



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 21, 2013

Mr. Gary B. Lawson
Counsel for the Dallas Police & Fire Pension System
Strasburger & Price, LLP
901 Main Street, Suite 4400
Dallas, Texas 75202-3794

OR2013-04717

Dear Mr. Lawson:

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# 481856.

The Dallas Police and Fire Pension System (the "system"), which you represent, received a request for e-mails between a named individual and any employee of a named company for a specified period of time. You claim the requested information is excepted from disclosure under sections 552.103, 552.107, 552.110, 552.111, 552.137, and 552.143 of the Government Code, and privileged under Texas Rules of Civil Procedure 192.3 and 192.5 and Texas Rule of Evidence 503.¹ We have considered your arguments and reviewed the submitted representative sample of information.² We have also received and considered

¹Although you also mark some of the submitted e-mails under section 552.102 of the Government Code, you have provided no arguments explaining how this exception is applicable to the submitted information. Therefore, we assume you no longer assert this exception. *See* Gov't Code §§ 552.301(e)(1)(A), .302.

²We 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 those submitted to this office.

comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note a portion of the submitted information was created after the request was received. This information, which we have marked, is not responsive to the instant request for information. This ruling does not address the public availability of non-responsive information, and the system is not required to release non-responsive information in response to this request.

You argue some of the responsive information is excepted from public disclosure under section 552.101 of the Government Code³ in conjunction with Texas Rules of Civil Procedure 192.3 and 192.5 and Texas Rule of Evidence 503.⁴ We note that this office generally does not address discovery and evidentiary rules that may or may not be applicable to information submitted to our office by a governmental body. *See* Open Records Decision No. 416 (1984) (finding that even if evidentiary rule specified that certain information may not be publicly released during trial, it would have no effect on disclosability under Act). However, the Texas Supreme Court has ruled that the Texas Rules of Civil Procedure and the Texas Rules of Evidence are "other law" that make information confidential for the purposes of section 552.022. *See* Gov't Code § 552.022 (enumerating several categories of information not excepted from required disclosure unless expressly confidential under the Act or other law); *see also In re City of Georgetown*, 53S.W.3d 328 (Tex. 2001). In this instance, the responsive information does not fall into one of the categories of information made expressly public by section 552.022 of the Government Code. Therefore, the Texas Rules of Civil Procedure and Texas Rules of Evidence are not applicable. We also note that section 552.101 does not encompass civil discovery privileges. *See* Open Records Decision Nos.647 at 2(1996). Accordingly, we conclude the system may not withhold any portion of the responsive information pursuant to section 552.101 of the Government Code in conjunction with the Texas Rules of Civil Procedure or the Texas Rules of Evidence.

Next, we note that you argue some of the submitted information is excepted from disclosure under section 552.110 of the Government Code. We note, however, section 552.110 is designed to protect the interests of third parties not the interests of a governmental body. Thus, we will not consider the system's arguments under section 552.110, and none of the submitted information may be withheld under section 552.110 on the basis of the system's interests.

³Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101.

⁴We note the proper exceptions to raise when asserting the attorney-client privilege and work product privilege for information not subject to section 552.022 of the Government Code are sections 552.107 and 552.111 of the Government Code, respectively. *See* Open Records Decision Nos. 676 at 1 -2 (2002),677 (2002).

You argue the remaining information at issue is excepted from disclosure under section 552.143 of the Government Code, which provides, in part,

(c) All information regarding a governmental body's direct purchase, holding, or disposal of restricted securities that is not listed in Section 552.0225(b)(2)-(9), (11), (13)-(16) is confidential and excepted from the requirements of Section 552.021. This Subsection does not apply to a governmental body's purchase, holding, or disposal of restricted securities for the purpose of reinvestment nor does it apply to a private investment fund's investment in restricted securities.

