ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 18, 2008

Mr. Jesus Toscano, Jr.
Administrative Assistant City Attorney
City Attorney's Office
1500 Marilla Street, Room 7DN
Dallas, TX 75201

OR2008-17229

Dear Mr. Toscano:

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# 330289.

The City of Dallas Fire-Rescue Department (the "city") received a request for all information within the requestor's investigative file. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.117, and 552.136 of the Government Code and privileged under the Texas Rule of Civil Procedure 192.5.[1] We have considered the exceptions you claim and reviewed the submitted investigative file, portions of which constitute representative samples.[2]

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[1]While you cite section 552.103 of the Government Code for your argument to withhold attorney work product, we understand you to raise Texas Rule of Civil Procedure 192.5, as this is the proper rule for the substance of your argument.

[2]We assume that the representative samples of records submitted to this office are 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 first note that the documents within the submitted investigative file reflect that this file pertains to a completed investigation subject to required public disclosure under section 552.022 of the Government Code, which provides in relevant part:

> 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[.]

Gov't Code § 552.022(a)(1). The submitted investigative file constitutes a completed investigation subject to public disclosure pursuant to section 552.022(a)(1) of the Government Code. Therefore, the city may only withhold this information if it is confidential under "other law." Although you raise sections 552.103 and 552.107 of the Government Code, these sections are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived. *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. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived); 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103 and 552.107 are not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the department may not withhold any of the submitted investigative file under sections 552.103 or 552.107 of the Government Code. However, the Texas Supreme Court has held that the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d at 336. The attorney-client privilege is also found under rule 503 of the Texas Rules of Evidence, and the attorney work product privilege is found at rule 192.5 of the Texas Rules of Civil Procedure. Accordingly, we will consider your assertions of these privileges under rule 503 and rule 192.5 for the submitted information. Furthermore, we will address your claims under sections 552.117 and 552.136 of the Government Code, which are also "other law" for the purposes of section 552.022.

Rule 503 of the Texas Rules of Evidence encompasses the attorney-client privilege and 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:
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> > (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
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> > (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;
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> (D) between representatives of the client or between the client and a representative of the client; or
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> (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). Thus, 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 information is privileged and 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).

You assert that the memorandum you have marked is a privileged attorney-client communication. You inform this office that this communication is between city attorneys and city employees and that it was made in furtherance of the rendition of legal advice to the city. You also state that the marked memorandum has remained confidential. Based on your representations and our review of the submitted information, we agree that the memorandum you have marked constitutes a privileged attorney-client communication. Accordingly, the city may withhold this memorandum under Texas Rule of Evidence 503.

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 that the information implicates the core work product aspect of the work product privilege. *See* Open Records Decision No. 677 at 9-10 (2002). 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 that the material was (1) created for trial or in anticipation of litigation when the governmental body

received the request for information and (2) consists of an attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *Id.* In this instance, you have marked one document "attorney work product." However, you provide no arguments explaining how rule 192.5 applies to the document you have marked. Thus, we find that you have failed to demonstrate the applicability of rule 192.5 to the information you have marked, and it may not be withheld on this basis. *See* Gov't Code §§ 552.301, .302.

Section 552.117(a)(1) of the Government Code 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 of the Government Code. *See* Gov't Code §§ 552.117(a)(1), .024. We note section 552.117 also encompasses a personal cellular telephone number, unless the service is paid for by a governmental body. *See* Open Records Decision Nos. 670 at 6 (2001), 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cell phone numbers provided and paid for by governmental body and intended for official use). 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). The city may only withhold information under section 552.117(a)(1) on behalf of former or current employees who have made a request for confidentiality under section 552.024 prior to the date on which the request for information was made. In this instance, we have marked the information within the submitted documents that is generally subject to section 552.117. You do not inform this office that the city employees whose information we have marked elected to keep their personal information confidential before the city received the instant request for information. We must therefore rule conditionally. If the employees whose personal information we have marked timely elected to withhold their personal information under section 552.024, this marked information must be withheld under section 552.117(a)(1). If those employees did not timely elect confidentiality, the marked information may not be withheld under section 552.117(a)(1).

You have highlighted certain information you assert must be withheld under section 552.136 of the Government Code, which provides:

> (a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:
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> > (1) obtain money, goods, services, or another thing of value; or
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> > (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

> (b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. You inform us that the city employee numbers you have marked are used as these employees' credit union account number. Based on this representation, we have marked representative samples of employee numbers that must be withheld under section 552.136 of the Government Code. However, some of the information you have marked under this section pertains to the requestor. Section 552.136 protects privacy interests; thus, the requestor has a right of access to her own employee number under section 552.023 of the Government Code. *Id.* § 552.023.

In summary, the city may withhold the memorandum marked under Texas Rule of Evidence 503. To the extent that the employees at issue made timely elections under section 552.024, the city must withhold the information we have marked pertaining to those employees under section 552.117(a)(1). We have also marked representative samples of information the city must withhold pursuant to section 552.136 of the Government Code. The remaining information must be released.[3]

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the

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[3]We note that because the requestor has a special right of access to her own section 552.117 and section 552.136 information, the city must again seek a decision from this office if it receives another request for the same information from another requestor.

Government Code. If the governmental body fails to do one of these things, 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 challenge 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 Office of the Attorney General 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. 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,

Reg Hargrove
Assistant Attorney General
Open Records Division

RJH/eb

Ref: ID# 330289

Enc. Submitted documents

c: Requestor
(w/o enclosures)