KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 7, 2016

Ms. Marie N. Rovira
Counsel for the Dallas Police and Fire Pension System
Messer, Rockefeller & Fort, PLLC
6351 Preston Road, Suite 350
Frisco, Texas 75034

OR2016-20208

Dear Ms. Rovira:

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# 625439.

The Dallas Police and Fire Pension System (the "system"), which you represent, received multiple requests from the same requestor for the following information during specified time periods: agreements, contracts, and engagement agreement letters by and between the system and specified third parties; invoices received by the system from specified third parties; detailed billings received by the system from specified third parties; all open records requests received by the system; all open records requests referred to the Office of the Attorney General; all open records requests received from the Dallas Morning News; and all invoices or billings from specified third parties paid by the system. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.143 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rule of Civil Procedure. We have considered the submitted arguments and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (permitting interested

third party to submit to attorney general reasons why requested information should or should not be released).

Initially, we note some of 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:
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> . . .
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> (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body; [and]
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> . . .
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> (16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Id. § 552.022(a)(3), (16). The submitted information contains information in an account, contract, or voucher relating to the receipt or expenditure of funds by the system that is subject to section 552.022(a)(3) and attorney fee bills that are subject to section 552.022(a)(16). This information must be released unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(3), (16). Although you seek to withhold some of the information subject to section 552.022 under sections 552.103 and 552.107 of the Government Code, these exceptions are discretionary 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); *see also* Open Records Decision Nos. 676 at 10-11 (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the information subject to section 552.022 may not be withheld under section 552.103 or section 552.107 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence and Texas Rules of Civil Procedure are "other law" that makes information expressly confidential for purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will address the system's claims 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. We note sections 552.101 and 552.143 can make information confidential under the Act. Accordingly, we will consider your arguments under sections 552.101 and 552.143 for the information subject to section 552.022, as well as the remaining

information. We will also consider your arguments for the submitted information not subject to section 552.022.

The system contends the submitted information should be withheld under section 552.101 of the Government Code in conjunction with a settlement agreement. The system states the terms of the settlement agreement stipulate that a named party to the settlement agreement "will not call upon or contact the [system,] its [t]rustees or employees." Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. However, the system has not pointed to any statutory confidentiality provision, nor are we aware of any, that would make any of the information at issue confidential for purposes of section 552.101. *See, e.g.*, Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, the system may not withhold the information at issue under section 552.101 of the Government Code. Further, we note information is not confidential under the Act simply because the parties anticipate or request that it be kept confidential. *See Indus. Found, v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110 Government Code). Consequently, unless the submitted information comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) 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:
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> > (A) between the client or the client's representative and the client's lawyer or the lawyer's representative;
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> > (B) between the client's lawyer and the lawyer's representative;
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> > (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
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> (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* ORD 676. 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 [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

You state the submitted fee bills contain communications between attorneys for the system and system representatives that were made for the purpose of facilitating the rendition of legal services to the system. You further state these communications were intended to be, and have remained, confidential. Based on your representations and our review, we conclude the system may withhold the information we have marked under rule 503 of the Texas Rules of Evidence.[1] However, you have not demonstrated the remaining information at issue consists of privileged attorney-client communications. Further, we note an entry stating a memorandum or an e-mail was prepared or drafted does not demonstrate the document was communicated to the client. Accordingly, the system may not withhold any of the remaining information at issue under rule 503 of the Texas Rules of Evidence.

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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[1]As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

work-product aspect of the work-product privilege. *See* Open Records Decision No. 677 at 9–10 (2002). 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 state the information you marked in the remaining information subject to section 552.022 of the Government Code consists of attorney core work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. You state this information was created in anticipation of litigation. You further state this information reflects attorneys' mental impressions, conclusions, or legal theories. Having considered the submitted arguments and reviewed the information at issue, we conclude some of the information at issue, which we have marked, constitutes privileged attorney core work product that may be withheld under rule 192.5. Accordingly, the system may withhold the information we have marked under rule 192.5 of the Texas Rules of Civil Procedure. However, we find you have not demonstrated any of the remaining information at issue contains the mental impressions, opinions, conclusions, or legal theories of an attorney or the attorney's representative that was developed in anticipation of litigation or for trial. We therefore conclude the system may not withhold any of the remaining information at issue under rule 192.5 of the Texas Rules of Civil Procedure.

Section 552.143 of the Government Code provides, in part, the following:

> (a) All information prepared or provided by a private investment fund and held by a governmental body that is not listed in Section 552.0225(b) is confidential and excepted from the requirements of Section 552.021.
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> (b) Unless the information has been publicly released, pre-investment and post-investment diligence information, including reviews and analyses, prepared for 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).

