



July 22, 2002

Ms. Susan C. Rocha  
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San Antonio, Texas 78205-3111

OR2002-4015

Dear Ms. Rocha:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 165993.

The San Antonio Water System ("SAWS"), which you represent, received four requests for information regarding attorney fee bills from the law firm of Bracewell & Patterson, L.L.P. In addition, one of the requestors also seeks information regarding attorney fee bills from the law firms of Strausberger & Price, L.L.P. and Wells Pinkney & McHugh. We note that you have submitted a separate request for a decision regarding the request for billing information from Strausberger & Price and Wells Pinkney & McHugh. Accordingly, we will issue a separate decision with respect to that submission and do not address that information in this ruling. You claim that information regarding the billing of Bracewell & Patterson is excepted from disclosure under sections 552.101, 552.103, 552.104, 552.107, 552.110, and 552.111 of the Government Code, Rules 503 and 507 of the Texas Rules of Evidence, Rule 192.5 of the Texas Rules of Civil Procedure, and Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct. We have considered the exceptions you claim and reviewed the submitted information.

As a preliminary matter, we note that you have failed to fully comply with section 552.301 of the Government Code. Under section 552.301(b), a governmental body that receives a request for information that it wishes to withhold from public disclosure must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. You indicate that SAWS received this request on May 3, 2002. Therefore, you were required to submit your request for a decision, stating the exceptions that apply, by May 16, 2002. Although you timely submitted your initial request for a decision to this office, we note that in your brief of May 24, 2002, you raise sections 552.105 and 552.109 as additional exceptions to disclosure. Sections 552.105 and 552.109 are discretionary exceptions that protect the governmental body's interests and may be waived. *See* Open Records Decision No. 552 (1989) (discretionary exceptions in general). In this instance, we find that you did not timely raise sections 552.105 and 552.109 and have therefore waived these exceptions.

Next, we note that the submitted attorney fee bills are subject to section 552.022(a) of the Government Code, which provides in pertinent part as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

.....

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(16). Under section 552.022, attorney fee bills must be released unless they are expressly confidential under other law. Sections 552.103, 552.107, and 552.111 of the Government Code are discretionary exceptions to disclosure that protect the governmental body's interests and are therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.— Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 630 at 4-5 (1994) (governmental body may waive statutory predecessor to section 552.107), 473 (1987) (governmental body may waive section 552.111); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, SAWS may not withhold the requested attorney fee bills under sections 552.103, 552.107, and 552.111 of the Government Code.

We note, however, that the attorney-client privilege and work product privilege are also found in Rule 503 of the Texas Rules of Evidence and Rule 192.5 of the Texas Rules of Civil Procedure, respectively. Recently, the Texas Supreme Court held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). We note that the Supreme Court did not hold that the Texas Disciplinary Rules of Professional Conduct are “other law” within the meaning of 552.022. Thus, we will determine only whether the submitted information is excepted under section 552.104 or is confidential under section 552.110, Rule 503, Rule 507 or Rule 192.5.

Section 552.104 of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage from the release of information will not suffice. *See* Open Records Decision Nos. 541 (1990), 592 (1991). In this case, you have not argued that SAWS is engaged in a specific open bidding situation, or otherwise demonstrated how the release of the information would give an advantage to a competitive bidder. Gov't Code §552.301(e)(1)(A) (requiring a

governmental body to explain the applicability of a raised exception). Therefore, we determine that section 552.104 does not apply in this instance.

You claim that the requested fee bills are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the property interests of private parties by excepting from disclosure two types of information: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>1</sup> Upon review of your arguments and the submitted information, we find that you

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<sup>1</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

have failed to establish that any of the information you have highlighted in pink constitutes a trade secret.<sup>2</sup>

With respect to the commercial or financial branch of section 552.110, we note that section 552.110 was not designed to protect a governmental body's interests, but its ability to obtain information from private entities that may have no legal obligation to provide such information. Open Records Decision No. 541 (1990); *see generally* Open Records Decision Nos. 504, 494 (1988). Upon review, we find that none of the information you seek to withhold under section 552.110 consists of commercial or financial information obtained from a third person. *See* Gov't Code § 552.110(b). Accordingly, we determine that section 552.110 does not apply in this instance.

Next, you claim that portions of the attorney fee bills are protected by the attorney work product privilege. An attorney's work product is confidential under Rule 192.5. Work product is defined as

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.

Tex. R. Civ. P. 192.5(a). Accordingly, to withhold attorney work product from disclosure under Rule 192.5, a governmental body must demonstrate that the material, communication, or mental impression was created for trial or in anticipation of litigation. *Id.* To show that the information at issue was created in anticipation of litigation, a governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See National 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. Information that meets the work product test is confidential under Rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in Rule 192.5(c). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). In this instance, we are unable to determine, nor have you explained, what specific information you claim is protected by the privilege.

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<sup>2</sup>Because we determine that no portion of the fee bills at issue are protected as trade secrets under section 552.110(a) of the Government Code, we do not address your trade secret argument under Rule 507 of the Texas Rules of Evidence.

Furthermore, we find that you have not specifically explained how any portions of the attorney fee bills at issue reveal material prepared or mental impressions developed for or in anticipation of litigation. We therefore determine that SAWS may not withhold any of the information in the attorney fee bills pursuant to Rule 192.5 and the attorney work product privilege.

We next address your claim under the attorney-client privilege. Texas Rule of Evidence 503(b)(1) provides:

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 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* Tex. R. Evid. 503(a)(5).

Thus, 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. Upon a demonstration of all three factors, the privileged information is 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); *see also* Tex. R. Evid. 511 (waiver of privilege by voluntary disclosure). After careful review of your arguments and the submitted documents, we agree that much of the information you have highlighted in

blue consists of confidential communications protected by the attorney-client privilege and Rule 503. Therefore, with the exception of the information we have marked for release, SAWS may withhold the information you have highlighted in blue under Rule 503 of the Texas Rules of Evidence.

Finally, you indicate that the submitted information contains several bank routing numbers and account numbers from checks issued by SAWS that are protected by section 552.136 of the Government Code. Section 552.136 provides in relevant part:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. Accordingly, SAWS must withhold the account numbers and routing numbers that you have highlighted in purple under section 552.136 of the Government Code. We note, however, that a portion of the information you have highlighted in purple does not consist of account numbers or routing numbers, and you have not explained, nor is it apparent from the documents, how this information constitutes information protected by section 552.136. Therefore, we have marked the information that must be released.

In summary, we conclude that: (1) with the exception of the information we have marked for release, SAWS may withhold the information you have highlighted in blue under Rule 503 of the Texas Rules of Evidence; and (2) with the exception of the information which we have marked for release, SAWS must withhold the information you highlighted in purple under section 552.136 of the Government Code. The remaining submitted information must be released to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by

filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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Assistant Attorney General  
Open Records Division

DRS/seg

Ref: ID# 165993

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