



MESSER * ROCKEFELLER * FORT
THE MUNICIPAL LAW FIRM

July 1, 2016

Via CMRRR #7012 1640 0000 0420 1895

The Honorable Ken Paxton
Attorney General of Texas
Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548

Re: Determination of availability of information requested under the Public Information Act by Julie Kobel

Dear General Paxton:

This law firm represents the Dallas Police and Fire Pension System (“DPFP”). DPFP received twenty requests¹ for information (collectively “Requests”) under the Public Information Act (“Act”) from Julie Kobel (“Requestor”). Copies of the Requests were received by DPFP on June 17, 2016, and are attached as ***Exhibit 1***. ***Exhibit 1*** constitutes evidence of the date DPFP received the Requests under section 552.301(e)(1)(C) of the Texas Government Code. Requestor seeks the following and DPFP’s notations are italicized below:

1601-001 Diamond McCarthy - All agreements, contracts, and/or engagement agreement letters by and between the Dallas Police & Fire Pension System and the law firm of Diamond McCarthy, its employees and/or agents, firms or persons acting on behalf of Diamond McCarthy during the period January 1, 2014, thru present.

*Responsive documents enclosed as **Exhibit 2**.*

1601-002 Diamond McCarthy - All invoices received by the Dallas Police & Fire Pension System from the law firm of Diamond McCarthy, its employees and/or agents, firms or persons acting on behalf of Diamond McCarthy during the period January 1, 2014, thru present.

*Responsive documents enclosed as **Exhibit 3**.*

1601-003 Diamond McCarthy - All detailed billings received by the Dallas Police & Fire Pension System from the law firm of Diamond McCarthy, its employees and/or agents, firms or persons acting on behalf of Diamond McCarthy during the period January 1, 2014, thru present.

*Responsive documents enclosed as **Exhibit 3**.*

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1601-004 Open Records Requests - Identify all "Open Records Requests" received by the Dallas Police & Fire Pension System during the period January 1, 2014, thru present.

*Responsive documents enclosed as **Exhibit 4**.*

1601-005 Attorney General Rulings - Identify all "Open Records Requests" referred by the Dallas Police & Fire Pension System to the Texas Attorney General's office for legal ruling and/or legal opinion during the period from January 1, 2014, thru present.

*Responsive documents enclosed as **Exhibit 4**.*

1601-006 Dallas Morning News - Copies of all "Open Records Requests" received by the Dallas Police & Fire Pension System from the Dallas Morning News, its employees, attorneys, law firms, and/or agents acting on behalf of the Dallas Morning News during calendar year 2015.

*Responsive documents enclosed as **Exhibit 5**.*

1601-007 Clark Law Firm - All agreements, contracts, and/or engagement agreement letters by and between the Dallas Police & Fire Pension System and Clark Law Firm, its employees and/or agents, firms or persons acting on behalf of Clark Law Firm during the period January 1, 2015, thru present.

No responsive documents.

1601-008 Clark Law Firm - All invoices received by the Dallas Police & Fire Pension System from Clark Law Firm, its employees and/or agents, firms or person acting on behalf of Clark Law Firm during the period January, 1, 2015, thru present.

*Responsive documents enclosed as **Exhibit 6**.*

1601-009 Clark Law Firm - All detailed billings received by the Dallas Police & Fire Pension System from Clark Law Firm, its employees and/or agents, firms, or person acting on behalf of Clark Law Firm during the period January 1, 2015, thru present.

*Responsive documents enclosed as **Exhibit 6**.*

1601-010 Prospere and Russell - All agreements, contracts, and/or engagement agreement letters by and between the Dallas Police & Fire Pension System and the law firm of Prospere and Russell, its employees and/or agents, firms

or persons acting on behalf of Prospere and Russell during the period January 1, 2015, thru present.

No responsive documents.

1601-011 Prospere and Russell - All invoices received by the Dallas Police & Fire Pension System from the law firm of Prospere and Russell, its employees and/or agents, firms or persons acting on behalf of Prospere and Russell during the period January 1, 2015 thru present.