Gov't Code § 552.143(a), (b). You contend the remaining information in Exhibit 6 is subject to section 552.143. You state the information at issue "relates to pre and post investment diligence information on a variety of real estate projects." However, we find you have failed to demonstrate the information at issue was prepared or provided by a private investment fund or constitutes pre-investment or post-investment due diligence information. Accordingly, we find the system may not withhold this informaiton under section 552.143 of the Government Code.

Section 552.103 of the Government Code provides 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.
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> . . .
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> (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.

Id. § 552.103(a), (c). A 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 (1) litigation was 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551.

To establish litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect that litigation is "realistically contemplated." *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld from disclosure if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is "reasonably likely to result"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* ORD 452 at 4.

You assert the information not subject to section 552.022 of the Government Code relates to litigation reasonably anticipated by the system. You state, and provide documentation showing, prior to the system's receipt of the instant request, the system notified a named individual and the requestor of noncompliance with a specified settlement agreement and specifically identified two potential causes of action that require litigation. Based on these representations and our review, we find the system reasonably anticipated litigation at the time it received the request. You state the information at issue is directly related to the dispute between the system and the named individual and the requestor regarding the specified settlement agreement. We find the information at issue is related to the anticipated litigation. Therefore, the system may withhold the information not subject to section 552.022 under section 552.103 of the Government Code.[2]

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the system may withhold the information we have marked under rule 503 of the Texas Rules of Evidence. The system may withhold the information we have marked under rule 192.5 of the Texas Rules of Civil Procedure. The system may withhold the information not subject to section 552.022 of the Government Code under section 552.103 of the Government Code. The system must release the remaining information.

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[2]As our ruling is dispositive, we need not address your remaining argument against disclosure of this 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,

Kenny Moreland
Assistant Attorney General
Open Records Division

KJM/som

Ref: ID# 625439

Enc. Submitted documents

c: Requestor
(w/o enclosures)

January 25, 2017

RESOLUTION

WHEREAS, the Dallas Police & Fire Pension System (System) has taken steps that include: (1) making risky investments through limited-purpose entities that it has formed without any legal authority, or with which it has partnered without legal authority, under agreements that purport to make information about such entities secret; (2) borrowing to make investments instead of only investing "surplus" as required by law; (3) engaging in extensive, expensive, and unnecessary travel around the world by board members for the ostensible purpose of inspecting investments; (4) authorizing excessive disbursements to pensioners from DROP accounts even when the amount of such disbursements impaired the Dallas Police & Fire Pension System's ability to pay retirement, disability, and survivor pension benefits; (5) considering the sale of assets to resume DROP disbursements even after temporarily deferring them under a judicial order; (6) authorizing additional millions of dollars in response to "cash calls" from investment enterprises even when such disbursements also impair the Dallas Police & Fire Pension System's ability to pay retirement, disability, and survivor pension benefits; (7) allowing the system and undisclosed investments to be run by current and former employees who are not fiduciaries of the system; (8) making board decisions without properly posting agendas that adequately describe items to be discussed or actions to be considered, as required by law; and (9) incurring wasteful, uncontrolled, and high administrative expenses;

WHEREAS, the Dallas Police & Fire Pension System's practices, including overstating asset values, misclassifying risky investments to make them appear safer and to make the system's investments appear more diversified, entering into opaque investment agreements, and failing to post sufficiently informative agenda items, as required by law, are among the many methods that the System has used to evade state and city oversight that would have prevented many, if not all, of the enumerated improper practices and the current dire financial condition;

WHEREAS, the System has gone to the lengths of hiring a private investigator to conduct a forensic trace on a councilmember trustee who publicly opposed the System's irresponsible steps and clandestine practices;

WHEREAS, Article 6243a-1 governs the pension funds of police officers and fire fighters to permit the consolidation of the terms of certain pension plans;

WHEREAS, Article 6243a-1 delegates unfettered powers to the System and its board and members, with no meaningful standards or safeguards, and therefore the funds supposedly held in trust by the system must be protected by a duly appointed and authorized fiduciary operating under court supervision;

WHEREAS, several past and current System board members appear to have direct personal financial interests, including sizable balances under the System's Deferred Retirement Option Plan (DROP) program, creating material conflicts between their personal financial interests and the interests of the System and its members, pensioners, and beneficiaries, but they have consistently failed to recuse themselves from board decisions and instead have deliberated and voted on matters subject to those conflicts, and appear determined to continue this practice, and therefore the System and its members and pensioners must be protected by a disinterested and loyal fiduciary;

WHEREAS, some of the persons who administer Article 6243a-1 apparently interpret it to limit or eliminate the city's powers to protect the financial security of its valued first responders, retired first responders, and their families and survivors;

WHEREAS, the System's board has administered plan assets in a manner that impairs the system's ability to achieve its primary fiduciary purpose of paying retirement, disability, and survivor pension benefits;

