



October 31, 2002

Ms. Amy L. Sims
Assistant City Attorney
City of Lubbock
P. O. Box 2000
Lubbock, Texas 79457

OR2002-6219

Dear Ms. Sims:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 171482.

The City of Lubbock (the "city") received a request for copies of "any evaluation, report, feasibility study, or internally generated memoranda pertaining to the effect or advisability of the residential development of property bordering on Lake Allen Henry in Garza County, Texas." You claim that some of the requested information is excepted from disclosure pursuant to sections 552.101, 552.103, 552.106, 552.107, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and have reviewed the submitted information.

We note at the outset that the city did not submit some of the requested information to us for our review. We, therefore, presume that the city has already provided the requestor with this information. If not, the city must do so at this time. *See* Gov't Code §§ 552.006, .301, .302; *see also* Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances).

Next, we note that the information at issue contains a copy of city ordinance No. 10132, which we have marked. Municipal ordinances are matters of public record and may not be withheld from disclosure under the Public Information Act (the "Act"). *See* Open Records Decision Nos. 551 at 2-3 (1990) (laws or ordinances are open records), 221 at 1 (1979) ("official records of the public proceedings of a governmental body are among the most open

¹ As the city did not submit to this office written comments stating the reasons why section 552.101 of the Government Code would allow this information to be withheld from disclosure, we assume that this exception to disclosure is no longer being asserted by the city. *See* Gov't Code §§ 552.301, .302.

of records"). Accordingly, we conclude that the city must release the marked city ordinance to the requestor.

Additionally, we note that the information at issue contains some information that is subject to section 552.022 of the Government Code. Section 552.022 provides in pertinent part that

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:

...

- (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

- (5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate; and

...

- (18) a settlement agreement to which a governmental body is a party[.]

Gov't Code §§ 552.022(a)(3),(5),(18). The section 552.022 information that we have marked is encompassed by the above-noted categories of information under section 552.022. This information must be released to the requestor pursuant to section 552.022 unless it is expressly confidential under other law. Although the city claims that this information is excepted from disclosure under sections 552.103, 552.107(1) and 552.111 of the Government Code, we note that these exceptions to disclosure are discretionary exceptions that protect the governmental body's interests and may be waived.² Accordingly, we conclude that the city may not withhold this section 552.022 information under any of these particular exceptions to disclosure. We note, however, that the Texas Supreme Court

² Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

recently held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney work product and attorney-client privileges are also found in rule 192.5 of the Texas Rules of Civil Procedure and rule 503 of the Texas Rules of Evidence, respectively. Therefore, we will determine whether any portion of this section 552.022 information is confidential under rule 192.5 or rule 503.

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 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. 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 id.* 503(a)(5).

Thus, 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. 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). After carefully reviewing your representations and the section 552.022 information that you have marked as excepted from disclosure under section 552.107, we find that the city has failed to sufficiently demonstrate how any portion of this information constitutes a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client. Accordingly, we conclude that the city may not withhold any portion of this particular information under rule 503. Consequently, the city must release this information to the requestor.

We note that for purposes of section 552.022 of the Government Code, 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, in order 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. *See 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.–Houston [14th Dist.] 1993, no writ).

After carefully reviewing your representations and the section 552.022 information that you have marked as excepted from disclosure under section 552.111, we find that none of this information constitutes the work product of an attorney or an attorney's representative developed in anticipation of litigation or for trial that contains the attorney's or the attorney's

representative's mental impressions, opinions, conclusions, or legal theories. Accordingly, we conclude that the city may not withhold any portion of this information pursuant to rule 192.5 of the Texas Rules of Civil Procedure. Consequently, the city must release this information to the requestor.

We now address your section 552.103 claim with respect to the remaining submitted information. Section 552.103 provides in pertinent part:

(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.

....

(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). The city maintains the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the governmental body receives the request for information and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *see also 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). The city must meet both prongs of this test for information to be excepted under section 552.103(a).

A governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture" when establishing that litigation is reasonably anticipated. *See Open Records Decision No. 452 at 4 (1986)*. Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.³ *See Open Records*

³ In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see Open Records Decision*

Decision Nos. 555 (1990), 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986).

You state that litigation is reasonably anticipated by the city because the city received a claim letter from an attorney for potentially opposing parties that directly relates to the requested information. You also state that all of the materials included in this request for decision relate directly to the anticipated litigation matters as they involve the issues related to the claim letter. Based on our review of your representations, the submitted claim letter(s), and the remaining submitted information, we find that the city has established through concrete evidence that litigation was reasonably anticipated by the city on the date that the city received the present request and that the remaining information is related to that reasonably anticipated litigation for purposes of section 552.103. Accordingly, we conclude that the city may withhold the entirety of the remaining submitted information pursuant to section 552.103 of the Government Code.⁴

However, we note that 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 potential opposing parties in the anticipated litigation is not excepted from disclosure under section 552.103(a) and may not be withheld from disclosure on that basis. 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 city must release the remaining requested information that was not submitted to us for a decision to the extent that it has not yet done so. The city must also release the marked city ordinance to the requestor. The city must release to the requestor the section 552.022 information that we have marked. The city may withhold the remaining submitted information that is not subject to section 552.022 pursuant to section 552.103 of the Government Code.

No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

⁴ Because we base our ruling on the above-noted exceptions to disclosure, we need not address the applicability of your remaining claims.

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,

A handwritten signature in black ink that reads "Ronald J. Bounds". The signature is written in a cursive style with a large initial 'R'.

Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 171482

Enc. Marked documents

c: Mr. Harvey L. Morton
P. O. Box 10305
1604 Avenue M
Lubbock, Texas 79408
(w/o enclosures)