



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

September 16, 2015

Ms. Barbara B. Bozon  
Executive Director  
Central Texas Housing Consortium  
P.O. Box 1326  
Temple, Texas 76503-1326

OR2015-19355

Dear Ms. Bozan:

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# 579643.

The Central Texas Housing Consortium ("CTHC") received a request for information pertaining to a specified investigation. CTHC claims it is not subject to the Act or, in the alternative, the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.111, and 552.117 of the Government Code. We have considered the submitted arguments and reviewed the submitted information.

CTHC asserts it is not a governmental body and, therefore, is not subject to the Act. The Act defines "governmental body" in pertinent part as

the part, section, or portion of an organization, corporation, commission, committee, institution, or agency that spends or that is supported in whole or in part by public funds[.]

Gov't Code § 552.003(1)(A)(xii). "Public funds" means "funds of the state or of a governmental subdivision of the state." *Id.* § 552.003(5). The Temple Housing Authority and the Belton Housing Authority are municipal housing authorities, which you inform us are subject to chapter 392 of the Local Government Code. *See* Loc. Gov't Code ch. 392.

Each constitutes a governmental body for purposes of the Act. *See* Gov't Code § 552.003; Loc. Gov't Code §§ 392.006 (for all purposes, a housing authority is a unit of government), .011(b) ("A municipal housing authority is a public body corporate and politic."); *see also* Open Records Decision No. 268 (1981) (amounts collected by city housing authority from rentals assumed character of "public moneys" upon payment to authority; thus, housing authority of City of Seguin is "governmental body" for purposes of predecessor to Act).

Pursuant to section 392.059(b) of the Local Government Code, municipal housing authorities may cooperate in the exercise of a power conferred by chapter 392 to finance, plan, undertake, construct, or operate a housing project in the area of operation of one or more of the cooperating authorities. Loc. Gov't Code § 329.059(b). We understand CTHC was thereby created pursuant to an agreement entered into between the Temple Housing Authority and the Belton Housing Authority. We also understand the Temple Housing Authority's main office serves as CTHC's headquarters. In addition, CTHC informs us it is "comprised of the Temple and Belton Housing Authorities." Based on these representations, we conclude CTHC is acting as the functional equivalent of the government. *See generally Greater Houston P'ship v. Paxton*, No. 13-0745, 2015 WL 3978138, at \*8 (Tex. June 26, 2015).

In addition, we note, in order to ascertain whether CTHC is supported by public funds as interpreted by the Texas Supreme Court in *Greater Houston Partnership*, this office asked CTHC to explain whether or not the consortium could or could not perform the same or similar services without public funds. *See* Gov't Code § 552.303 (if attorney general determines information in addition to that required by section 552.301 is necessary to render decision, written notice of that fact shall be given to governmental body and requestor, and governmental body shall submit necessary additional information to attorney general not later than seventh calendar day after date of receipt of notice). We also inquired whether the consortium is dependent on public funds to operate as a going concern, or whether, in the absence of public funds, the consortium would continue to operate as a going concern. *See Greater Houston P'ship*, 2015 WL 3978138, at \*8-9. In response to our letter, you informed us, among other sources of income, the consortium receives federal funding. You also provided documentation demonstrating that 64.3 percent of the consortium's revenue for the current fiscal year is from rental property we understand is owned by either the Temple Housing Authority or the Belton Housing Authority. We note such rental revenue is considered "public funds" for purposes of the Act. Gov't Code § 552.003(5); *see* ORD 268. Finally, you informed us "Public Housing and Rural Development rental subsidies provided to CTHC residents could not be continued in the absence of public funding." Accordingly, on the basis of the foregoing, we find CTHC is sustained by public funds, and, as previously noted, is acting as the functional equivalent of the government. *See generally Greater Houston P'ship*, 2015 WL 3978138, at \*8-9. Therefore, we conclude CTHC is a governmental body for purposes of the Act, and the submitted information is public

information subject to release under the Act. Therefore, we will address CTHC's arguments to withhold the submitted information under the Act's exceptions.

We next note, with the exception of the information you have labeled "Texas Workforce Commission Proceedings," the submitted information consists of a completed investigation that is subject to section 552.022(a)(1) of the Government Code, which reads as follows:

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are 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). CTHC asserts this information is excepted from release under section 552.103 of the Government Code. However, section 552.103 is discretionary and does 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, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, CTHC may not withhold the information subject to section 552.022 under section 552.103. 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 consider CTHC's assertions of the attorney-client privilege and the attorney work product privilege under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, respectively. Additionally, sections 552.101, 552.102, 552.117, and 552.137 of the Government Code make information confidential for purposes of section 552.022.<sup>1</sup> Accordingly, we will also consider the applicability of these exceptions to the information subject to section 552.022. Further, we will address CTHC'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

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<sup>1</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987).