WHEREAS, Article 6243a-1's lack of limits, checks, and balances on the powers of the pension system board and plan members make it difficult or impossible for the state or the city to obtain necessary records and information needed for adequate oversight of the System, and permitted the System for years to overstate asset values to conceal its deteriorating financial condition from the city, the state, and its own members, directly causing the current emergency situation;

WHEREAS, because of the above and other deficiencies in Article 6243a-1, the Dallas Police & Fire Pension System has escaped any meaningful governance supervision, leading to incurrence of obligations far in excess of assets, increased benefits and features such as shockingly generous DROP returns, without the ability to honor those commitments, and materially diminished morale, security, and retention among important first responders who participate in plans administered by the Dallas Police & Fire Pension System;

WHEREAS, the city has insufficient tools under Article 6243a-1 to enable the city to protect the System's pensioners' retirement, disability, and survivor pension benefits while maintaining its own fiscal health and the safety of its residents;

WHEREAS, this situation has created a crisis posing an imminent and substantial threat to the fiscal health and public safety of the city;

WHEREAS, the System board, if it validly exists, is constitutionally and statutorily required to hold assets of the system in trust but has inexplicably abandoned its fiduciary obligations, as evidenced by, among other things, the board's stated intent to liquidate assets to resume uncontrolled DROP disbursements even while leaving underfunded its ability to pay retirement, disability, and survivor pensions;

WHEREAS, this situation as created an emergency substantially threatening the financial security of valued and courageous first responders who participate in pension plans created based on Article 6243a-1, as well as the financial security of their families;

WHEREAS, this emergency requires substantially increased control and oversight of the System;

WHEREAS, absent extraordinary measures, the Dallas Police & Fire Pension System will soon run out of sufficient funds to pay retirement, disability, and survivor pension benefits;

WHEREAS, the city's extensive and intensive efforts to negotiate agreed plan amendments and joint proposals to be considered by the Legislature to alleviate this emergency have been rejected by the System;

WHEREAS, until there are statutory changes that provide adequate governance tools to the city and/or financial support, the only remaining feasible method of meeting this emergency and of effectively supporting and protecting, for the near and long term, the Dallas Police & Fire Pension System, is extraordinary judicial action including, for example, receivership, declaratory relief, mandamus, and injunction; and,

WHEREAS*,* the public interest, the city's interest, and fundamental fairness require that the city indemnify and reimburse any and all such councilmembers who take such actions for their consequential expenses, and defend and indemnify them from any liability arising from such actions, and such indemnity, reimbursement, and defense will serve a public purpose; **Now, Therefore,**

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF DALLAS:

Section 1. That the members of the city council who are also Dallas Police & Fire Pension System board members are strongly encouraged to take all lawful measures, including without limitation retaining outside counsel for the purpose of seeking judicial remedies, to address this dire emergency situation.

Section 2. That the city shall, to the fullest extent permitted by applicable law, indemnify, hold harmless, and defend all such councilmembers who take such actions from and against all losses, claims, actions, demands, obligations, judgments, settlements, damages, liabilities, costs, and/or expenses of any kind (including without limitation attorneys' fees and costs), whether or not involving a third-party claim, to which such councilmembers may become subject that in any way arise from, relate to, and/or result from any such actions.

Section 3. If any such councilmember takes any such actions, including without limitation retaining outside counsel for the purpose of seeking judicial remedies, the city shall pay (as they are incurred) such councilmember's legal and other expenses (including without limitation attorneys' fees and costs, and the costs of any investigation

and/or preparation) incurred in connection therewith; provided, however, that the city attorney will review any such payments to ensure the public purpose is accomplished and the public's investment is protected, and that no payment shall be made without the city attorney's approval on those grounds, which approval shall not be unreasonably withheld.

Section 4. If any such councilmember seeks judicial remedies, such councilmember shall, to the fullest extent permitted by applicable law, apply for an order for payment by any adverse parties of such councilmember's legal expenses (including without limitation attorneys' fees and costs), and such councilmember shall direct payment to the city of any such legal expenses that such councilmember actually and finally recovers from any adverse parties.

Section 5. That the city remains dedicated to providing a secure pension for retired and disabled first responders and their families, and providing for survivors, while not jeopardizing the public treasury, and the city will receive a return benefit from the proposed reimbursement, defense, and indemnity because such legal action is necessary to save the System from looming insolvency, which would severely compromise the morale and retention of the city's first responders and result in substantial claims against the city that would be expensive and time-consuming to defend even though not meritorious, and there would be financial risks to the city.

Section 6. That regardless of any legal action by the city council members who are trustees of the System or by others, the city will continue to seek consensual remedies for this emergency situation.

Section 7. That this resolution shall take effect immediately from and after its passage in accordance with the provisions of the Charter of the city of Dallas, and it is accordingly so resolved.

APPROVED AS TO FORM:

LARRY E. CASTO, City Attorney

By _____
Assistant City Attorney