



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 9, 2009

Mr. C. Patrick Phillips
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street, 3rd Floor
Fort Worth, Texas 76102

OR2009-12717

Dear Mr. Phillips:

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# 354550 (City of Fort Worth PIR No. 3804-09).

The City of Fort Worth Police Department (the "city") received a request for several categories of information pertaining to a specified incident. You state you have released some of the requested information to the requestor. You claim that the submitted 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 submitted information.

Initially, we note that some of the submitted information within Exhibit C-1 is subject to section 552.022 of the Government Code. 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 information at issue consists of a completed investigation that is subject to section 552.022(a)(1). While you raise sections 552.103, 552.107, and 552.111 for the completed investigation, we note these 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); Open Records Decision Nos. 677

at 10-11 (2002) (attorney work-product privilege under section 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 473 (1987) (sections 552.103 and 552.111 may be waived). As such, those sections do not make information expressly confidential for the purposes of section 552.022(a)(1). Therefore, the information subject to section 552.022 within Exhibit C-1, which we have marked, may not be withheld under section 552.103, section 552.107, or section 552.111.

The Texas Supreme Court has held, however, that the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege also is found at Texas Rule of Evidence 503, and the attorney work product privilege also is found at Texas Rule of Civil Procedure 192.5. Accordingly, we will consider your assertion of these privileges under rule 503 and rule 192.5 with respect to the completed investigation.

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 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 state that the information subject to section 552.022 within Exhibit C-1 consists of confidential communications amongst city attorneys and city employees that were made for the purpose of facilitating the rendering of professional legal services to the city. You further inform us that the communications were intended to be confidential, and that the confidentiality of the communications has been maintained. Based on your representations and our review, we conclude that you may withhold some of the information, which we have marked, under Texas Rule of Evidence 503. The remaining information at issue consists of documents within the city's records that exist separate and apart from the attorney-client communications and documents from the opposing party. You have failed to demonstrate the documents from the opposing party are privileged communications. Further, we note the request seeks information pertaining to a specified incident rather than attorney-client communications. Thus, we find you have not demonstrated how the documents that exist separate and apart from the attorney-client communications constitute confidential communications between privileged parties. Therefore, these records are not privileged under rule 503 of the Texas Rules of Evidence, and may not be withheld on that basis.

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). A governmental body seeking to withhold information under this privilege bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. TEX. R. CIV. P. 192.5; Open Records Decision No. 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied 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 [created or obtained the information] for the purpose of preparing for such litigation. *Nat'l Tank Co. 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; ORD 677 at 7.

You explain that the remaining information subject to section 552.022 within Exhibit C-1 consists of records of the Risk Management Office and Internal Affairs Division prepared in the course of the examination of an incident in which an individual allegedly sustained an injury during the course of an arrest. You state that the examination was undertaken pursuant to the authority of the Fort Worth City Attorney's office in evaluating and defending the claim, and reveals the mental processes, conclusions, and legal theories of the city attorneys. However, some of the documents were prepared by the opposing party and not by the city attorneys or their representatives; these documents are not protected as the city's core work product. Further, the remaining documents subject to section 552.022 were prepared in the ordinary course of the city's business and not prepared in anticipation of litigation. In evaluating whether information created in the ordinary course of business was prepared in anticipation of litigation, Texas courts look to the "primary motivating purpose underlying the ordinary business practice" that caused the information to be created. *National Tank*, 851 S.W.2d at 206; ORD 677 at 7. You do not explain the primary motivating purpose for the routine practice that gave rise to some of the information at issue. Thus, we find the remaining information subject to section 552.022 within Exhibit C-1 is not privileged under rule 192.5, and may not be withheld on that basis.

We now turn to your arguments regarding the information within Exhibit C-1 not subject to section 552.022. Section 552.103 of the Government Code provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ

ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* In Open Records Decision No. 638 (1996), this office stated that a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act ("TTCA"), Civ. Prac. & Rem. Code, ch. 101, or an applicable municipal ordinance.

You state, and provide documentation showing, the city received a notice of claim letter that meets the requirements of the TTCA and alleges the use of excessive force by a city officer during an arrest. You inform us the city received the notice of claim letter prior to receiving the present request for information. Therefore, we conclude the city reasonably anticipated litigation on the date it received the present request for information. You state the information at issue includes documents created to assist with the review, examination, and evaluation of the claim. Thus, we find the information at issue relates to the anticipated litigation. Accordingly, section 552.103 is generally applicable to the remaining information not subject to section 552.022(a)(1) within Exhibit C-1.