Gov't Code § 552.143(c). You argue the information pertains to the system's direct purchase, holding, or disposal of a restricted security. *See id.* § 552.143(d)(3) (defining "restricted securities" for purposes of section 552.143); *see also* 17 C.F.R. § 230.144(a)(3) (defining "restricted securities" as "securities acquired directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving public offering"). You inform us the submitted information involves Museum Tower, L.P. (the "Museum Tower"), which you state is not a governmental body. You state the system's limited partnership interest in the Museum Tower, is a security acquired directly from the issuer of the security, the Museum Tower, in a transaction that did not involve a public offering. Accordingly, based on your representations and our review, we find the system has demonstrated the applicability of section 552.143(c) to some of the information at issue. Thus, the system must withhold the information we have marked under section 552.143(c) of the Government Code. However, we find the system has failed to demonstrate how the remaining information pertains to the system's direct purchase, holding, or disposal of a restricted security. Accordingly, none of the remaining information may be withheld under section 552.143 of the Government Code.

Section 552.103 of the Government Code provides in relevant part as follows:

(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 has the burden of providing relevant facts and documents to show section 552.103(a) is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551.

To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *See* Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.⁵ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You contend the system reasonably anticipates litigation because it is currently in a dispute with the Nasher Sculpture Center (the “Nasher”). You explain the Nasher has made allegations that glare emanating from the glass walls of the Museum Tower, a high-rise residential condominium owned by the system, is damaging the Nasher's art and vegetation and creating an unpleasant experience for visitors. You state representatives of Museum Tower and the Nasher recently participated in mediation efforts which were unsuccessful. You indicate all efforts short of litigation to resolve the dispute have failed and state the system anticipates being a party to any suit regarding Museum Tower and you argue there would be legal and financial recourse against the system as a result of any suit. Based on your representations and our review, we determine the system has established it reasonably anticipated litigation on the date it received the request for information. We also find the

⁵In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

information at issue is related to litigation the system anticipated on the date of its receipt of the request for information. Accordingly, the system may withhold the information you have marked under section 552.103 of the Government Code.⁶

However, once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

Section 552.111 of the Government Code excepts from disclosure “[a]n 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. Section 552.111 encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure, which is discussed above. *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 work product as

- (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 seeking to withhold information under this exception bears the burden of demonstrating 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; ORD 677 at 6-8. In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied

- 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.

⁶As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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. Furthermore, as noted above, if a requestor seeks a governmental body’s entire litigation file, the governmental body may assert the file is excepted from disclosure in its entirety because such a request implicates the core work product aspect of the privilege. *See* ORD 677 at 5-6. Thus, in such a situation, if the governmental body demonstrates the file was created in anticipation of litigation, this office will presume the entire file is within the scope of the privilege. *See* ORD 647 at 5; *see also* *Curry*, 873 S.W.2d at 380.

You claim a portion of the remaining responsive information consists of attorney work product that is protected under section 552.111. You inform us the information at issue contains the mental impressions and advice of consultants for and representatives of the system that were created or developed in anticipation of litigation with the Nasher. Upon review, we find the system has demonstrated the applicability of the attorney work product privilege to the information at issue, which we have marked. Thus, the system may withhold the information we marked under section 552.111 of the Government Code.⁷

Section 552.137 of the Government Code 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). Gov’t Code § 552.137(a)-(c). We note the information at issue includes the requestor’s e-mail address, to which he has a right of access pursuant to section 552.137(b) of the Government Code. *See id.* § 552.137(b). Accordingly, the system must withhold the e-mail addresses you have marked, in addition to the e-mail addresses we have marked, under section 552.137 of the Government Code, unless the owners of the addresses have affirmatively consented to their release.

In summary, the system must withhold the information we have marked under section 552.143(c) of the Government Code. The system may withhold the information you have marked under section 552.103 of the Government Code and the information we have marked under the section 552.111 of the Government Code. The system must withhold the e-mail addresses you have marked, in addition to the e-mail addresses we have marked, under section 552.137 of the Government Code, unless the owners of the addresses have affirmatively consented to their release. The system must release the remaining responsive information.

⁷As our ruling is dispositive, we need not address your remaining arguments against disclosure of this 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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/bhf

Ref: ID# 481856

Enc. Submitted documents

cc: Requestor
(w/o enclosures)