



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 13, 2009

Mr. Kyle Lasley  
Assistant District Attorney  
Thirty-Fourth Judicial District  
500 East San Antonio Street, 2<sup>nd</sup> Floor  
El Paso, Texas 79901-2420

OR2009-11359

Dear Mr. Lasley:

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# 352142.

The El Paso County Human Resources Department and the El Paso County Board of Ethics (collectively the "county") received two requests for information relating to a specified ethics investigation, as well as certain e-mails pertaining to the requestor. You state you have released some of the information. You claim the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

Initially, we address the county's argument that a portion of the request requires the county to answer questions. We agree that the Act does not require a governmental body to answer

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<sup>1</sup>Although you raise section 552.022 of the Government Code, that provision is not an exception to disclosure. Rather, section 552.022 lists categories of information that are not excepted from disclosure unless they are expressly confidential under other law. See Gov't Code § 552.022.

factual questions, conduct legal research, or create new information in responding to a request. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). Likewise, the Act does not require a governmental body to take affirmative steps to create or obtain responsive information that is not in its possession, so long as no other individual or entity holds such information on behalf of the governmental body that received the request for information. *See* Gov't Code § 552.002(a); Open Records Decision Nos. 534 at 2-3 (1989), 518 at 3 (1989). However, a governmental body must make a good-faith effort to relate a request to any responsive information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). We assume the county has made a good faith effort to do so.

Next, we note that section 552.022 of the Government Code is applicable to the submitted information in Exhibit D. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]" unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). In this instance, the submitted information constitutes a completed investigation and is thus subject to section 552.022(a)(1). Although you seek to withhold Exhibit D under sections 552.107 and 552.111 of the Government Code, these sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See* Open Records Decision No. 676 at 6 (2002) (stating that where section 552.022 is applicable to the information at issue the governmental body should raise Texas Rule of Evidence 503 not section 552.107 of the Government Code); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally); Open Records Decision No. 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). As such, sections 552.107 and 552.111 are not other law that makes information confidential for the purposes of section 552.022. Accordingly, the county may not withhold Exhibit D under these sections. However, the attorney-client privilege found in Texas Rule of Evidence 503 and the attorney work-product privilege found in Texas Rule of Civil Procedure 192.5 can serve as other law for the purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001) (addressing applicability of Texas Rule of Evidence 503 to information encompassed by section 552.022); Open Records Decision No. 676 (2002); Open Records Decision No. 677 (2002) (addressing applicability of Texas Rule of Civil Procedure 192.5 to information encompassed by section 552.022). Therefore, we will address your arguments under rule 503 and rule 192.5 for Exhibit D. We will also address your arguments under section 552.107 and 552.111 of the Government Code for the information that is not subject to 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:

(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.

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 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 the communication is confidential by explaining it was not intended to be disclosed to third persons and 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 Exhibit D consists of documents gathered or created by attorneys acting on behalf of the Board of Ethics for the purpose of rendering legal advice. *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25 3d 328, (Tex. App.—Austin 2000, pet.denied) (investigative report prepared by attorney acting in legal capacity protected by attorney client privilege). However, you do not inform us that these documents were intended to be confidential or that the confidentiality of this information has been maintained. Furthermore, you inform us that the results and conclusions of the investigation were never communicated to the client, the Board of Ethics. Therefore, we find you have not demonstrated that this information may

be withheld under rule 503 of the Texas Rules of Evidence. Thus, we will address your remaining argument for Exhibit D.

For purposes of section 552.022 of the Government Code, information may be withheld under rule 192.5 only to the extent 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 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.*

The first prong of the work product test, which requires a governmental body to show 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 there was a substantial chance litigation would ensue, and (2) the party resisting discovery believed in good faith there was a substantial chance 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 documents at issue contain 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 may be withheld 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 that Exhibit D consists of documents and information gathered or created by attorneys on behalf of the Board of Ethics during the investigation of the complaint at issue. You state the information was intended to be presented to the Board of Ethics at a meeting and that the meeting was not held. We note that the Board of Ethics proceeding is subject to the county's Code of Ethics, which does not address formal discovery. Instead, the Code authorizes the Board to promulgate its own rules and regulations "consistent with fundamental fairness and due process." Since the Board of Ethics proceeding operates under its own rules instead of the Texas Rules of Civil Procedure, we conclude that the attorney work product privilege does not apply. *Cf.* Gov't Code § 2001.091 (stating that contested

cases under Administrative Procedures Act are subject to limitations of discovery under the Texas Rules of Civil Procedure). Accordingly, Exhibit D may not be withheld under this exception.

We now turn to your arguments regarding the information not subject to section 552.022. You assert the information submitted as Exhibit C consists of an attorney-client communication that is excepted from disclosure under section 552.107 of the Government Code. When asserting the attorney-client privilege under section 552.107, 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. *See* ORD 676 at 6-7. The elements of the privilege under section 552.107 are the same as those for rule 503 outlined above. You assert that Exhibit C consists of a communication made for the purpose of facilitating the rendition of professional legal services. You indicate that the communication was between a county attorney and a representative of the Board of Ethics. You further inform us that the communication was intended to be confidential, and that the confidentiality of the communication has been maintained. Upon review, we find the county may withhold Exhibit C under section 552.107 of the Government Code.<sup>2</sup>

Next, we note that a portion of the remaining information is subject to section 552.101 of the Government Code. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the common-law right of privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types 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. *Id.* at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under 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). We have marked information that must be withheld under section 552.101 in conjunction with common-law privacy.

We note that some of the remaining information may be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. *See id.* § 552.117(a)(1). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Pursuant to section 552.117(a)(1), the county must withhold the social security number, home address, home telephone number, and family member information of current or former county employees who elected, prior to the county's receipt of the request for information, to keep such information confidential. We have marked the information that may be subject to section 552.117. If the individuals at issue are, or were, employed with the county, and timely elected to withhold their personal information, the county must withhold the information we have marked pursuant to section 552.117(a)(1) of the Government Code.<sup>3</sup>

A portion of the remaining information is subject to section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The addresses we have marked are not a type specifically excluded by section 552.137. Accordingly, the county must withhold the marked e-mail addresses under section 552.137, unless the owners of the addresses have affirmatively consented to their release. *See id.* § 552.137(b). As you raise no other exceptions to disclosure, the remaining information must be released.

In summary, the county may withhold Exhibit C under section 552.107 of the Government Code. The county must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The county must withhold the information we have marked pursuant to section 552.117(a)(1) of the Government Code, if a timely election was made to withhold this information. The county must withhold the e-mail addresses we have marked under section 552.137 unless the county receives consent for their release. The remaining information must be released.

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 responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php),

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<sup>3</sup>We note that if the requestor is the authorized representative of an individual whose personal information is at issue, he has a right of access to the information that would ordinarily be protected by section 552.117. *See* Gov't Code 552.023 (a person or a person's authorized representative has special right of access, beyond that of the general public, to information that pertains to that person).

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,



Pamela Wissemann  
Assistant Attorney General  
Open Records Division

PFW/dls

Ref: ID# 352142

Enc. Submitted documents

c: Requestor  
(w/o enclosures)