We note, however, that the opposing party in the anticipated litigation has seen or had access to some of the information at issue. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, to the extent that the opposing party in the anticipated litigation has seen or had access to any of the information at issue, such information is not protected by section 552.103 and may not be withheld on that basis. Further, we note the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer realistically anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).¹

Next, you claim Exhibits C-2 and C-3 are confidential under section 143.089 of the Local 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 other statutes, such as

¹As our ruling is dispositive of this information, we need not address your remaining arguments against disclosure.

section 143.089 of the Local Government Code. You state the City of Fort Worth is a civil service city under chapter 143 of the Local Government Code. Section 143.089 provides for the existence of two different types of personnel files relating to a police officer: a file that must be maintained as part of the officer's civil service file and another the police department may maintain for its own use. *See* Local Gov't Code § 143.089(a), (g). The officer's civil service file must contain certain specified items, including commendations, periodic evaluations by the police officer's supervisor, and documents relating to any misconduct in which the department took disciplinary action against the officer under chapter 143 of the Local Government Code. *Id.* § 143.089(a)(1)-(2). Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *Id.* §§ 143.051-.055; *see* Attorney General Opinion JC-0257 (written reprimand is not disciplinary action for purposes of Local Gov't Code chapter 143). In cases in which a police department investigates a police officer's misconduct and takes disciplinary action against an officer, it is required by section 143.089(a)(2) to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the police officer's civil service file maintained under section 143.089(a). *See Abbott v. Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, no pet.). All investigatory materials in a case resulting in disciplinary action are "from the employing department" when they are held by or are in the possession of the department because of its investigation into a police officer's misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* Such records may not be withheld under section 552.101 of the Government Code in conjunction with section 143.089 of the Local Government Code. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990).

However, a document relating to a police officer's alleged misconduct may not be placed in his civil service personnel file if there is insufficient evidence to sustain the charge of misconduct. Local Gov't Code § 143.089(b). Information that reasonably relates to a police officer's employment relationship with the police department and that is maintained in a police department's personnel file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. Tex. Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You state Exhibits C-2 and C-3 are maintained in the internal files of the city's police department as authorized under section 143.089(g) of the Local Government Code. Based upon this representation and our review of the submitted records, we agree Exhibits C-2 and C-3 are confidential pursuant to section 143.089(g) of the Local Government Code and must be withheld under section 552.101 of the Government Code.

You claim the submitted W-4 forms in Exhibit C-5 are excepted from disclosure under section 6103(a) of title 26 of the United States Code. Section 552.101 of the Government Code also encompasses section 6103(a). Section 6103(a) renders tax return information

confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, . . . , or offense[.]" See 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. See *Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993). Consequently, the city must withhold Exhibit C-5 pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

You claim that a portion of the information in Exhibit C-6 is confidential under section 772.218 of the Health and Safety Code. Section 552.101 encompasses Chapter 772 of the Health and Safety Code, which makes the originating telephone numbers and addresses of 9-1-1 callers that are furnished by a 9-1-1 service supplier confidential. Sections 772.118, 772.218, and 772.318 of the Health and Safety Code are applicable to emergency 9-1-1 districts established in accordance with chapter 772. See Open Records Decision No. 649 (1996). Section 772.118 applies to an emergency communication district for a county with a population of more than two million. Section 772.218 applies to an emergency communication district for a county with a population of more than 860,000. Section 772.318 applies to an emergency communication district for a county with a population of more than 20,000.

You state the City of Fort Worth is part of an emergency communication district established under section 772.218. You have highlighted a telephone number and address of a 9-1-1 caller in Exhibit C-6. You state the highlighted information was furnished by a 9-1-1 service provider. Based on your representations, we conclude the city must withhold the originating telephone number and addresses you have marked in Exhibit C-6 under section 552.101 of the Government Code in conjunction with section 772.218 of the Health and Safety Code.

You claim the information marked as Exhibit C-4 is excepted from disclosure under common-law privacy, which is also encompassed by section 552.101 of the Government Code. Common-law privacy protects information that (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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate and embarrassing. See Open

Records Decision No. 545 (1990). Upon review, we find the personal financial information within Exhibit C-4 is both highly intimate or embarrassing and not of legitimate public concern. Accordingly, the city must withhold Exhibit C-4 under section 552.101 in conjunction with common-law privacy.

In summary, the city may withhold the information we have marked in Exhibit C-1 under Texas Rule of Evidence 503 and section 552.103 of the Government Code. The city must withhold Exhibits C-2 and C-3 under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. The city must withhold Exhibit C-5 pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. The city must withhold the highlighted telephone number and address in Exhibit C-6 under section 552.101 in conjunction with section 772.218 of the Health and Safety Code. The city must withhold Exhibit C-4 under section 552.101 of the Government Code in conjunction with common-law privacy. The remaining information must be released.²

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, 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, toll free, at (888) 672-6787.

Sincerely,



Christina Alvarado
Assistant Attorney General
Open Records Division

CA/rl

²We note the information being released contains 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. However, the requestor has a right of access to his client's social security number and it must be released to him. *See* Gov't Code § 552.023.

Ref: ID# 354550

Enc. Submitted documents

cc: Requestor
(w/o enclosures)