



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.
The ruling and judgment can be viewed in PDF
format below.



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 21, 2016

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

Ms. Heather Silver
Assistant City Attorney
City of Dallas
1500 Marilla Street, Room 7DN
Dallas, Texas 75201

OR2016-01539

Dear Ms. Silver:

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# 594635.

The City of Dallas (the "city") received a request for information pertaining to a specified incident. You state you will release some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

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

(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:

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.

(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). The submitted information consists of a completed investigation which must be released under section 552.022(a)(1), unless the information is excepted from disclosure under section 552.108 or made confidential under the Act or other law. *See id.* Although you raise sections 552.103 and 552.111 of the Government Code for the entirety of the submitted information, 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, no pet.) (governmental body may waive Gov't Code § 552.103); 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). Therefore, none of the information at issue may be withheld under section 552.103 or section 552.111. However, the Texas Supreme Court has held the Texas Rules of Civil Procedure are “other law” that makes information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will consider your assertion of the attorney work product privilege under Texas Rule of Civil Procedure 192.5. Further, as section 552.101 of the Government Code makes information confidential, we will consider the city's argument under this exception for the information at issue.

Rule 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, 427 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

You argue the information at issue consists of privileged attorney work product. You state this information consists of communications, work product, and material prepared in anticipation of litigation by city employees. Upon review, we find you have not demonstrated the information at issue consists of mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. We therefore conclude the submitted information is not core attorney work product for purposes of rule 192.5 and may not be withheld on that basis.

Section 552.101 of the Government Code exempts 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Indus. Found.* at 682. In considering whether a public citizen's date of birth is private, the Third Court of Appeals looked to the supreme court's rationale in *Texas Comptroller of Public Accounts v. Attorney General of Texas*, 354 S.W.3d 336 (Tex. 2010). *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). The supreme court concluded public employees' dates of birth are private under section 552.102 of the Government Code because the employees' privacy interest substantially outweighed the negligible public interest in disclosure.² *Texas Comptroller*, 354 S.W.3d at 347-48. Based on *Texas Comptroller*, the court of appeals concluded the privacy rights of public employees apply equally to public citizens, and thus, public citizens' dates of birth are also protected by common-law privacy pursuant to section 552.101. *City of Dallas*, 2015 WL 3394061, at *3. Thus, the city must withhold date of birth you have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The remaining information must be released.³

²Section 552.102(a) exempts 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).

³The information being released contains a social security number. 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. See Gov't Code § 552.147(b).

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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/dls

Ref: ID# 594635

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

OCT 18 2016

mk

Cause No. D-1-GV-09-001574

At 8:38 A.M.
Velva L. Price, District Clerk

CITY OF DALLAS,
Plaintiff,

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IN THE DISTRICT COURT OF

v.

201st JUDICIAL DISTRICT

GREG ABBOTT,
ATTORNEY GENERAL OF TEXAS,
Defendant.

TRAVIS COUNTY, TEXAS

AGREED FINAL JUDGMENT

This cause is an action under the Public Information Act (PIA), Texas Government Code chapter 552, in which Plaintiff City of Dallas sought to withhold information pertaining to a slip and fall injury that occurred at the Dallas Convention Center. The Defendant Ken Paxton,¹ Attorney General of Texas, ruled in open records ruling OR2009-10939 that the City could not withhold the majority of the requested information. During the pendency of the suit, the City supplemented its petition five times, challenging five subsequent open records rulings which arose from new requests for public information. The City's supplemental petitions challenged open records rulings OR2010-08494, OR2011-02304, OR012-20378, OR2014-03084, and OR2016-01539 on the same grounds as ruling OR2009-10939.

The City and the Attorney General agree that this matter should be dismissed pursuant to Texas Government Code section 552.327 on the grounds that five of the six requestors have abandoned or withdrawn their request for information. *See* Tex. Gov't Code § 552.327. In addition, the City agrees to release the requested

¹ This suit was brought against Greg Abbott in his official capacity. Ken Paxton now holds the Office of the Attorney General and is the proper defendant.



information to the remaining requestor. A court may dismiss a PIA suit under section 552.327 when all parties agree to dismissal and the Attorney General determines and represents to the Court that the requestor has voluntarily withdrawn the request for information in writing or has abandoned the request. *Id.* The Attorney General represents to the Court that requestor Monica Bridges withdrew her request in writing, and requestors Porcha Dews, Brian Stork, James Banks, and Laura Cozby abandoned their requests for information. In response to Alton Patrick's October 9, 2012 request for information, the City agrees to disclose the information subject to release in open records ruling OR2012-20378.

Accordingly, the parties agree that the City is required to disclose the information subject to release in open records ruling OR2012-20378 (to Mr. Patrick), but the City is not required to disclose the requested information subject to release in open records letter rulings OR2009-10939 (to Ms. Dews), OR2010-08494 (to Mr. Stork), OR2011-02304 (to Mr. Banks), OR2014-03084 (to Ms. Cozby), and OR2016-01539 (to Ms. Bridges).

The Court is of the opinion that entry of this Agreed Final Judgment is appropriate.

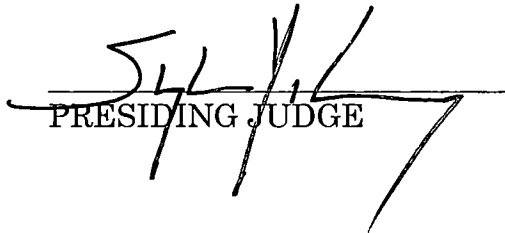
It is THEREFORE, ORDERED, ADJUDGED and DECREED that:

1. The City is required to disclose the requested information subject to release in open records ruling OR2012-20378 to the requestor Alton Patrick;
2. The City is not required to disclose the requested information subject to release in open records rulings OR2009-10939, OR2010-08494, OR2011-02304,

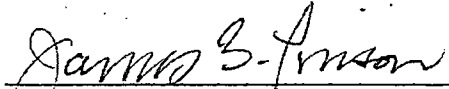
OR2014-03084, and OR2016-01539 to the requestors Porcha Dews, Brian Stork,
James Banks, Laura Cozby, and Monica Bridges;

3. All court costs and attorney fees are taxed to the party incurring same;
4. All relief not expressly granted is denied; and
5. This order disposes of all claims between the parties and is a final judgment.

SIGNED the 18 day of October, 2016.


PRESIDING JUDGE

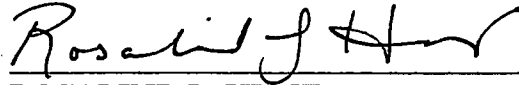
AGREED:



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**ATTORNEY FOR PLAINTIFF
CITY OF DALLAS**

DATE: 10/14/2016



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**ATTORNEY FOR DEFENDANT
ATTORNEY GENERAL OF TEXAS**

DATE: 10/14/2016