



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 15, 2015

Mr. Zachary Noblitt
Assistant City Attorney
City of Dallas
1500 Marilla Street, Room 7DN
Dallas, Texas 75201

OR2015-11720

Dear Mr. Noblitt:

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# 567011.

The City of Dallas (the "city") received a request for six categories of information related to the Mardi Gras Texas Style event held at Fair Park during a specified time period. You state the city will provide some responsive information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note the submitted information in Exhibits C and E consists of completed investigations subject to section 552.022 of the Government Code. Section 552.022 provides in part:

- (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are

¹We 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 that those records contain substantially different types of information than that submitted to this office.

public information and not excepted from required disclosure unless made confidential under this chapter or 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). Although you seek to withhold Exhibits C and E under sections 552.103 and 552.111 of the Government Code, these sections are discretionary exceptions to disclosure and do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, orig. proceeding) (governmental body may waive section 552.103); *see also* Open Records Decision Nos. 677 at 8 (2002) (attorney work product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Accordingly, the city may not withhold Exhibits C and E pursuant to section 552.103 or section 552.111 of the Government Code. However, because information subject to section 552.022(a)(1) may be withheld under section 552.108 of the Government Code, we will consider your argument under that section for Exhibit E. Moreover, the Texas Supreme Court has held “other law,” such as the Texas Rules of Civil Procedure, makes information confidential for purposes of section 552.022(a). *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Accordingly, we will consider your attorney work product argument for Exhibit C under rule 192.5 of the Texas Rules of Civil Procedure. Furthermore, we will consider your claim under section 552.101 of the Government Code for the information in Exhibit B, which is not subject to section 552.022.

Rule 192.5 of the Texas Rules of Civil Procedure encompasses the attorney work-product privilege. For purposes of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent it implicates the core work product aspect of the work product privilege. *See* ORD 677 at 9-10. 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 and (2) consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney’s representative. *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 (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 part of the work product test requires the governmental body to show the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney’s or an attorney’s representative. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both parts of the work product test is confidential under rule 192.5, provided the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

The city claims Exhibit C is privileged under Texas Rule of Civil Procedure 192.5. You explain this information pertains to an investigation that was conducted for the purpose of preparing for potential litigation against the city. You state the information at issue was prepared by the city’s employees and agents. However, the city has failed to explain the information contains the mental impressions, opinions, conclusions, or legal theories of an attorney’s or an attorney’s representative. Upon review, we find the city has failed to demonstrate the information at issue is protected core work product. Accordingly, the city may not withhold Exhibit C under Texas Rule of Civil Procedure 192.5.

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. Section 552.101 of the Government Code encompasses information protected by other statutes, such as section 773.091 of the Health and Safety Code, which provides, in relevant part:

(b) Records of the identity, evaluation or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

...

(g) The privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services.

Health & Safety Code § 773.091(a)-(b), (g). Except for the information specified in section 773.091(g), emergency medical services (“EMS”) records are deemed confidential

under section 773.091. Upon review, we find the information in Exhibit B constitutes EMS records or information obtained from EMS records that are subject to chapter 773 of the Health and Safety Code. Thus, with the exception of the information subject to section 773.091(g), the city must withhold Exhibit B under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code.

Section 552.108(a)(2) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]” Gov’t Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that concluded in a final result other than conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A) (providing that a governmental body must provide written comments explaining why exceptions raised should apply to information requested).

You state the submitted information in Exhibit E relates to a matter that “*has not resulted* in a conviction or deferred adjudication[.]” Letter from Zachary Noblitt, Asst. City Attorney, City of Dallas, to Honorable Ken Paxton, Tex. Att’y Gen., at 3 (April 16, 2015) (emphasis added). We note, however, section 552.108(a)(2) is applicable only if the information at issue is related to a concluded criminal case that “*did not result* in conviction or deferred adjudication[.]” *See* Gov’t Code § 552.108(a)(2) (emphasis added). Thus, we find you have failed to demonstrate the applicability of section 552.108(a)(2) to the submitted information. Accordingly, the city may not withhold Exhibit E under section 552.108(a)(2) of the Government Code.

We note portions of the submitted information are subject to section 552.136 of the Government Code.² Section 552.136 states, “Notwithstanding any other provision of [the Act], 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.” *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined an insurance policy number is an access device for purposes of this exception. Thus, the city must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.

In summary, with the exception of the information subject to section 773.091(g), the city must withhold Exhibit B under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code. The city must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code. The city must release the remaining information.

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. *See* Open Records Decision No. 481 (1987), 480 (1987), 470 (1987).

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 567011

Enc. Submitted documents

c: Requestor
(w/o enclosures)