



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 30, 2011

Mr. James T. Jeffrey, Jr.
Law Offices of Jim Jeffrey
2214 Park Springs Boulevard
Arlington, Texas 76013

OR2011-14208

Dear Mr. Jeffrey:

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# 431640.

The Town of Pantego (the "town"), which you represent, received a request for information pertaining to two specified investigations involving the requestor. You state the town has released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, and 552.111 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure.¹ We have considered your arguments and reviewed the submitted information.

¹Although you raise section 552.101 of the Government Code in conjunction with the attorney-client privilege under Texas Rule of Evidence 503 and the attorney work product privilege under Texas Rule of Civil Procedure 192.5, this office has concluded that section 552.101 does not encompass discovery privileges. See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

You state the town sought clarification of the request for information. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request). You further state that although the requestor has not responded to the request for clarification, the town related the request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). Thus, we consider the town to have made a good-faith effort to identify the information that is responsive to the request.

Next, we note the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant 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). The submitted information consists of completed investigations made by or for the town that are subject to section 552.022(a)(1). The town must release this information pursuant to section 552.022 unless it is excepted from disclosure under section 552.108 of the Government Code or is expressly made confidential under other law. *See id.* Although you claim this information is subject to sections 552.103, 552.107, and 552.111 of the Government Code, these sections are discretionary exceptions that protect a governmental body's interest and are, therefore, not "other law" for purposes of section 552.022. *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 Record 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), 542 at 4 (1990) (statutory predecessor to section 552.103 subject to waiver). Therefore, the town may not withhold submitted information under section 552.103, section 552.107, or section 552.111 of the Government Code. However, we note 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. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your assertion of the attorney-client privilege under rule 503 and the attorney work product privilege under rule 192.5 for the submitted information. Further, section 552.101 of the Government Code is "other law" for purposes of section 552.022 and information subject to section 552.022(a)(1) may be withheld under section 552.108 of the Government Code. Accordingly, we will consider your arguments under sections 552.101 and 552.108 for the submitted information. Additionally, we note portions of the submitted information are

subject to sections 552.102, 552.117, and 552.130 of the Government Code.² As these exceptions are also “other law” for purposes of section 552.022, we will consider their applicability to the submitted information.

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

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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 explain the town hired an outside attorney to conduct an investigation of a discrimination complaint filed by an employee with the Texas Workforce Commission and provide the town with legal advice regarding the complaint. You state the attorney's investigation was not intended for release to third parties, and the town has maintained the confidentiality of her investigation. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the attorney's investigation, which we have marked. *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (concluding attorney's entire investigative report was protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney for purpose of providing legal services and advice). Accordingly, the town may withhold the information we have marked under rule 503 of the Texas Rules of Evidence. However, you state the submitted internal affairs investigation was conducted by a police officer to investigate possible misconduct on the part of an officer of town's police department (the "department"). You have not explained how this investigation consists of a privileged attorney-client communication. Accordingly, the town may not withhold the submitted internal affairs investigation under rule 503.

Next, we address your argument under Texas Rule of Civil Procedure 192.5 for the internal affairs investigation. Rule 192.5 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 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 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 (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 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 explain because of the parties involved and the small size of the department, the town requested a lieutenant from a neighboring city conduct the internal affairs investigation at issue. You assert this investigation constitutes the lieutenant’s work product and should be withheld. However, you do not explain how the internal affairs investigation consists of the work product of an attorney or an attorney’s representative. Accordingly, having considered your arguments regarding the information at issue, we conclude you have not demonstrated that any of this information consists of core work product for purposes of rule 192.5. Therefore, we conclude the town may not withhold the internal affairs investigation under Texas Rule of Civil Procedure 192.5.

We understand the town to assert the internal affairs investigation is confidential under section 551.071 of the Government Code. 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. Section 551.071 permits a governmental body to consult with its attorney in a closed meeting. *See id.* §§ 551.071. This provision does not make information confidential for purposes of section 552.101 of the Government Code. *See* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Thus, the town may not withhold the internal affairs investigation under section 552.101 in conjunction with section 551.071 of the Government Code.

We understand you to argue the internal affairs investigation is confidential because the internal affairs investigation was presented to the town Council in executive session.³ Section 552.101 also encompasses section 551.104 of the Government Code. This section provides that “[t]he certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3).” Gov’t Code § 551.104(c). Thus, such information cannot be released in response to an open

³We note that you rely upon Open Records Decision No. 159 (1977). However, we note Open Records Decision No. 485 (1987) states that to the extent Open Records Decision No. 159 implies the conclusion that “any report concerning a public employee which is discussed in an executive session necessarily may be withheld under [statutory predecessor to section 552.101] . . . [w]e overrule Open Records Decision No. 159[.]” Open Records Decision No. 485 at 9.

records request. *See* Attorney General Opinion JM-995 at 5-6 (1988) (public disclosure of certified agenda of closed meeting may be accomplished only under procedures provided in Open Meetings Act). However, other than certified agendas and tape recordings, records relating to closed meetings are not expressly made confidential by chapter 551 of the Government Code. *See, e.g.*, ORD 485 at 6 (investigative report not excepted from disclosure under statutory predecessor to section 552.101 simply by virtue of its having been considered in executive session); *see also* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure), 649 at 3 (1996) (language of confidentiality provision controls scope of its protection), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to public). You state the internal affairs investigation you seek to withhold was presented and discussed in an executive session of a town Council meeting. You have not demonstrated, however, nor does it appear, the information at issue consists of a certified agenda or tape. Therefore, the internal affairs investigation may not be withheld under section 552.101 of the Government Code in conjunction with section 551.104 of the Government Code.

