



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 4, 2015

Mr. Matthew L. Grove
Assistant County Attorney
County of Fort Bend
401 Jackson Street, 3rd Floor
Richmond, Texas 77469

OR2015-15998

Dear Mr. Grove:

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# 574186.

Fort Bend County (the "county") received two requests from the same requestor for (1) all documents and correspondence pertaining to the requestor sent between named individuals and a specified party during a specified time period; (2) all documents produced by specified parties in response to a specified internal investigation; and (3) information evidencing the result of the specified investigation. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note you have not submitted information responsive to the portion of the requests seeking information evidencing the result of the specified investigation. To the extent information responsive to this portion of the requests existed and was maintained by the county on the date the county received the request, we assume the county has released it. If the county has not released any such information, it must do so at this time. Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

Next, we note one of the requests seeks information created after the date the request was received. It is implicit in several provisions of the Act that the Act applies only to information already in existence. *See* Gov't Code §§ 552.002, .021, .227, .351. The Act does not require a governmental body to prepare new information in response to a request. *See* Attorney General Opinion H-90 (1973); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 452 at 2-3 (1986), 87 (1975). Consequently, a governmental body is not required to comply with a standing request to supply information prepared in the future. *See* Attorney General Opinion JM-48 at 2 (1983); *see also* Open Records Decision Nos. 476 at 1 (1987), 465 at 1 (1987). Thus, the only information encompassed by the present requests consists of information the county maintained or had a right of access to as of the dates it received the requests.

We note some of the submitted information may have been the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2015-07308 (2015). In Open Records Letter No. 2015-07308, we ruled the county (1) may withhold certain information under section 552.111 of the Government Code; (2) must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy, to the extent the information pertains to an offender who was ten to sixteen years of age at the time of the alleged conduct; (3) may withhold certain information under section 552.107(1) of the Government Code; (4) may withhold certain information under section 552.116 of the Government Code; (5) must withhold the information we marked under section 552.117(a)(1) of the Government Code, to the extent the employees at issue timely requested confidentiality under section 552.024 of the Government Code; and (6) must release the remaining information. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by law. *See* Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the county may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential under law. Although you claim portions of the submitted information are excepted from disclosure under sections 552.103, 552.107, 552.111, and 552.116 of the Government Code, these sections do not prohibit the release of information or make information confidential. *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 8-10 (2002) (attorney work product privilege under section 552.111 and rule 192.5 may be waived), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) and rule 503 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, to the extent any of the submitted information was previously released pursuant to Open Records Letter No. 2015-07308, the county may not now withhold it under section 552.103, section 552.107, section 552.111,

or section 552.116. However, because section 552.101 of the Government Code makes information confidential under the Act, we will consider the applicability of this exception to the previously released information. Further, we will consider your arguments against disclosure of the information that has not been previously released.

We note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part, the following:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(15) information regarded as open to the public under an agency's policies[.]

Gov't Code § 552.022(a)(15). The submitted information includes job descriptions that are open to the public and, thus, are subject to section 552.022(a)(15). The county must release this information pursuant to section 552.022(a)(15), unless it is made confidential under the Act or other law. *See id.* Although the county raises sections 552.103, 552.107, and 552.111 of the Government Code for this information, these exceptions are discretionary in nature and do not make information confidential under the Act. *See Dallas Area Rapid Transit*, 4 S.W.3d at 475-76; Open Records Decision Nos. 677 at 8-10, 676 at 10-11, 665 at 2, 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the county may not withhold any of the information subject to section 552.022, which we have marked, under section 552.103, section 552.107, or section 552.111. However, the Texas Supreme Court has held the Texas Rules of Evidence and Texas Rules of Civil Procedure are "other law" that make information expressly confidential for purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will determine whether the information is excepted from disclosure under Rule 503 and Rule 192.5. Further, we will address the county's arguments against disclosure of the remaining information.