*Responsive documents enclosed as **Exhibit 7**.*

1601-012 Prospere and Russell - All detailed billings received by the Dallas Police & Fire Pension System from the law firm of Prospere and Russell, its employees and/or agents, firms or persons acting on behalf of Prospere and Russell during the period January 1, 2015 thru present.

*Responsive documents enclosed as **Exhibit 7**.*

1601-013 Nicole Knox - All agreements, contracts, and/or engagement agreement letters by and between the Dallas Police & Fire Pension System and Nicole Knox, her employees and/or agents, firms or persons acting on behalf of Nicole Knox during the period January 1, 2015, thru present.

*Responsive documents enclosed as **Exhibit 8**.*

1601-014 Nicole Knox - All invoices received by the Dallas Police & Fire Pension System from Nicole Knox, her employees and/or agents, firms or persons acting on behalf of Nicole Knox during the period January 1, 2015, thru present.

*Responsive documents enclosed as **Exhibit 8**.*

1601-015 Nicole Knox - All detailed billings received by the Dallas Police & Fire Pension System from Nicole Knox, her employees and/or agents, firms or persons acting on behalf of Nicole Knox during the period January 1, 2015, thru present.

*Responsive documents enclosed as **Exhibit 8**.*

1601-017 Investigations International - All invoices received by the Dallas Police & Fire Pension System from Investigations International, its employees and/or agents, firms or persons acting on behalf of Investigations International during calendar year 2013.

*Responsive documents enclosed as **Exhibit 9**.*

1601-018 Investigations International - All detailed billings received by the Dallas Police & Fire Pension System from Investigations International, its employees and/or agents, firms or persons acting on behalf of Investigations International during calendar year 2013.

*Responsive documents enclosed as **Exhibit 9**.*

1601-020 Argyle Volunteer Fire District - All invoices received by the Dallas Police & Fire Pension System from the Argyle Volunteer Fire District, its employees and/or agents, firms or persons acting on behalf of the Argyle Volunteer Fire District during April 2016.

No responsive documents.

1601-021 American Express - All invoices/billings from American Express paid by the Dallas Police & Fire Pension System during April 2016.

*Responsive documents enclosed as **Exhibit 10**.*

1601-022 Card Member Service (8732) - All invoices/billings from Card Member Service (8732) paid by the Dallas Police & Fire Pension System during April 2016.

*Responsive documents enclosed as **Exhibit 11**.*

DPPF seeks a determination from your office confirming that some or all of the requested records and information are exempt from public disclosure pursuant to certain exceptions provided in the Act. Section 552.301(b) of the Texas Government Code prescribes that a written request for an Attorney General's ruling must be made within ten (10) business days after the date the governmental body receives the written request for information. Accordingly, this request for a ruling made on July 1, 2016, is timely and made in accordance with section 552.301(b). DPPF may send additional written comments within the next 5 business days in accordance with section 552.301(e)(1)(A).

Further, in compliance with section 552.303 of the Texas Government Code, copies of the records responsive to the Requests are being produced to your office with this request for a determination. The requested records DPPF claims to be exempt from public disclosure are marked as **Exhibits 2-11**. Pursuant to section 552.301(d) of the Texas Government Code, a copy of this letter is being sent to the Requestor without exhibits.

Background information relevant to the Requests:

In early 2002, DPPF hired Columbus Alexander ("Alexander") d/b/a CFOpros to conduct financial accounting for DPPF. The information concerning Alexander is relevant to these Requests because DPPF has good reason to believe Alexander and Requestor are closely related. **Exhibit 12**. By

mid 2002, a dispute arose between DFPF and Alexander and the parties became involved in a lawsuit filed in Dallas County in which both parties were represented by counsel. The dispute was resolved by the settlement agreement enclosed as **Exhibit 13**. The settlement agreement stated the following: “[t]he Pension System, its trustees, and employees agree not to call upon or contact Mr. Alexander, or use his services and knowledge, in any way in the future, and likewise Mr. Alexander will not call upon or contact the Pension System, its Trustees or employees.” The settlement agreement was executed by all parties and an order to non-suit was entered by the court on August 19, 2002. **Exhibit 13**.ⁱⁱ DFPF has complied with all of its obligations under the settlement agreement, including paying Alexander all sums agreed to in the settlement agreement.

