 of the Government Code. 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 that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (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 the pending or anticipated litigation. *See 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 from disclosure under section 552.103(a). *See* ORD 551 at 4.

In order to demonstrate that litigation is reasonably anticipated, the governmental body must provide this office "concrete evidence showing that the claim that litigation might ensue is more than a mere conjecture." Open Records Decision No. 452 at 4 (1986). In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect that litigation is "realistically contemplated." *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld from disclosure if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is "reasonably likely to result"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* ORD 452 at 4.

You state the department reasonably anticipated litigation on the date the department received the request for information because the information at issue pertains to an enforcement investigation which, "[b]ased on the nature of the allegations and findings to date," could result in an enforcement action. You also state the information at issue pertains to this investigation. As such, we conclude that the department may withhold the

information you have marked that is not subject to section 552.022 under section 552.103 of the Government Code.<sup>2</sup>

We note that once the information has been obtained by all parties to the anticipated litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation is concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). 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 Tex. 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 to only communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A)-(E). 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 to only a confidential communication, *id.* 503(b)(1), 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 pet.). 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

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the remaining information that you have marked under section 552.107 constitutes notes documenting communications made to the department's Assistant General Counsel. You inform us that the department attorney represents the department in this matter and these communications were made for the purpose of providing legal services to the department regarding the investigation at issue. You state these communications were intended to be confidential and we understand they have remained so. Accordingly, based on your representations and our review, we find the department may withhold the remaining information you have marked under section 552.107(1) of the Government Code.

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." See Gov't Code § 552.111. This section encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as:

- (1) [M]aterial prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

- a) 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 b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

*Nat'l Tank Co. 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; ORD 677 at 7.

As noted above, you state the department anticipates litigation because there is a pending enforcement investigation regarding this matter. You explain the remaining information you have marked under section 552.111 consists of notes prepared by the department's staff and the department Assistant General Counsel regarding the investigation at issue and enforcement actions related to the complaint at issue. Based on your representations and our review, we find that the remaining information you have marked that is not subject to section 552.022 is subject to the work product privilege and the department may withhold this information under section 552.111 of the Government Code.

We will now address the information that is subject to section 552.022. 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 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. 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 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 test for determining whether information was created or developed in anticipation of litigation is the same as that discussed above concerning section 552.111 of the Government Code. *See Nat'l Tank Co.*, 851 S.W.2d at 207. 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 privileged 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. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1993, no writ).

As previously discussed, you state the department reasonably anticipated litigation on the date of the request for information because there is a pending enforcement investigation regarding this matter. However, you have failed to demonstrate that the information that is subject to section 552.022 consists of mental impressions, opinions, conclusions, or legal theories of an attorney or attorney's representative. Consequently, you have failed to demonstrate the applicability of the privilege and we determine the department may not

withhold the information subject to section 552.022 of the Government Code as core work product under rule 192.5 of the Texas Rules of Civil Procedure.

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. Section 552.101 encompasses the common-law right of privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Additionally, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Whether information is subject to a legitimate public interest and therefore not protected by common-law privacy must be determined on a case-by-case basis. *See* Open Records Decision No. 373 (1983).

Initially, we note the requestor is the parent of the individual whose privacy rights are implicated for the information you have marked in the document subject to section 552.022. Thus, the requestor has a special right of access to information that would ordinarily be withheld to protect her child's privacy interests and the department may not withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy. *See* Gov't Code § 552.023(a)-(b) (governmental body may not deny access to person or person's representative to whom information relates on grounds that information is considered confidential under privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). We find that the information we have marked under section 552.101 in the remaining documents is highly intimate or embarrassing and not of legitimate public concern. However, you have failed to demonstrate how the remaining information you have marked under section 552.101 is highly intimate or embarrassing and not of legitimate public concern; thus, the department may not withhold this information under section 552.101 in conjunction with common-law privacy. Accordingly, the department must withhold only the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

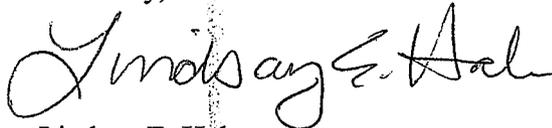
In summary: (1) the department may withhold the information you have marked that is not subject to section 552.022 under section 552.103 of the Government Code; (2) the department may withhold the remaining information you have marked under

section 552.107(1) of the Government Code; (3) the department may withhold the remaining information that you have marked that is not subject to section 552.022 as work product under section 552.111 of the Government Code; and (4) the department must withhold the medical information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The department must release the remaining submitted information.<sup>3</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, toll free at (888) 672-6787.

Sincerely,



Lindsay E. Hale  
Assistant Attorney General  
Open Records Division

LEH/em

Ref: ID# 406217

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>3</sup>Because this requestor has a right of access under section 552.023 of the Government Code to some of the information being released, if the department receives another request for this information from an individual other than this requestor, the department must again seek a ruling from this office.