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. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Nevertheless, this office has also found the public has a legitimate interest in information relating to employees of governmental bodies and their employment qualifications and job performance. *See* Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 405 at 2-3 (1983) (public has interest in manner in which public employee performs job). Upon review, we find some of the submitted information, which we have marked, satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, CTHC must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we conclude the remaining information is not confidential under common-law privacy, and CTHC may not withhold it under section 552.101 on that ground.

Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” Gov’t Code § 552.102(a). The Texas Supreme Court has held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). CTHC must withhold the information we have marked under section 552.102(a) of the Government Code. However, we find none of the remaining information is excepted under section 552.102(a) of the Government Code. Accordingly, CTHC may not withhold any of the remaining information on that basis.

CTHC asserts the information not subject to section 552.022 of the Government Code is excepted from disclosure under section 552.103 of the Government Code, which provides in 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). The 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 that (1) litigation is 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). The governmental body must meet both prongs of this test for information to be excepted from disclosure 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 litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, an attorney for a potential opposing party making a demand for payment and asserting an intent to sue if such payments are not made. Open Records Decision Nos. 555 at 3 (1990), 346 (1982). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party threatened to sue on several occasions and hired an attorney. *See* Open Records Decision No. 288 at 2 (1981). However, an individual publicly threatening to bring suit against a governmental body, but who does not actually take objective steps toward filing suit, is not concrete evidence that litigation is reasonably anticipated. *See* Open Records Decision No. 331 at 1-2 (1982).

CTHC states it reasonably anticipated litigation when it received the request for information because an employee was terminated as a result of the investigation at issue. However, we find CTHC has not demonstrated any party had taken concrete steps toward filing litigation when CTHC received the request for information. Thus, we conclude CTHC has failed to demonstrate it reasonably anticipated litigation when it received the request for information. Therefore, CTHC may not withhold the remaining information under section 552.103(a) of the Government Code.

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

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:

(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* Open Records Decision No. 676 (2002). 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 [14<sup>th</sup> Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

CTHC asserts the submitted information includes confidential communications between attorneys for and employees of CTHC. Upon review, we find some of the information at issue, which we have marked, constitutes privileged attorney-client communications that CTHC may withhold under rule 503. However, we conclude CTHC has not established the remaining information consists of privileged attorney-client communications. Therefore, CTHC may not withhold this information under rule 503.

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. Open Records Decision No. 677 at 9-10 (2002). 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 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 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 the documents at issue contain 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).

Upon review, we conclude CTHC has not provided arguments establishing any of the remaining information consists of privileged core attorney work product. Therefore, CTHC may not withhold any of the remaining information under rule 192.5.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Section 552.117 also encompasses a personal cellular telephone number, provided a governmental body does not pay for the cellular telephone service. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information.

*See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Therefore, CTHC must withhold the information we have marked in the submitted documents under section 552.117(a)(1) if the current or former employees at issue made timely elections to keep the information confidential; however, CTHC may only withhold the cellular telephone numbers at issue under section 552.117(a)(1) if the cellular telephone service was not provided to the employees at issue at public expense.<sup>2</sup>

Section 552.137 of the Government Code exempts 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). *See* Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). CTHC does not inform us a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, CTHC must withhold the e-mail addresses we have marked under section 552.137 of the Government Code.

To conclude, CTHC must withhold the following: (1) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (2) the information we have marked under section 552.117(a)(1) of the Government Code if the current or former employees at issue made timely elections to keep the information confidential; however, CTHC may only withhold the cellular telephone numbers at issue under section 552.117(a)(1) if the cellular telephone service was not provided to the employees at issue at public expense; and (3) the information we have marked under sections 552.102 and 552.137 of the Government Code. CTHC may withhold the information we have marked under rule 503(b)(1) of the Texas Rules of Evidence. CTHC 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.

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<sup>2</sup>Regardless of the applicability of section 552.117, 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. Gov't Code § 552.147(b).

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](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,



James L. Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/cbz

Ref: ID# 579643

Enc. Submitted documents

c: Requestor  
(w/o enclosures)