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 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) 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. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has held common-law privacy protects the identity of a juvenile offender. *See* Open Records

Decision No. 394 (1983); *cf.* Fam. Code § 58.007(c). In this instance, the submitted information contains the identifying information of individuals who may have been juvenile offenders. However, because the submitted information does not reflect these individuals' ages, we must rule conditionally. Therefore, to the extent the information we have marked pertains to an offender who was ten to sixteen years of age at the time of the alleged conduct, the county must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, to the extent the information we have marked does not identify an offender who was ten to sixteen years of age at the time of the alleged conduct, the county may not withhold this information on that basis. Additionally, we find none of the remaining information to be intimate or embarrassing and of no legitimate public interest. Therefore, the county may not withhold any of the remaining information at issue under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.103 of the Government Code provides 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 the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (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. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *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).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must provide this office "concrete evidence

showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* This office has concluded that litigation was reasonably anticipated when the potential opposing party filed a complaint with the Equal Employment Opportunity Commission (“EEOC”). *See* Open Records Decision No. 336 (1982).

We understand you to contend portions of the remaining information not subject to section 552.022, which you indicated, are related to anticipated litigation and pending litigation to which the county is a party. You inform us, and provide documentation demonstrating, litigation styled *Verakisha Roach, et al. v. Heather Ingram, FBISD Attendance Specialist, et al.*, Cause No. 15-DCV-223241, was pending in the 268th Judicial District Court of Fort Bend County, Texas on the dates the county received the requests. You further explain the information at issue is related to the pending lawsuit because it pertains to the business of the Fort Bend Truancy Court, which is the issue of the pending litigation. You further inform us, and provide documentation showing, a county employee filed a discrimination claim with the EEOC prior to the date of the county’s receipt of the second request for information. You indicate the complaint is pending. You explain portions of the information at issue are related to the anticipated litigation. Based on your representations, the submitted documentation, and our review of the submitted information, we find the county was a party to pending litigation with respect to some of the information at issue and reasonably anticipated litigation with respect to the remaining information at issue on the date it received the requests. Therefore, with the exception of the information subject to section 552.022 of the Government Code, which we have marked, the county may withhold the remaining information you indicated under section 552.103 of the Government Code.¹

We note, however, the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to the pending litigation through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Rule 503(b)(1) of the Texas Rules of Evidence provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

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

- (A) between the client or the client's representative and the client's lawyer or the lawyer's representative;
- (B) between the client's lawyer and the lawyer's representative;
- (C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;
- (D) between the client's representatives or between the client and the client's representative; 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 to further the rendition of professional legal services to the client or reasonably necessary to transmit the communication. *Id.* 503(a)(5).

Accordingly, 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. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under Rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

You contend the information subject to section 552.022 consists of communications between the Fort Bend County Attorney (the "county attorney"), a county judge, and a county justice of the peace. You state these communications were not intended to be disclosed to third persons. Upon review, however, we find you have failed to demonstrate the information at issue documents confidential communications between privileged parties. Thus, the

information subject to section 552.022 of the Government Code is not privileged, and the county may not withhold it under Rule 503 of the Texas Rules of Evidence.

For the purpose of section 552.022, information is confidential under Rule 192.5 of the Texas Rules of Civil Procedure only to the extent the information implicates the core work product aspect of the work product privilege. ORD 677 at 9-10. Core work product is defined as the work product of an attorney or an attorney's representative developed in anticipation of litigation or for trial that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. 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 that the material was 1) created for trial or in anticipation of litigation 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 that 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 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 prong of the work product test requires the governmental body to show that the documents at issue contains 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 is confidential 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, orig. proceeding).

You contend the information subject to section 552.022 contains attorney core work product that is protected by Rule 192.5 of the Texas Rules of Civil Procedure. You assert this information was created in anticipation of litigation. You further assert this information reflects the county attorney's mental impressions, conclusions, or legal theories. Upon review, however, we find you have not demonstrated any of the information at issue consists of mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative that were created for trial or in anticipation of trial. Accordingly, the county may not withhold any of the information subject to section 552.022 of the Government Code under Rule 192.5 of the Texas Rules of Civil Procedure.

In summary, to the extent the submitted information is identical to the information previously submitted to and ruled on by this office, the county must release any information that was

previously released in Open Records Letter No. 2015-07308 pursuant to section 552.007 of the Government Code. To the extent the information we have marked pertains to an offender who was ten to sixteen years of age at the time of the alleged conduct, the county must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. With the exception of the information subject to section 552.022 of the Government Code, which we have marked, the county may withhold the remaining information you indicated under section 552.103 of the Government Code. The county must release the remaining 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.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,



Kenny Moreland
Assistant Attorney General
Open Records Division

KJM/som

Ref: ID# 574186

Enc. Submitted documents

c: Requestor
(w/o enclosures)