



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

This ruling has been modified by court action
The ruling and judgment can be viewed in PDF
format below.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 13, 2013

Ms. Katie Anderson
Strasburger & Price, L.L.P.
901 Main Street, Suite 4400
Dallas, Texas 75202-3794

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

OR2013-14063

Dear Ms. Anderson:

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# 496157 (DCS Ref. No W000241-052213).

Dallas County Schools ("DCS"), which you represent, received a request for specified information pertaining to the requestor's client. DCS states it has provided some of the requested information to the requestor but claims the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.108 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rules of Civil Procedure 192.3 and 192.5.¹ We have considered the submitted arguments and reviewed the submitted representative sample of information.²

Initially, we note you marked some of the submitted information as not being responsive to the request for information. This ruling does not address the public availability of any

¹Although you also appear to raise section 552.022 of the Government Code, we note section 552.022 is not an exception to disclosure. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are made confidential under the Act or other law. *See* Gov't Code § 552.022.

²We assume the "representative sample" of records 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 that submitted to this office.

information that is not responsive to the request, and DCS is not required to release this information in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed).

Next, we note the submitted information is part of a completed investigation that is subject to section 552.022(a)(1) of the Government Code, which reads as follows:

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 unless made confidential under this chapter or 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). Although you raise sections 552.103 and 552.107 of the Government Code, these sections are discretionary 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); Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, DCS may not withhold the submitted information under section 552.103 or 552.107. However, the Texas Supreme Court has held the Texas Rules of Evidence and Texas Rules of Civil Procedure are “other law” that make information expressly confidential for the purposes of section 552.022. *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, the consulting expert privilege under rule 192.3, and the attorney work product privilege under rule 192.5 for the information at issue. We will also consider your arguments under section 552.108 of the Government Code. *See* Gov't Code § 552.022(a)(1). In addition, sections 552.101, 552.102, 552.117, 552.130, and 552.137 of the Government Code make information confidential under the Act.³ Accordingly, we will consider the applicability of these sections to the submitted information as well.

Rule 503(b)(1) of the Texas Rules of Evidence provides the following:

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987).

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 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).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must do the following: (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. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

Having considered your representations and reviewed the information at issue, we find you have established some of the submitted information, which we have marked, constitutes privileged attorney-client communications between a DCS attorney and DCS officials and

employees that DCS may withhold under rule 503.⁴ See *Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (attorney’s entire investigative report 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). However, we conclude you have not established any of the remaining information consists of privileged attorney-client communications. Therefore, DCS may not withhold this information under rule 503.

For the purpose of section 552.022, information is confidential under rule 192.5 of the Texas Rules of Civil Procedure only to the extent the information implicates the core work product aspect of the work product privilege. Open Records Decision No. 677 at 9-10 (2002). Core work product is defined as the work product of an attorney or an attorney’s representative developed in anticipation of litigation or for trial that contains the attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. 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 an attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. *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 prong of the work product test requires the governmental body to show the documents at issue contains the attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test is confidential under rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in rule 192.5(c). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

Upon review, we find you failed to establish any of the remaining information consists of privileged work product. Thus, we conclude you have not established any of the remaining

⁴As our ruling is dispositive, we do not address your other arguments to withhold this information.

information is excepted from disclosure pursuant to rule 192.5 and the attorney work product privilege

Rule 192.3 of the Texas Rules of Civil Procedure provides for the consulting expert privilege. A party to litigation is not required to disclose the identity, mental impressions, and opinions of consulting experts whose mental impressions or opinions have not been reviewed by a testifying expert. *See* TEX. R. CIV. P. 192.3(e). A “consulting expert” is defined as “an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert.” *Id.* 192.7. Although you generally claim this privilege, we find you have not demonstrated its applicability to the information at issue. Accordingly, DCS may not withhold any of the remaining information at issue under rule 192.3 of the Texas Rules of Civil Procedure.

Section 552.108 of the Government Code provides in relevant part the following:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

...

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

...

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

...

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(2), (b)(2). By its terms, section 552.108 applies only to a law enforcement agency or a prosecutor. This office has concluded, however, that section 552.108 may be invoked by any proper custodian of information that relates to the incident. *See* Open Records Decision Nos. 474 (1987), 372 (1983). Where a non-law enforcement agency is in the custody of information relating to a concluded criminal 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 criminal case that has reached a conclusion other than a conviction or deferred adjudication and a representation from the law enforcement entity that it wishes to withhold the information. You inform us the information for which you raise section 552.108 was created by or exchanged with members of the DCS police department. Nevertheless, you also state the records at issue were not in possession of the DCS police department "and thus an exception based on [section] 552.108 with respect to the DCS police department is not being alleged." Accordingly, you represent the DCS police department does not assert the information at issue is excepted from release under section 552.108 based on its own interests. Further, you have not provided our office with a representation from any other law enforcement agency that wishes the information to be withheld. Accordingly, DCS has failed to demonstrate section 552.108(a)(2) or 552.108(b)(2) of the Government Code is applicable to any of the information at issue, and DCS may not withhold any of portion of it from release on those grounds.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses the doctrine of common-law privacy, which 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 types 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.

