KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 21, 2015

Ms. Donna Grafe-Tucker
Counsel for the Port O'Conner Improvement District
Walker Keeling, LLP
P.O. Box 108
Victoria, Texas 77902-0108

OR2015-19676

Dear Ms. Grafe-Tucker:

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# 579963.

The Port O'Conner Improvement District (the "district"), which you represent, received a request for information relating to the investigation conducted in response to a specified complaint letter, including the specified complaint letter. The district argues some of the submitted information is not subject to the Act and claims some of the remaining information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code and privileged under Texas Rule of Evidence 503.[1] The district also informs us it has notified interested third parties of their right to submit comments to this office as to why their information should not be released. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information). We have received and considered comments from an interested third party. We have considered the submitted arguments and reviewed the submitted information.

[1]We note, although the district raises section 552.022 of the Government Code as an exception to disclosure, section 552.022 acts to make certain information public, and is not an exception to disclosure.

Initially, the district argues the information in Exhibit D is not subject to the Act. The Act applies to "public information," which is defined in section 552.002 of the Government Code as

> information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:
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> (1) by a governmental body; or
>
> (2) for a governmental body and the governmental body:
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> (A) owns the information;
>
> (B) has a right of access to the information; or
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> (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or
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> (3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Id. § 552.002(a). Thus, virtually all of the information in a governmental body's physical possession constitutes public information and is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act can also encompass information that a governmental body does not physically possess. Information that is written, produced, collected, assembled, or maintained by a third party, including an individual officer or employee of a governmental body in his or her official capacity, may be subject to disclosure under the Act if a governmental body owns, has a right of access, or spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information. Gov't Code § 552.002(a); *see* Open Records Decision No. 462 at 4 (1987); *cf.* Open Records Decision No. 499 (1988). Information is "in connection with the transaction of official business" if it is "created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer's or employee's official capacity, or a person or entity performing official business or a government function on behalf of a governmental body, and pertains to official business of the governmental body." *Id.* § 552.002(a-l). Moreover, section 552.001 of the Act provides it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. *See id.* § 552.001(a).

The district contends the document in Exhibit D is not subject to the Act because the author may not have intended the document to be delivered to the district. However, we note the document at issue was delivered to the district as an attachment to the complaint letter at issue and is maintained by the district. We further note the document at issue pertains to the district's official business. Accordingly, we find this information was written, produced, collected, assembled, or maintained in connection with the transaction of the district's official business. Therefore, we conclude the information in Exhibit D is subject to the Act and the district must release it unless it demonstrates the information falls within an exception to public disclosure under the Act. *See id.* §§ 552.006, .021, .301, .302.

Next, we note 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:
>
> > (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Id. § 552.022(a)(1). The submitted information consists of a completed investigation that is subject to section 552.022(a)(1). The district must release the completed investigation pursuant to section 552.022(a)(1), unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* Although the district 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 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) (governmental body may waive attorney work product privilege under section 552.111), 676 at 10-11 (2002) (governmental body may waive attorney-client privilege under section 552.107(1)), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the district may not withhold any of the submitted information subject to section 552.022 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 consider the district'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, because sections 552.101 and 552.117 of the Government Code can make information confidential

for purposes of section 552.022, we will address their applicability to the information subject to section 522.022.[2]

Texas Rule of Civil Procedure 192.5 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 the information 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 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 there was a substantial chance litigation would ensue, and (2) the party resisting discovery believed in good faith there was a substantial chance 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 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, 426 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

The district claims the information in Exhibit C consists of attorney core work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. The district states the information at issue consists of materials prepared by an attorney for the district in anticipation of litigation. Upon review, we find the district has demonstrated the information

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[2]The 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).

at issue constitutes core attorney work product. Therefore, we conclude the district may withhold the information in Exhibit C under Texas Rule of Civil Procedure 192.5.[3]

Section 552.101 of the Government Code excepts "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. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). 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 employee or official 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. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the employees whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. Conversely, to the extent the employees whose information is at issue did not timely request confidentiality under section 552.024, the district may not withhold the information under section 552.117(a)(1).

In summary, the district may withhold the information in Exhibit C under Texas Rule of Civil Procedure 192.5. The district must withhold the information we have marked under

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[3]As our ruling is dispositive, we need not address the district's remaining arguments against disclosure of this information.

section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the employees whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The district 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,

David L. Wheelus
Assistant Attorney General
Open Records Division

DLW/bhf

Ref: ID# 579963

Enc. Submitted documents

c: Requestor
(w/o enclosures)