



May 1, 2002

Mr. Marvin Foust
Assistant City Attorney
City of El Paso
2 Civic Center Plaza
El Paso, Texas 79901-1196

OR2002-2266

Dear Mr. Foust:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 162217.

The City of El Paso Police Department (the "department") received a request for a certain complaint file maintained by the El Paso Water Utilities. You claim that the requested information is excepted from disclosure under sections 552.101, 552.108, 552.117, and 552.130 of the Government Code.¹ You also assert that portions of the requested information are excepted from required public disclosure based on the attorney-client and work product privileges. We have considered the exceptions you claim and reviewed the representative sample of submitted information.²

We begin with your privacy claim. For information to be protected from public disclosure under common-law privacy, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, *writ denied*), the court addressed the applicability of the common-

¹As you did not submit to this office written comments stating any reason why section 552.108 applies to the information, we find that you have waived this exception. See Gov't Code §§ 552.301, .302.

²We assume that the "representative sample" of responsive documents 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 that those records contain substantially different types of information than that submitted to this office.

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. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "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.* When there is an adequate summary of the investigation, the summary must be released, but the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from disclosure.

Although you state that your submissions include an incident report and a case summary report, we do not find such reports. You also indicate that you have marked information as summary information, but we do not find such markings. Consequently, because we find no adequate summary of the investigation, you must release the requested information. However, based on *Ellen*, the department must withhold from disclosure the identity of the victims and witnesses of the alleged harassment. We have marked the information that must be withheld under common-law privacy.

Next, you assert that the some of the submitted information contains confidential attorney-client communications and attorney work product. Section 552.101 excepts from disclosure information made confidential by law. However, this office has found that discovery and evidentiary rules, such as Rule 503 of the Texas Rules of evidence and Rule 192.5 of the Texas Rules of Civil Procedure, are not confidentiality provisions for the purposes of section 552.101.³ See Open Records Decision Nos. 575 (1990), 416 (1984). Consequently, the department may not withhold the information based on section 552.101 in conjunction with these rules. Moreover, while we acknowledge that the Texas Supreme Court recently held that "[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 (Tex. 2001), the submitted documents do not fall into a section 552.022 category of information. Thus, we need not address whether the submitted information is confidential under Rule 503 of the Texas Rules of Evidence or Rule 192.5 of the Texas Rules of Civil Procedure.

Section 552.107(1) of the Government Code excepts information "that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the

³ We note that in Open Records Decision No. 574 (1990), this office determined that the statutory predecessor to section 552.107(1) is the appropriate section for a governmental body to cite when seeking to except from required public disclosure communications between the governmental body and its legal counsel. As discussed above, by failing to assert section 552.107 as an exception to disclosure within ten business-days of the system's receipt of the present request, the system waived this exception. See Open Records Decision No. 664 at 5 (1999).

client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct[.]” While section 552.107(1) appears to apply to information within rule 1.05 of the Texas Disciplinary Rules of Professional Conduct, this office determined that section 552.107 cannot be applied as broadly as written to information in the possession of an attorney for a governmental body. Open Records Decision No. 574 (1990). Section 552.107(1) protects only the attorney’s communication of legal advice or opinion to the client and communications from a client to an attorney where those communications are made in confidence and in furtherance of the attorney rendering professional legal service to the governmental body. *Id.* at 5. We determine the applicability of section 552.107(1) on a case-by-case basis. Here, you state that “throughout the file, there are numerous documents constituting [a]ttorney-[c]lient [p]rivileged communications or attorney work product such as observations and conclusions arrived at from interviews with witnesses and potential witnesses.” You have not marked the information you assert is privileged. Furthermore, we have reviewed the information and find no information that appears to be “attorney observations or conclusions.” Thus, you may not withhold any information based on this section.

You suggest that some of the requested information constitutes attorney work product. A governmental body may withhold attorney work product from disclosure under section 552.111 if it demonstrates that the material was (1) created for trial or in anticipation of civil litigation, and (2) consists of or tends to reveal an attorney’s mental processes, conclusions, and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the documents at issue were 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 or release 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. Open Records Decision No. 647 at 4 (1996) (citing *National Tank v. Brotherton*, 851 S.W.2d 193, 200 (Tex. 1993)). The second requirement that must be met is that the work product “consists of or tends to reveal the thought processes of an attorney in the civil litigation process.” Open Records Decision No. 647 at 4 (1996). Although the attorney work product privilege protects information that reveals the mental processes, conclusions, and legal theories of the attorney, it generally does not extend to facts obtained by the attorney. *See id.* (citing *Owens-Corning Fiberglass v. Caldwell*, 818 S.W.2d 749, 750 n.2 (Tex. 1991); *see also Leede Oil & Gas, Inc. v. McCorkle*, 789 S.W.2d 686 (Tex. App.—Houston [1st Dist.] 1990, no writ)(the attorney work product privilege does not protect memoranda prepared by an attorney that contain only a “neutral recital” of facts).

As you have not indicated that any of the submitted information was created for trial or in anticipation of civil litigation, we cannot conclude that it is attorney work product within the meaning of 552.111. Therefore, none of the submitted information is protected by section 552.111 and the work product privilege.

You next claim that the submitted information is excepted under section 552.117 of the Government Code. Section 552.117 excepts from disclosure the home addresses and telephone numbers, 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. As the submitted information does not contain any information pertaining to an employee's or official's home address, home telephone number, social security number, or family member information, we are unable to conclude that any of the submitted information is excepted under section 552.117.

You finally argue that some of the submitted information is excepted under 552.130. Section 552.130 excepts from public disclosure information relating to a driver's license or motor vehicle title or registration issued by an agency of this state. Because the submitted information does not contain any driver's license, motor vehicle title or registration information, we have no basis for concluding that any of the submitted information is excepted under 552.130.

To summarize: the department must release the requested information, but, based on the *Ellen* decision, must withhold information that identifies the victims and witnesses of the harassment.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor

should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



V.G. Schimmel
Assistant Attorney General
Open Records Division

VGS/sdk

Ref: ID# 162217

Enc: Submitted documents

c: Mr. Fernando Rico, Jr.
Water Supply Manager
El Paso Water Utilities
2453 Alan Duncan
El Paso, Texas 79936
(w/o enclosures)