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Id.* at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.* Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released under *Ellen*, but the identities of the victims and witnesses of the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. See Open Records Decision Nos. 393 (1983), 339 (1982). However, common-law privacy does not protect information about a public employee's alleged misconduct on the job or complaints made about a public employee's job performance. See Open Records Decision Nos. 438 (1986), 405 (1983), 230

(1979), 219 (1978). We note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

The submitted information includes an investigation into alleged sexual harassment. Upon review, we find the submitted information does not contain an adequate summary of the sexual-harassment investigation. However, the submitted documents contain identifying information of the alleged sexual harassment victims. Accordingly, we conclude DCS must withhold this information, which we have marked, pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy and the holding in *Ellen*.

We note the submitted 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 has 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.*, 354 S.W.3d 336 (Tex. 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.

Section 552.117 of the Government Code may also be applicable to some of the submitted information. 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 that this information be kept confidential under section 552.024 of the Government Code. Gov’t Code § 552.117(a)(1). Section 552.117 also encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cellular phone service. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body’s receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former official or 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. DCS must withhold the telephone numbers we have marked under section 552.117(a)(1) if they consist of home telephone numbers of the employees at issue and the employees made timely elections to keep the information confidential. However, DCS may only withhold the cellular telephone numbers we have marked under section 552.117(a)(1) if they were not provided to the employees at issue at public expense.

Section 552.130(a) of the Government Code provides the following:

Information is excepted from the requirements of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state or another state or country;
- (2) a motor vehicle title or registration issued by an agency of this state or another state or country; or
- (3) a personal identification document issued by an agency of this state or another state or country or a local agency authorized to issue an identification document.

Gov't Code § 552.130. DCS must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

The remaining information contains e-mail addresses of members of the public. Section 552.137 of the Government Code 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 id.* § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. The requestor has a right of access to his client's e-mail address pursuant to section 552.137(b) of the Government Code. *See id.* § 552.137(b). However, the remaining e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, DCS must withhold the e-mail addresses we have marked under section 552.137.⁵

To conclude, DCS may withhold the information we have marked under Texas Rule of Evidence 503. DCS must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and under sections 552.102, 552.130, and 552.137 of the Government Code. DCS must also withhold the telephone numbers we have marked under section 552.117(a)(1) of the Government Code

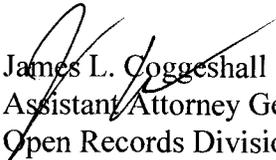
⁵This office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general opinion. Accordingly, if DCS receives another request from an individual other than this requestor, DCS is authorized to withhold the e-mail address of the requestor's client under section 552.137 without the necessity of requesting an attorney general decision.

if they consist of home telephone numbers of the employees at issue and if the employees timely elected under section 552.024 of the Government Code to keep this information confidential; however, DCS may only withhold the cellular telephone numbers we have marked under section 552.117(a)(1) if they were not provided to the employees at public expense. DCS must release the remaining information.⁶

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,


James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/tch

Ref: ID# 496157

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁶We note the submitted information contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. The requestor has a right, however, to his client's social security number. *See generally* Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates, or that person's representative, solely on grounds that information is considered confidential by privacy principles). The requestor also has a special right of access to some of the other information being released. Thus, DCS must again seek a decision from this office if it receives another request for this information from another requestor.

Notice sent: Final Interlocutory None
Disp Parties: AI
Disp code: CVD / OLS 465
Redact pgs: 131
Judge: WJL Clerk: AY

Filed in The District Court
of Travis County, Texas
DEC - 2 2013 RT
At 8:00 A M.
Amalia Rodriguez-Mendoza, Clerk

CAUSE NO. D-1-GN-13-002887

DALLAS COUNTY SCHOOLS,

Plaintiff,

vs.

ATTORNEY GENERAL OF TEXAS,

Defendant.

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IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

261ST JUDICIAL DISTRICT

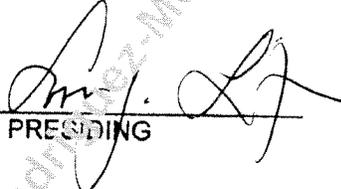
AGREED ORDER OF DISMISSAL WITH PREJUDICE

Dallas County Schools ("Plaintiff" or "DCS") and the Attorney General of Texas ("Defendant" or "Attorney General") move that this cause be dismissed pursuant to Sections 552.301(g) and 552.327 of the Texas Government Code. This lawsuit arises under the Public Information Act, Chapter 552 of the Texas Government Code. DCS timely filed suit challenging the Attorney General's open records ruling No. OR2013-14063. The Attorney General has determined and represents to the Court that the requestor, Sunny Letot, has voluntarily withdrawn the request for information at issue in this suit, and DCS need not produce records in accordance with Open Records Letter No. OR2013-14063. Accordingly, the parties request that the Court enter this Agreed Order of Dismissal with Prejudice pursuant to Section 552.327 of the Texas Government Code.

The Court finds that the Motion is in all things GRANTED, and that the above-entitled and numbered action should be dismissed.

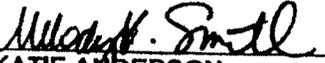
It is THEREFORE, ORDERED, ADJUDGED and DECREED that this cause is hereby dismissed in all respects. Court costs are taxed to the party incurring same. All other requested relief not expressly granted herein is denied.

Signed this 26th day of November, 2013.



 JUDGE PRESIDING

APPROVED AND SUBMITTED BY:


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