You claim the internal affairs investigation is subject to section 552.108(a)(1) of the Government Code, which 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 claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). In this instance, the information at issue consists of an internal affairs investigation. Section 552.108 is generally not applicable to the records of an internal affairs investigation that is purely administrative in nature and does not involve the investigation or prosecution of crime. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.); *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution); *see also* Open Records Decision No. 350 at 3-4 (1982). You state the internal affairs investigation involved, in part, allegations of criminal misconduct. Although you state that these allegations “could result” in a criminal prosecution, you do not inform us, and the submitted information does not otherwise indicate, that the internal affairs investigation has resulted in any criminal investigation or charges that are currently pending. We therefore conclude the town has not demonstrated section 552.108(a)(1) is applicable to the internal affairs investigation, and it may not be withheld on that basis.

We note the internal affairs investigation contains information subject to section 1703.306 of the Occupations Code. Section 552.101 also encompasses section 1703.306 of the Occupations Code, which provides in relevant part:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

(1) the examinee or any other person specifically designated in writing by the examinee[.]

Occ. Code § 1703.306. The information we have marked consists of information acquired from polygraph examinations subject to section 1703.306. In this instance, the requestor is the polygraph examinee. Thus, the town has the discretion to release the requestor's polygraph information to him pursuant to section 1703.306(a)(1). *See* Open Records Decision No. 481 at 9 (1987) (predecessor to section 1703.306 permits, but does not require, examination results to be disclosed to examinees).

Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy protects information that (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). The type of information considered intimate or 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. 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). This office has also found that a compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep't of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. Additionally, this office has determined that common-law privacy protects the identities of juvenile offenders. *See* Open Records Decision No. 394 (1983); *cf.* Fam. Code § 58.007 (c).

Upon review, we find the information we have marked in the internal affairs investigation and the types of information we have indicated in the submitted audio and video recordings is highly intimate or embarrassing and not of legitimate public concern. Therefore, the town

must withhold this information pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

We note the remaining information includes information that is excepted from disclosure under section 552.102(a) of the Government Code. Section 552.102(a) excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Having carefully reviewed the information at issue, we have marked the information that must be withheld under section 552.102(a) of the Government Code. None of the remaining information is subject to section 552.102(a) and it may not be withheld on that basis.

We note portions of the remaining information may be subject to subsections 552.117(a)(1) and 552.117(a)(2) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. *See* Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov’t Code § 552.117(a)(1)); Open Records Decision No. 622 (1994). Whether a particular piece of information is protected by 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, information may only be withheld under section 552.117(a)(1) on behalf of a current or former 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. The internal affairs investigation and the related audio recordings contain the personal information of former and current town employees. If the employees whose personal information is at issue made timely elections under section 552.024, the town must withhold the information we have marked in the internal affairs investigation and the types of information we have indicated in the submitted audio recordings under section 552.117(a)(1). If an employee whose information is at issue did not make a timely election under section 552.024, then the town may not withhold the information pertaining to that employee under section 552.117(a)(1).

Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, emergency contact information, social security number, and family member information of a peace officer, as defined by article 2.12 of the Code of Criminal Procedure. *See* Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov’t Code § 552.117(a)(2)); ORD 622. We note section 552.117 applies to a cellular telephone number only if the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 670 at 6 (2001) (statutory predecessor to section 552.117(a)(2)).

encompassed personal cellular phone numbers and personal pager numbers of peace officers who purchased cellular or pager service with their personal funds). Accordingly, the town must withhold the information we have marked in the internal affairs investigation and the types of information we have indicated in the submitted audio recordings under section 552.117(a)(2); however, the town may only withhold the marked cellular telephone number if the town did not pay for the cellular telephone service.

Section 552.130 of the Government Code excepts from public disclosure information relating to a driver's license or motor vehicle title or registration issued by an agency of this state or another state or country. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 4 (to be codified as an amendment to Gov't Code § 552.130). The town must withhold the motor vehicle record information we have marked in the internal affairs investigation and the types of information we have indicated in the submitted video recording under section 552.130 of the Government Code.

In summary, the town may withhold the marked information under rule 503 of the Texas Rules of Evidence. The town has the discretion to release the requestor's polygraph information, which we have marked, to him pursuant to section 1703.306(a)(1) of the Occupations Code. The town must withhold the information we have marked in the internal affairs investigation and the types of information we have indicated in the submitted audio and video recordings pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. The town must withhold the information we have marked under section 552.102(a) of the Government Code. If the former employees whose information is at issue made timely elections under section 552.024 of the Government Code, the town must withhold the information we have marked in the internal affairs investigation and the types of information we have indicated in the submitted audio under section 552.117(a)(1) of the Government Code. The town must withhold the information we have marked in the internal affairs investigation and the types of information we have indicated in the submitted audio under section 552.117(a)(2); however, the town may only withhold the marked cellular telephone number if the town does not pay for the cellular telephone service. The town must withhold the motor vehicle record information we have marked in the internal affairs investigation and the types of information we indicated in the submitted video recording under 552.130 of the Government Code. The remaining information must be released.⁴

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.

⁴We note that the information being released contains confidential information to which the requestor has a right of access. See Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual or authorized representative asks governmental body to provide information concerning that individual). Thus, if the town receives another request for this particular information from a different requestor, then the town should again seek a decision from this office.

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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/dls

Ref: ID# 431640

Enc. Submitted documents

c: Requestor
(w/o enclosures)