



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 26, 2012

Ms. Michelle M. Kretz
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street, Third Floor
Fort Worth, Texas 76102

OR2012-18898

Dear Ms. Kretz:

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# 471848 (Ft. Worth PIR# W019973).

The City of Fort Worth (the "city") received a request for information pertaining to a specified investigation involving the requestor. You claim the requested information is excepted from disclosure under sections 552.103, 552.107, 552.111, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note portions of the submitted information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2012-13101 (2012). In this ruling, we concluded the city must withhold certain information under section 552.101 of the Government Code in conjunction with common-law privacy and release the remaining information at issue. We have no indication the law, facts, and circumstances on which the previous ruling was based have changed. Accordingly, to the extent the submitted information is identical to the information previously requested and ruled upon by this office, the city must continue to rely on Open Records Letter No. 2012-13101 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673

(2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure); *see also* Gov't Code § 552.007 (prohibiting selective disclosure of information). To the extent the requested information is not encompassed by the previous ruling, we will consider the submitted arguments.

Next, we note the submitted information contains completed employee evaluations that are subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]" unless the information is made confidential under this chapter or other law or is excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). Although you raise sections 552.103 and 552.111 of the Government Code for this information, these are discretionary exceptions and do not make information confidential under the Act. *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); *see also* Open Records Decision Nos. 677 at 8 (2002) (attorney work product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 (1987), (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). Therefore, the information subject to section 552.022(a)(1) may not be withheld under section 552.103 or section 552.111. We note the attorney work product privilege, which you claim under section 552.111, is also found at Texas Rule of Civil Procedure 192.5, which has been held to be other law that makes information confidential for purposes of section 552.022(a)(1). *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Therefore, we will determine whether the city may withhold the completed employee evaluations under rule 192.5. We will also consider your claims under sections 552.103, 552.107, 552.111, and 552.137 for the information not subject to section 552.022(a)(1).

Section 552.103 of the Government Code provides as follows:

(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 that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* Concrete evidence to support a claim litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.¹ *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You state the submitted information pertains to a pending employee grievance procedure the requestor initiated against the city under section 554.006 of the Government Code, the Whistleblower Act, for alleged wrongful and retaliatory actions on the part of the city in response to the requestor’s claims of misconduct by other employees. Section 554.006 of the Government Code provides, in part, that an aggrieved party must initiate action under the grievance or appeal procedures of the employing state or local governmental entity before filing suit. *See* Gov’t Code § 554.006(a). You indicate the grievance was initiated prior to

¹In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

the city's receipt of the request for the information. You state the information at issue is related to the requestor's claims of retaliation. Based on your representations and our review of the information at issue, we find you have demonstrated the information at issue is related to litigation the city reasonably anticipated when it received this request for information. Accordingly, the city may withhold the information not subject to section 552.022(a)(1) under section 552.103 of the Government Code.²

We note once information has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Texas Rule of Civil Procedure 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* 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. *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

²As our ruling on this information is dispositive, we need not address your remaining arguments against its disclosure.

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.

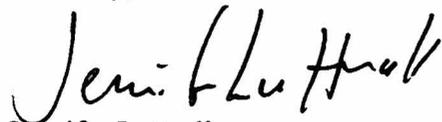
You generally assert the information subject to section 552.022(a)(1) consists of attorney work product. As previously noted, the information subject to section 552.022(a)(1) consists of completed employee evaluations. Upon review, we conclude you have failed to demonstrate the information subject to section 552.022(a)(1) consists of mental impressions, opinions, conclusions, or legal theories of an attorney or a representative of an attorney prepared in anticipation of litigation or for trial. Therefore, the information subject to section 552.022(a)(1) is not privileged pursuant to Texas Rule of Civil Procedure 192.5, and the city may not withhold it on that basis.

In summary, to the extent the submitted information is identical to the information previously requested and ruled upon by this office, the city must continue to rely on Open Records Letter No. 2012-13101 as a previous determination and withhold or release the identical information in accordance with that ruling. The city may withhold the information not subject to section 552.022(a)(1) of the Government Code under section 552.103 of the Government Code. The remaining information must be released.

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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/som

Ref: ID# 471848

Enc. Submitted documents

c: Requestor
(w/o enclosures)