



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 7, 2003

Ms. Julie Joe  
Assistant County Attorney  
County of Travis  
P. O. Box 1748  
Austin, Texas 78767

OR2003-5518

Dear Ms. Joe:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 185498.

The Travis County Attorney's Office (the "county attorney") received a request for documents related to the investigation and cremation of the body of a named individual. You state that you will be releasing some responsive information to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.107, 552.111, 552.117, 552.130, and 552.136 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

First, we address a procedural issue. You explain that the requestor complained that Travis County Judge Sam Biscoe's Office (the "county judge") failed to respond to his request for the identical information. You state that you contacted the county judge regarding the request, faxed the county judge a copy of the request at issue, and were informed that the

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<sup>1</sup>Although you initially raised section 552.136, you have not indicated which information you seek to withhold under this exception, nor have you submitted any arguments as to why this exception is applicable. Therefore, we assume you are no longer asserting this exception to disclosure. See Gov't Code §§ 552.301, .302.

<sup>2</sup>We assume that the 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.

We also note that the requestor has specifically excluded certain categories of information from his request. This ruling, therefore, will not address any such information which is not responsive to the present request.

county judge had no record of ever having received the request complained of in this instance. You further state that you were "left with the impression that [this] office may construe the [county attorney's] fax to the [county judge] to constitute a public information request that triggers the provisions of the Public Information Act (the 'Act')." You assert that you do not believe the county judge's receipt of the county attorney's fax constitutes an open records request, and that you do not believe the Act requires the county judge to release any information to the requestor. Based on our review of your representations and the submitted correspondence, we conclude that we have no evidence sufficient to establish that the county judge received a written request for public information that triggered the Act. *Cf.* Gov't Code § 552.003(6) ("requestor" means person who submits request to governmental body for inspection or copies of public information). Because the Act is not implicated with respect to the county judge, we will not address your arguments for the information submitted to us on behalf of the county judge. We therefore find that the county attorney need not provide this information to the requestor. Thus, we turn to the request received by the county attorney and address your arguments for the information submitted on behalf of that office.

We begin by noting that the submitted information contains information subject to section 552.022 of the Government Code, which provides in part:

Section 552.022 provides that

(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:

...

(12) final opinions, including concurring and dissenting opinions, and orders issued in the adjudication of cases;

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(12), (17). Such information may not be withheld unless it is confidential under other law. Section 552.111 is a discretionary exception and therefore not "other law" for purposes of section 552.022. *See* Open Records Decision No. 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111). Accordingly, we conclude that the county attorney may not withhold any portion of these documents pursuant to section 552.111 of the Government Code. However, we note that 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." See *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will determine whether any portion of the documents that are subject to section 552.022 is confidential under rule 192.5 of the Texas Rules of Civil Procedure. See Open Records Decision No. 677 at 9 (2002) (appropriate law for claim of attorney work product privilege for section 552.022 information is Texas Rule of Civil Procedure 192.5).

An attorney's work product is confidential under Rule 192.5, which 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). 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). Having considered your arguments and reviewed the documents subject to section 552.022, we agree that they constitute privileged work product that may be withheld under Rule 192.5. We now turn to your arguments for the remaining submitted information not subject to section 552.022 of the Government Code.

You assert that some of the documents you submitted to this office constitute attorney work product and, thus, may be withheld from the public pursuant to section 552.111 of the Government Code. Section 552.111 of the Government Code excepts from required public

disclosure an “interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” This office has stated that to withhold attorney work product under section 552.111, a governmental body must show that the material 1) was created for trial or in anticipation of litigation under the test articulated in *National Union Fire Insurance Company v. Valdez*, 863 S.W.2d 458 (Tex. 1993), and 2) consists of or tends to reveal an attorney’s mental processes, conclusions, and legal theories. *See id.*

To show that requested documents were created in anticipation of litigation for the first prong of the work product test, a governmental body’s task is twofold. The governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances 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 created documents for the purpose of preparing for such litigation. *See id.* at 5. In this regard, you have informed this office that the information you seek to withhold as work product was prepared in anticipation of litigation involving the cremation of the named individual. Based on your representations and our review of the information at issue, we conclude that you have met the first prong of the work product test. Furthermore, having reviewed the information at issue, we conclude that the information reveals attorney mental impressions, conclusions, and strategy. We therefore conclude that the county attorney may withhold the information you have marked as attorney work product under section 552.111 of the Government Code.

