



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 3, 2011

Ms. Cheryl K. Byles
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street, 3rd Floor
Fort Worth, Texas 76102

OR2011-16226

Dear Ms. Byles:

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# 435132 (PIR No. W010766).

The City of Fort Worth (the "city") received a request for information pertaining to (1) the results of interviews for a specified position and (2) a specified Equal Employment Opportunity Commission ("EEOC") charge number for a specified time period.¹ You state some of the information will be released to the requestor. You indicate the city will redact personal information subject to section 552.117 of the Government Code, as permitted by section 552.024(c) of the Government Code.² You further indicate the city will redact

¹We note the city sought and received clarification from the requestor regarding the request. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if 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); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²Section 552.117 of the Government Code exempts 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. 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)). Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117 without requesting a decision from this office if the employee or official or former employee or official chooses not to allow public access to the information. *See* Gov't Code § 552.024(c), Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2.

information subject to section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).³ You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.122 of the Government Code.⁴ We have considered the exceptions you claim and reviewed the submitted information, a portion of which is a representative sample.⁵

Section 552.111 of the Government Code 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) material 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 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. TEX. R. CIV. P. 192.5; 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:

³Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information without the necessity of requesting an attorney general decision, including an e-mail address of a member of the public under section 552.137 of the Government Code.

⁴Although you assert the attorney-client privilege under Texas Rule of Evidence 503 and the attorney work-product privilege under Texas Rule of Civil Procedure 192.5, we note none of the information for which you claim these privileges is subject to section 552.022 of the Government Code. Thus, sections 552.107 and 552.111 of the Government Code are the proper exceptions to raise, respectively, for your attorney-client and work-product privilege claims in this instance. *See generally* Open Records Decision Nos. 676 (2002), 677 (2002).

⁵We assume the “representative sample” of information 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 those records contain substantially different types of information than those submitted to this office.

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.

Furthermore, if a requestor seeks a governmental body’s entire litigation file, the governmental body may assert the file is excepted from disclosure in its entirety because such a request implicates the core work product aspect of the privilege. ORD 677 at 5-6. Thus, in such a situation, if the governmental body demonstrates the file was created for trial or in anticipation of litigation, this office will presume the entire file is within the scope of the privilege. Open Records Decision No. 647 at 5 (1996) (citing *Nat'l Union Fire Ins. Co. v. Valdez*, 863 S.W.2d 458, 461 (Tex. 1993)) (organization of attorney’s litigation file necessarily reflects attorney’s thought processes); *see also Curry v. Walker*, 873 S.W.2d 379, 380 (Tex. 1994) (holding “the decision as to what to include in [the file] necessarily reveals the attorney’s thought processes concerning the prosecution or defense of the case”).

You state Exhibit C-1 consists of the entire litigation file of an attorney representing the city in the requestor’s discrimination claim against the city. You state the city anticipates litigation because the requestor has filed claims against the city with the EEOC and has received his right to sue letter. You explain the information at issue reflects the opinions and mental impressions of the city’s attorney as to the veracity of the requestor’s claims. Based on your representations and our review, we conclude the city may withhold Exhibit C-1 as attorney work product under section 552.111 of the Government Code.⁶

Section 552.122 of the Government Code excepts from required public disclosure “a test item developed by a . . . governmental body[.]” Gov’t Code § 552.122(b). In Open Records Decision No. 626 (1994), this office determined the term “test item” in section 552.122 includes “any standard means by which an individual’s or group’s knowledge or ability in a particular area is evaluated,” but does not encompass evaluations of an employee’s overall job performance or suitability. ORD 626 at 6. The question of whether specific information falls within the scope of section 552.122(b) must be determined on a case-by-case basis. *Id.* Traditionally, this office has applied section 552.122 where release of “test items” might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Section 552.122 also protects the answers to test questions when

⁶As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

the answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987); ORD 626 at 8.

You seek to withhold the information you have marked in Exhibit C-2 under section 552.122 of the Government Code. You argue the release of these questions would be disadvantageous to the selection process and would jeopardize the effectiveness of future examinations. Having considered your arguments and reviewed the submitted information, we find the questions we have marked evaluate the applicant's specific knowledge or ability in a particular area, thus qualifying as "test items" under section 552.122(b) of the Government Code. We also find the release of the answers we have marked would tend to reveal the questions themselves. Therefore, the city may withhold the information we have marked in Exhibit C-2 under section 552.122(b). We find, however, the remaining information at issue only evaluates each applicant's individual abilities, personal opinions, and subjective ability to respond to particular situations, and does not test any specific knowledge of an applicant. Accordingly, we determine the remaining information in Exhibit C-2 does not constitute test items under section 552.122(b) and may not be withheld on that basis.

In summary, the city may withhold Exhibit C-1 as attorney work product under section 552.111 of the Government Code. The city may withhold the information we have marked in Exhibit C-2 under section 552.122(b) of the Government Code. The city must release the remaining information.

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,



Sean Nottingham
Assistant Attorney General
Open Records Division

SN/agn

Ref: ID# 435132

Enc. Submitted documents

c: Requestor
(w/o enclosures)