Alexander abided by this agreement until April 6, 2016, when he submitted a public information request to DFPF. **Exhibit 14**. DFPF submitted this request to your office as **OAG Request ID # 616065**. Alexander again violated the settlement agreement by submitting a total of twelve requests from May 16 to May 19, 2016. **Exhibit 15**. In response to these requests, the DFPF sent Alexander notification on May 23, 2016, he was in violation of the settlement agreement. **Exhibit 16**. In response to this notification, Alexander withdrew all outstanding requests on May 27, 2016. **Exhibit 17**.

Then on June 1, June 6, June 8, and June 10, 2016, Requestor submitted four requests to DFPF. **Exhibit 18**. DFPF responded to the June 1 request with a cost estimate letter. **Exhibit 19**. On June 10, 2016, DFPF also sent Alexander, with a copy to the Requestor, a second notification of his violation of the settlement agreement. **Exhibit 20**. DFPF had reason to believe that Requestor has a close relationship with Alexander based on the information contained in **Exhibit 12**, the similarity in format of Alexander and Requestor’s letters, the same “@dpfps.com” email address used by Alexander and Requestor, and the information requested by Alexander and Requestor is nearly identical. On June 16 and 17, 2016, DFPF received notice the Requestor withdrew all requests submitted on June 1, June 6, June 8, and June 10, 2016. **Exhibit 21**.

Subsequently on June 17, 2016, Requestor submitted the twenty Requests at issue. **Exhibit 1**. DFPF, based upon the belief that Alexander himself is submitting or motivating Requestor to submit the requests, filed suit against Alexander on June 23, 2016. **Exhibit 22**. Alexander while under full legal counsel by his attorney, agreed in the 2002 settlement agreement that he would not contact DFPF. Alexander waived his legal right to request public information from DFPF by entering into the settlement agreement. Alexander, himself and through the Requestor, has violated this agreement on numerous occasions. DFPF notified Alexander and Requestor of these defaults prior to filing suit. In addition, Alexander and Requestor have left DFPF in a difficult position – to either comply with the 2002 settlement agreement or violate the Texas Public Information Act.

Brief of Law in Support of Exceptions

DFPF contends that certain information in the requested records is exempt from disclosure based upon the Texas Government Code, Chapter 552, Sections 552.101 and 552.103 and 552.107 and 552.143.

Confidential Information by Law under § 552.101

DPFP asserts that ***Exhibits 2-11*** in their entirety are subject to the confidentiality exception. Section 552.101 of the Texas Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” As previously explained, the 2002 settlement agreement of a court case makes the information sought by these Requests confidential to Alexander and the Requestor, whom Alexander is operating through in an attempt to circumvent the settlement agreement. Therefore, DPFP contends the information sought by the Requests is confidential under 552.101 in conjunction with the 2002 settlement agreement.

Litigation Exception Under § 552.103

DPFP contends that all of the requested records in ***Exhibits 2-11*** are exempt from disclosure under Texas Government Code, Section 552.103, also known as the litigation exception. Section 552.103 provides exemption from required disclosure 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 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). To establish the applicability of section 552.103(a), a governmental entity must show 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, no pet.); *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).

