



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

February 8, 2016

Mr. Steven M. Kean  
Deputy City Attorney  
City of Tyler  
P.O. Box 2039  
Tyler, Texas 75710

OR2016-03003

Dear Mr. Kean:

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# 597239 (LegalDesk #TOL-686040, EDM-275759, and FBW-794564).

The City of Tyler (the "city") received three requests from two different requestors for information pertaining to a specified investigation and specified minutes of a civil service commission meeting. You state the city does not have information responsive to a portion of the requests.<sup>1</sup> You state you have released some information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.108, 552.111, 552.117, and 552.137 of the Government Code.<sup>2</sup> You also state you notified third parties of the request. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received and considered comments

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<sup>1</sup>The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</sup>Although you claim section 552.1175 of the Government Code for portions of the submitted information, section 552.117 is the proper exception to raise in this instance because the city holds the submitted information in an employment capacity.

from the requestor. *See id.* We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>3</sup>

You state some of the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2015-16062 (2015). In Open Records Letter No. 2015-16062, we determined the city (1) must withhold certain information under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code and (2) may withhold the marked information under section 552.107 of the Government Code. With regard to the information we marked under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code, we have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Accordingly, the city must continue to rely on Open Records Letter No. 2015-16062 as a previous determination and withhold the identical information in accordance with that ruling. *See* Open Records Decision No. 673 at 6-7 (2001) (discussing criteria for first type of previous determination). However, we find the information previously marked under section 552.107 of the Government Code is now part of a completed investigation subject to section 552.022 of the Government Code. Therefore, we find that the facts, law, and circumstances have changed with respect to this information, and the city may not rely on Open Records Letter No. 2015-16062 as a previous determination in this instance with respect to the information that was marked under section 552.107 of the Government Code. *See id.* Accordingly, we will address the submitted arguments for the information previously withheld under this section.

We note some of 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:

(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 information at issue consists of a completed investigation subject to section 552.022(a)(1). The city 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.*

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<sup>3</sup>We assume that 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.

Although you raise sections 552.107 and 552.111 of the Government Code for some of this information, these sections are discretionary exceptions to disclosure and do not make information confidential under the Act. *See* Open Records Decision Nos. 677 at 8 (2002) (attorney work product privilege under section 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver).

Therefore, none of the information subject to section 552.022(a)(1) may be withheld under 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 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-client privilege and the attorney work product privilege under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, respectively. Additionally, you raise sections 552.101, 552.117, and 552.137 of the Government Code for this information. These exceptions make information confidential under the Act. Accordingly, we will also consider the applicability of these exceptions to the information subject to section 552.022. We will also consider your argument under section 552.108 for the information subject to section 552.022(a)(1).

Rule 503 of the Texas Rules of Evidence enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

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

- (A) between the client or a representative of the client and the client’s lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer’s representative;
- (C) by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is “confidential” if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show 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 the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

The city states the information subject to section 552.022 consists of communications involving city attorneys, city representatives, and other city employees and officials. The city states the communications were made for the purpose of facilitating the rendition of professional legal services to the city and these communications have remained confidential. Having considered your representations and reviewed the information at issue, we find you have established most of the submitted information, which we have marked under rule 503 of the Texas Rules of Evidence, is protected by the attorney-client privilege. *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (attorney’s entire investigative report protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney for purpose of providing legal services and advice). Thus, the city may generally withhold the information we have marked under rule 503 of the Texas Rules of Evidence.<sup>4</sup> However, we note one of the privileged e-mail strings we have marked includes an e-mail received from a non-privileged party. If this e-mail is removed from the privileged e-mail string and stands alone, it is responsive to the request for information. Therefore, if the non-privileged e-mail we have marked is maintained by the city separate and apart from the otherwise privileged e-mail string in which it appears, then the city may not withhold this non-privileged e-mail under rule 503 of the Texas Rules of Evidence. Furthermore, we note the remaining information consists of communications with individuals you have not demonstrated are privileged parties. Therefore, this information is not privileged under rule 503 and the city may not withhold it on this basis.

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 the information implicates the core

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<sup>4</sup>As our ruling is dispositive, we need not address your remaining arguments for some of this information.

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). Upon review, we find none of the remaining information subject to section 552.022 of the Government Code consists of an attorney's core work product. Accordingly, the city may not withhold any of the remaining information under rule 192.5 of the Texas Rules of Civil Procedure.

We next address your claim under section 552.108 of the Government Code for the remaining information. Section 552.108(a)(1) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). We note section 552.108 is not applicable to records of an investigation that is purely administrative in nature and did not involve the investigation or prosecution of crime. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.) (section 552.108 not applicable to information police department holds as employer); *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ.

App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution).

You argue the remaining information is subject to section 552.108. In this case, you inform us the information at issue pertains to allegations of wrongdoing. You do not provide any arguments explaining how the internal investigation resulted in a criminal investigation or prosecution. Accordingly, we find you have failed to demonstrate section 552.108 is applicable to any of the information at issue. Thus, the city may not withhold any of the remaining information under section 552.108 of the Government Code.

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. 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 city has failed to demonstrate the remaining information it has marked is highly intimate or embarrassing and of no legitimate public interest. Thus, the city may not withhold the remaining information it has marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home address, home telephone number, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code. *See* Gov’t Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, the city must withhold the information we have marked under section 552.117(a)(2) of the Government Code. However, we find none of the remaining information you have marked is subject to section 552.117, and the city may not withhold any of the remaining information on that basis.

Section 552.137 of the Government Code excepts 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 id.* § 552.137(a)-(c). We find the e-mail addresses you have marked, and the additional e-mail addresses we have marked, are not excluded by subsection (c). Therefore, the city must withhold the personal e-mail addresses you have marked, and the additional e-mail addresses we have marked,

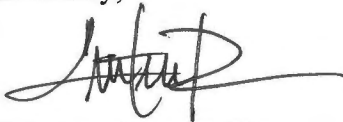
under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

In summary, the city must continue to rely on Open Records Letter No. 2015-16062 as a previous determination and withhold the identical information in accordance with that ruling, except for the information which was previously subject to section 552.107 of the Government Code. The city may generally withhold the information we have marked under rule 503 of the Texas Rules of Evidence; however, the city must release the non-privileged information we have marked if the city maintains it separate and apart from the otherwise privileged e-mail string in which it appears. The city must withhold the information we have marked under section 552.117(a)(2) of the Government Code. The city must withhold the personal e-mail addresses you have marked, and the additional e-mail addresses we have marked, under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The city 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](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,



Cristian Rosas-Grillet  
Assistant Attorney General  
Open Records Division

CRG/akg

Ref: ID# 597239

Enc. Submitted documents

c: Requestor  
(w/o enclosures)