



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 23, 2009

Mr. Stuart Smith
Naman Howell Smith & Lee
P.O. Box 1470
Waco, Texas 76703

OR2009-16627

Dear Mr. Smith:

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# 362210.

The City of Cameron (the "city"), which you represent, received three requests from the same requestor for information relating to properties at three specified addresses. You seek to withhold the requested information under sections 552.103, 552.107, and 552.111 of the Government Code and Texas Rule of Evidence 503.¹ We have considered your arguments and reviewed the information you submitted.² We also have considered the comments we received from the requestor.³

We first note that the submitted information includes a city ordinance. Because laws and ordinances are binding on members of the public, they are matters of public record and may not be withheld from disclosure under the Act. Therefore, the city ordinance that we have

¹Although you claim the attorney work product privilege under Texas Rule of Evidence 503, we note that this privilege is properly asserted under section 552.111 of the Government Code. *See* Open Records Decision No. 677 (2002).

²This letter ruling assumes that the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the city to withhold any information that is substantially different from the submitted information. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

³*See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

marked must be released. *See* Open Records Decision Nos. 551 at 2-3 (1990) (laws or ordinances are open records), 221 at 1 (1979) (official records of governmental body's public proceedings are among most open of records).

The submitted information also includes minutes of city council meetings. Minutes of a governmental body's public meetings are specifically made public under the Open Meetings Act, chapter 551 of the Government Code. *See* Gov't Code § 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying on request to governmental body's chief administrative officer or officer's designee). As a general rule, the exceptions to disclosure found in the Act do not apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the meeting minutes we have marked also must be released.

We also note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(17) provides for required disclosure of "information that is also contained in a public court record[.]" Gov't Code § 552.022(a)(17). We have marked court documents that are subject to section 552.022(a)(17). Although you seek to withhold the marked information that is subject to section 552.022(a)(17) under section 552.103 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; *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 Gov't Code § 552.103); Open Records Decision No. 665 at 2 n.5 (discretionary exceptions generally). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022(a)(17). Therefore, the information that is subject to section 552.022(a)(17) may not be withheld under section 552.103 and also must be released.

Next, we address your claim under section 552.103 for the rest of the submitted information. This exception 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 at issue. To meet this burden, a 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).*

You inform us that the rest of the submitted information is related to a lawsuit that was recently tried to a jury. You also state, and have submitted documentation demonstrating, that the lawsuit resulted in a judgment that was signed by the court and filed with the district clerk. You contend that, “[a]s the [j]udgment was only entered a few weeks ago, the case is still active.” You do not indicate, however, that any post-judgment proceedings in the case were either pending or anticipated on the date of the city’s receipt of these requests for information. Having considered your representations, we find that you have not demonstrated that the rest of the submitted information is related to litigation that was either pending or reasonably anticipated when the city received these requests. We therefore conclude that the city may not withhold any of the remaining information under section 552.103 of the Government Code.

You also claim the attorney work product privilege for some of the remaining information. Section 552.111 of the Government Code encompasses the attorney work product privilege found at rule 192.5 of the Texas Rules of Civil Procedure.⁴ *See* TEX. R. CIV. P. 192.5; *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); *Open Records Decision No. 677 at 4-8 (2002)*. Rule 192.5 defines attorney work product as consisting of

- (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 governmental body that seeks to withhold information on the basis of the attorney work product privilege under section 552.111 bears the burden of

⁴Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111.

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. *See id.*; ORD 677 at 6-8. In order for this office to conclude that information was created or developed in anticipation of litigation, we must be satisfied that

(a) 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 (b) 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 claim the work product privilege for the information submitted as Exhibit F. We find that the information at issue consists of material prepared, mental impressions developed, and communications made, in anticipation of litigation or for trial, by or for a party or a party's representatives. *See* TEX.R.CIV.P. 192.5. We therefore conclude that the city may withhold Exhibit F on the basis of the attorney work product privilege under section 552.111 of the Government Code.⁵

Lastly, we note that the information submitted as Exhibit E includes Texas license plate numbers. Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle title or registration issued by an agency of this state.⁶ *See* Gov't Code § 552.130(a)(2). But, because this exception protects personal privacy, the requestor has a right of access under section 552.023 of the Government Code to the license plate number of any vehicle in which she owns an interest. *See id.* § 552.023(a).⁷ Therefore, the Texas license plate numbers we have marked must be withheld under section 552.130 unless the requestor has a right to the information under section 552.023. *See* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself).

⁵As we are able to make this determination, we need not address your other arguments against disclosure of Exhibit F.

⁶Unlike other exceptions to disclosure under the Act, this office will raise section 552.130 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

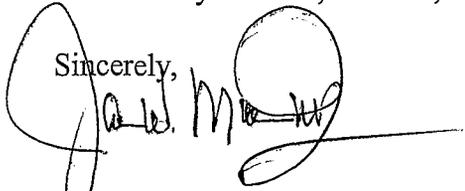
⁷Section 552.023(a) provides that "[a] person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests." Gov't Code § 552,023(a).

In summary: (1) the marked city ordinance must be released; (2) the marked minutes of city council meetings must be released pursuant to section 551.022 of the Government Code; (3) the marked court documents must be released pursuant to section 552.022(a)(17) of the Government Code; (4) the city may withhold Exhibit F on the basis of the attorney work product privilege under section 552.111 of the Government Code; and (5) the marked Texas license plate numbers must be withheld under section 552.130 of the Government Code unless the requestor owns an interest in the vehicle to which a particular license plate number pertains. The city also must release the rest of the submitted information.

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,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/cc

Ref: ID# 362210

Enc: Submitted documents

c: Requestor
(w/o enclosures)