As previously explained and evidenced in ***Exhibits 16 & 20***, DPFP notified Alexander and Requestor of noncompliance with the 2002 settlement agreement and specifically identifying two potential causes of action that require litigation (seeking specific performance and seeking return of money paid to Alexander as consideration for the settlement agreement) well in advance of the June 17, 2016, Requests. Accordingly, litigation was reasonably anticipated on the date DPFP received the Requests and litigation did so commence on June 23, 2016. ***Exhibit 22***. The information at issue in these Requests is related to the litigation because the very act of making the requests in violation of the 2002 settlement agreement is the reason DPFP has filed litigation against Alexander. Therefore, DPFP contends the information in ***Exhibits 2-11*** is confidential under 552.103.

Attorney-Client Privilege under § 552.101 and § 552.107

DPFP contends that the requested records in ***Exhibits 2, 3, 6, 7, & 8*** are excepted from disclosure under the Texas Government Code, Sections 552.107 and 552.101, as it is information which the attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence, Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.

Sections 552.107 and 552.101 protect the same information as protected under Texas Rule of Evidence 503. *See* Open Records Decision Nos. 676 at 1-3 (2002), 575 at 2 (1990); *see also* *City of Dallas v. Paxton*, 2015 WL 601974 (Tex. App. – Corpus Christi Feb. 12, 2015) *citing* *Abbott v. City of Dallas*, 2014 WL 7466736 (Tex. App. – Austin Dec. 23, 2014). Thus, the standard for demonstrating the attorney-client privilege under the Act is the same as the standard used in discovery under Rule 503. Rule 503 of the Texas Rules of Evidence encompasses the attorney-client privilege and 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:

- (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) (2015).

In order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must: (1) demonstrate the information constitutes or documents a communication, (2) the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body, (3) demonstrate that the communication was between or among clients, client representatives, lawyers, and lawyer representatives, and (4) the communication was confidential and “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.” *See* Open Records Decision No. 676 at 7-10; *see also* TEX. R. EVID. 503.

The documents contained in ***Exhibits 2, 3, 6, 7, & 8*** contain information that meets all four elements establishing the attorney-client privilege. First, the information contained in these exhibits was communicated between the four law firms retained by DPFP and DPFP authorized

representatives. The documents in **Exhibits 2, 3, 6, 7, & 8** constitute communications, as they are bills from the attorneys' offices to DPFPP detailing the legal services performed. Second, **Exhibits 2, 3, 6, 7, & 8** constitutes communications made for the purpose of facilitating the rendition of professional legal services because DPFPP, through its authorized representatives, requested legal counsel to perform specified tasks. Additionally, **Exhibits 2, 3, 6, 7, & 8** contain detailed communications and recommended courses of action based upon the results of the tasks performed by the attorney. Third, the communications were confidential between the attorneys and DPFPP representatives and were not intended to be disclosed. Finally, the communications have remained confidential, have not been reviewed by any other party other than the attorneys and DPFPP representatives duly authorized to seek legal advice on DPFPP's behalf. Privilege has not been waived by DPFPP. Therefore, the communications contained in **Exhibits 2, 3, 6, 7, & 8** are excepted from disclosure under Sections 552.101 and 552.107 of the Act because the information contained therein is protected by the attorney-client privilege in its entirety. Alternatively, if your office does not conclude that the entirety of the records in **Exhibits 2, 3, 6, 7, & 8** are excepted from disclosure, DPFPP has provided notations within **Exhibits 2, 3, 6, 7, & 8** for which DPFPP contends is information exempted from disclosure under Sections 552.101 and 552.107 and protected by the attorney-client privilege.

Attorney Work Product Privilege under § 552.101

DPFPP contends information contained in **Exhibits 2, 3, 7, 8, & 9** are subject to the attorney work product privilege. Texas Rule of Civil Procedure 192.5 encompasses the attorney work product privilege in conjunction with 552.101 of the Act. For purposes of Section 552.022 of the Government Code, information is confidential under Rule 192.5 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, which 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) and (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. 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* *In re Exxon Mobil Corp.*, 97 S.W.3d 653, 357 (Tex. App.—Houston [14th Dist] 2003, no writ) (*citing* *Pittsburgh Corning Corp v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

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 or created for trial. Documents in **Exhibits 2, 3, 7, 8, & 9** indicate the litigation the attorney invoiced and billed to DPFPP. These attorney bills were created in anticipation of litigation and trial. Thus the first prong is met.

