ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 6, 2009

Mr. Warren Ernst
Chief of the General Counsel Division
City of Dallas, Office of the City Attorney
1500 Marilla Street, Room 7DN
Dallas, Texas 75201

OR2009-10939

Dear Mr. Ernst:

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# 351229.

The City of Dallas (the "city") received two requests from the same requestor for information related to slip and fall accidents at the Dallas Convention Center during a specified period of time, and information relating to an accident involving a named individual.[1] You state you will release some of the responsive information. You claim the submitted information is excepted from disclosure under sections 552.103, 552.111, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[2]

Initially, we note the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part:

---

[1]You inform us the city requested and received clarification of the request. *See* Gov't Code §552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

[2]We 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.

> (a) [T]he 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[.]

Gov't Code § 552.022(a)(1). The information in Exhibit B relates to a completed investigation. Completed investigations must be released under section 552.022(a)(1), unless the information is excepted from disclosure under section 552.108 or expressly confidential under "other law." Although you claim this information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code, these exceptions to disclosure are discretionary exceptions that protect a 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. 522 (1989) (discretionary exceptions in general), 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 470 at 7 (1987) (statutory predecessor to section 552.111 may be waived). As such, sections 552.103 and 552.111 are not other laws for the purposes of section 552.022. Thus, the city may not withhold the completed investigation under section 552.103 or section 552.111 of the Government Code. However, 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). Therefore, we will consider your argument that the information subject to section 552.022 is privileged work product under rule 192.5 of the Texas Rules of Civil Procedure.

For purposes of section 552.022, information is confidential under rule 192.5 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 that 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 that 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 information 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, no writ).

You state the information at issue "consist[s] of material prepared in anticipation of litigation by employees and agents of the city." However, you have not explained this information was produced by an attorney or an attorney's representative or consists of an attorney's or an attorney's representative's mental impressions, opinions, conclusions, or legal theories that were made in anticipation of litigation. Thus, we find you have not demonstrated any of the information that is subject to section 552.022 consists of core work product for the purposes of Texas Rule of Civil Procedure 192.5. Accordingly, the city may not withhold any of the information subject to section 552.022 under rule 192.5. As you raise no further arguments against disclosure of this information, it must be released.

Section 552.136 of the Government Code states that "[n]otwithstanding 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(b). Accordingly, the city must withhold the insurance policy numbers you have marked under section 552.136 of the Government Code.

In summary, the city must withhold the marked insurance policy numbers under section 552.136 of the Government Code. The remaining information must be released.[3]

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.

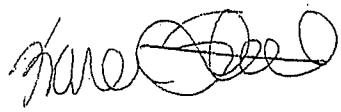
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and

---

[3]We note the information being released includes a social security number. 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.

responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Karen E. Stack
Assistant Attorney General
Open Records Division

KES/cc

Ref: ID# 351229

Enc. Submitted documents

c: Requestor
(w/o enclosures)