You also assert that portions of the submitted information are excepted under section 552.107 of the Government Code, which protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client

privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “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).

Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

Having considered your arguments and the information you seek to withhold under this exception, we agree that this information constitutes privileged attorney-client communications that may be withheld under section 552.107(1).

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 information protected by other statutes. You assert that an employer identification number is excepted from disclosure under section 552.101 in conjunction with title 26, section 6103(a) of the United States Code. Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Tax return information is defined as data furnished to or collected by the IRS with respect to the determination of possible existence of liability of any person under title 26 of the United States Code for any tax. *See* 26 U.S.C. § 6103(b). The employer identification number you have marked does not fall under the definition of tax return information. *See id.* This number, therefore, may not be withheld under section 552.101 of the Government Code.

Section 552.101 also encompasses the doctrines of common-law and constitutional privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type 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. 540 S.W.2d at 683.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected by constitutional privacy is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

This office has found that the following types of information are excepted from required public disclosure under constitutional or common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). After reviewing your arguments and the information you seek to withhold under common-law and constitutional privacy, we find that none of this information is highly intimate or embarrassing or otherwise implicates any individual's privacy interests. This information, therefore, may not be withheld under section 552.101.

Next, you argue that certain information you have marked is excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, 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. However, information subject to section 552.117(a)(1) may not be withheld from disclosure if the current or former employee made the request for confidentiality under section 552.024 after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, pursuant to section 552.117(a)(1), the county attorney must withhold the above-listed information for all current or former employees who elected, prior to the county attorney's receipt of this request, to keep such information confidential. The county attorney may not withhold such information under section 552.117 for anyone who did not make a timely election. We note, however, that a small portion of the information for which you claim section 552.117 is not

protected under this exception. We have marked the information that may not be withheld under section 552.117.<sup>3</sup>

We note that, even if not protected under section 552.117, social security numbers may nevertheless be excepted from disclosure under section 552.101 in conjunction with federal law. The 1990 amendments to the Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). We have no basis for concluding that the social security number in the submitted information is confidential under section 405(c)(2)(C)(viii)(I) and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number, the county attorney should ensure that such information is not obtained or maintained pursuant to any provision of law enacted on or after October 1, 1990.

Next, you argue that a driver's license number you have marked is confidential under section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement 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]

(2) a motor vehicle title or registration issued by an agency of this state[.]

Therefore, you must withhold Texas driver's license numbers, vehicle identification numbers, and license plate numbers under section 552.130 of the Government Code.

In summary, we conclude you may withhold (1) the documents subject to section 552.022 of the Government Code under rule 192.5 of the Texas Rules of Civil Procedure, (2) the documents you have marked under section 552.111 of the Government Code, and (3) the information that you have marked under section 552.107 of the Government Code. In addition, with the exception of the information we have marked for release, you must withhold the information you have marked under section 552.117 of the Government Code if the employees at issue timely elected to keep such information confidential under section 552.024. Even if the employee at issue did not timely elect to keep a social security number confidential under section 552.024, such number may be confidential under federal

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<sup>3</sup>You have also submitted an audiotape of Jesse Soliz's statement to this office which contains information which must be redacted in accordance with this ruling.

law. Finally, you must withhold Texas driver's license numbers, vehicle identification numbers, and license plate numbers under section 552.130 of the Government Code. The remaining submitted information must be released to the requestor.

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 Dep't of Pub. 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,

A handwritten signature in black ink, appearing to read "Sarah Swanson". The signature is fluid and cursive, with a long horizontal stroke at the end.

Sarah I. Swanson  
Assistant Attorney General  
Open Records Division

SIS/lmt

Ref: ID# 1855498

Enc. Submitted documents

c: Mr. David Fisher  
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(w/o enclosures)