



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

January 15, 2003

Ms. Jan Clark
Assistant City Attorney
City of Houston
P.O. Box 1562
Houston, Texas 77251-1562

OR2003-0309

Dear Ms. Clark:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 175021.

The City of Houston (the "city") received three requests for all documents pertaining to charges or complaints filed with the Equal Employment Opportunity Commission (the "EEOC") by a named individual against the city. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the representative sample of information submitted by the city.¹

Initially, we must address the city's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and *state the exceptions that apply* not later than the tenth business day after the date of receiving the written request. The city received the first request on October 17, 2002.²

¹We assume that 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 that those records contain substantially different types of information than that submitted to this office.

²We note that documents responsive to the second and third requests received by the city are the same or a subset of the documents responsive to the first request received by the city.

You did not, however, assert sections 552.107 and 552.111 as exceptions to disclosure until November 6, 2002, which was more than ten business-days after the city's receipt of the first request. Therefore, we find that the city has waived sections 552.107 and 552.111. See Gov't Code §§ 552.301, .302; Open Records Decision No. 663 at 5 (1999). Thus, the city may not withhold the submitted information under section 552.107 or 552.111.

We also note that a portion of the submitted materials includes information subject to section 552.022 of the Government Code. This section provides several categories of information that are not excepted from required disclosure unless they "are expressly confidential under other law." In pertinent part this section reads

(a) 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 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[.]

The submitted materials include a completed evaluation that is expressly public under section 552.022(a)(1) unless it is confidential under other law or excepted from disclosure under section 552.108.³ Although you claim that the submitted information is excepted under section 552.103, this section is a discretionary exception to disclosure and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). Open Records Decision 473 (1987) (section 552.103 is a discretionary exception that may be waived). However, you also claim that the submitted information is protected under Rule 503 of the Texas Rules of Evidence and Rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court has 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). This office has determined that when the attorney-client privilege or work product privilege is claimed for information that is subject to release under section 552.022, the proper analysis is whether the information at issue is excepted under Texas Rule of Evidence 503 (attorney-client communications) or Texas Rule of Civil Procedure 192.5 (work product). Open Records Decision Nos. 676 at 5-6 (2002), 677 at 8-9 (2002). We will therefore consider whether the information subject to section 552.022 is excepted under these rules.

Rule 503 of the Texas Rules of Evidence provides:

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:

³Because you do not raise section 552.108, we do not consider the applicability of this exception.

(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.

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. Tex. R. Evid. 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must: 1) show that 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 that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the document containing privileged information is confidential under Rule 503 provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). Here, you have failed to demonstrate that the completed employee evaluation consists of a communication between privileged parties or reveals confidential communications. Thus, the submitted evaluation may not be withheld under Rule 503.

You further claim that the submitted information is excepted from disclosure because it is attorney work product. An attorney's work product is confidential under Rule 192.5 of the Texas Rules of Civil Procedure. Work product is defined 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). Accordingly, in order to withhold attorney work product from disclosure under Rule 192.5, a governmental body must demonstrate that the material, communication, or mental impression was created for trial or in anticipation of litigation. *Id.* To show that the information at issue was created in anticipation of litigation, 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 National 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. Information that meets 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, no writ). Here, you have failed to show that the completed employee evaluation was created for trial or in anticipation of litigation. Consequently, the city may not withhold the submitted evaluation under Rule 192.5 as attorney work product. The city must release the evaluation.

We now turn to your argument under section 552.103 of the Government Code for the remaining information to which section 552.022(a) is inapplicable. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. The city 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 is pending or reasonably anticipated at the time the request is received, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas 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). The city must meet both prongs of this test for information to be excepted under section 552.103(a).

The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You have submitted information to this office showing that one of the requestors has filed a complaint with the Equal Employment Opportunity Commission (“EEOC”) alleging employment discrimination. *Id.* This office has stated that a pending EEOC complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). By showing that the complaint filed with the EEOC is pending, you have shown that litigation is reasonably anticipated. Our review of the records at issue also shows that the remaining information is related to anticipated litigation for purposes of section 552.103(a). Thus, the city may withhold some of the remaining information pursuant to section 552.103(a).

We note that once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). Many of the submitted documents were obtained from or provided to the opposing party. Thus, the city may not withhold these documents under section 552.103. We also note that the applicability of section 552.103(a) ends when the litigation is concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

Although you contend that the remaining information not protected by section 552.103 contains confidential attorney-client communications and attorney work product that are excepted from disclosure under Rule 503 of the Texas Rules of Evidence and Rule 192.5 of the Texas Rules of Civil Procedure, this office has found that discovery and evidentiary rules are not confidentiality provisions for the purposes of section 552.101.⁴ See Open Records Decision Nos. 575 (1990), 416 (1984). We previously acknowledged that the Texas Supreme Court 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 remaining documents, however, do not fall into the categories of information in section 552.022. Because the remaining information does not fall into a section 552.022 category, we conclude that the information not subject to section 552.103 may not be withheld on the basis of Rule 503 of the Texas Rules of Evidence or Rule 192.5 of the Texas Rules of Civil Procedure.

Next, with regard to the submitted information to which section 552.103 is inapplicable, we note that some information may be excepted from disclosure under section 552.117 of the Government Code. Section 552.117 excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former

⁴We note that in Open Records Decision Nos. 574 (1990) and 647 (1996), 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, and section 552.111 is the appropriate section for a governmental body to cite when seeking to except attorney work product from required public disclosure. See also Open Records Decision No. 677 (2003). As discussed above, by failing to assert sections 552.107 and 552.111 as exceptions to disclosure within ten business-days of the city’s receipt of the present request, the city waived these exceptions. See Open Records Decision No. 664 at 5 (1999).

official or employee of a governmental body who requests that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the city may only withhold information under section 552.117 on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the district received the present request for information. If the employee timely elected to keep his personal information confidential, the city must withhold the personal information. The city may not withhold this information under section 552.117 if the employee did not make a timely election to keep such information confidential. We have marked the information that is excepted from disclosure under section 552.117 if the employee made timely elections under section 552.024. We note however that section 552.117 is intended to protect a person's privacy interest, and one of the requestors is a person whose privacy interest the city seeks to protect. Under section 552.023 of the Government Code a person who is the subject of the information or the person's authorized representative has a special right of access to such information. Therefore, you may not withhold from Darrell Scott the marked information relating to Mr. Scott under section 552.117, and the department must release to Mr. Scott his own personal information.

In summary, the city must release the completed evaluation, which we have marked, under section 552.022(a)(1) of the Government Code. The city may withhold the remainder of the submitted information under section 552.103(a) with the exception of the information that was obtained from or provided to the opposing party. The city must also withhold the information that we have marked under section 552.117, but release to Mr. Scott his own personal information.

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,



Heather Pendleton Ross
Assistant Attorney General
Open Records Division

HPR/sdk

Ref: ID# 175021

Enc: Submitted documents

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