The second prong of the work product test requires the governmental body to show that 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). The information

highlighted in the attorney fee bills contains mental impressions and opinions of the attorneys which is preparing the case for trial. The highlighted information reveals legal strategy and the direction defense counsel is taking the case, which is the essence of attorney work product. Both prongs of the test to demonstrate attorney work product are met in regards to the highlighted information in *Exhibits 2, 3, 7, 8, & 9*.

Confidentiality of Certain Investment Information under § 552.143

DPFP contends information contained in *Exhibit 6* are subject to withholding under the Section 552.143 of the Government Code which provides in part as follows:

- (a) All information prepared or provided by a private investment fund and held by a governmental body that is not listed in Section 552.0025 (b) is confidential and excepted from the requirements of Section 552.021.
- (b) Unless the information has been publicly released, pre-investment and post investment diligence information, including reviews and analyses, prepared or maintained by a governmental body or a private investment fund is confidential and excepted from the requirements of Section 552.021, except to the extent it is subject to disclosure under Subsection (c).

Information contained in *Exhibit 6* relates to pre and post investment diligence information on a variety of real estate projects. This firm detailed the ownership structures of the referenced entities and provided this information to DPFP. If your office allows DPFP to withhold *Exhibit 6*, DPFP will release the information as required by 552.0025(b) of the Act.

In summary, the DPFP contends that based upon the authorities cited above, all of the requested records and information which have been produced to your office for inspection in *Exhibits 2-11*, are excepted from disclosure, in whole or in part. Thank you for your consideration in this matter.

Very truly yours,
MESSER, ROCKEFELLER & FORT, PLLC



MARIE N. ROVIRA
ATTORNEY FOR THE PENSION

MNR/SG

Enclosures: Exhibits 1-22ⁱⁱⁱ

cc: Julie Kobel

via email: julie.kobel@dpfps.org

Joshua Mond
General Counsel
Dallas Police and Fire Pension System

ⁱ Requestor numbered her requests 1601-001 to 1601-022. However, there is no request numbered 1601-016 or 1601-019.

ⁱⁱ DFPF is attempting to locate the actual court filings and will send to your office within the next five days if located.

ⁱⁱⁱ Exhibit 1: Requests
Exhibit 2: Documents responsive to request 1601-001
Exhibit 3: Documents responsive to requests 1601-002 & 1601-003
Exhibit 4: Documents responsive to requests 1601-004 & 1601-005
Exhibit 5: Documents responsive to request 1601-006
Exhibit 6: Documents responsive to requests 1601-008 & 1601-009
Exhibit 7: Documents responsive to requests 1601-011 & 1601-012
Exhibit 8: Documents responsive to requests 1601-013, 1601-014, & 1601-015
Exhibit 9: Documents responsive to requests 1601-017 & 1601-018
Exhibit 10: Documents responsive to request 1601-021 AMEX - 021
Exhibit 11: Documents responsive to request 1601-022
Exhibit 12: Documents evidencing relationship between Requestor and Columbus Alexander
Exhibit 13: Settlement agreement between DFPF and Columbus Alexander and court docket
Exhibit 14: Request submitted by Columbus Alexander on April 6, 2016
Exhibit 15: Requests submitted by Columbus Alexander May 16 to May 19, 2016
Exhibit 16: First notification of default, May 23, 2016
Exhibit 17: Withdrawal of all outstanding requests, May 27, 2016
Exhibit 18: June 1, June 6, June 8, and June 10, 2016, requests from Requestor
Exhibit 19: Cost estimate letter, June 15, 2016
Exhibit 20: Second notification of default, June 10, 2016
Exhibit 21: Withdrawal of outstanding requests, June 16 and 17, 2016
Exhibit 22: *Dallas Police and Fire Pension System v. Columbus Alexander* petition, June 23, 2016