



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 13, 2005

Mr. Duncan C. Norton
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Texas Commission on Environmental Quality
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Mr. Paul Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
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OR2005-00428

Dear Mr. Norton and Mr. Sarahan:

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# 216812.

The Texas Commission on Environmental Quality (the "commission") received a request for five types of information relating to "the Jones Road Groundwater Plume and the former Bell Dry Cleaners." The commission informs us that it has released some of the requested information. The Office of the General Counsel and the Litigation Division have submitted separate briefs, as well as separate groups of documents that each seeks to withhold from the public. The General Counsel claims that the information that it has submitted is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. The Litigation Division claims exceptions for the information that it has submitted

under sections 552.103, 552.107, 552.111, 552.136, and 552.137.¹ We have considered the claimed exceptions and have reviewed the submitted information.²

We first note that a small amount of the information submitted by the Litigation Division is subject to section 552.022 of the Government Code. This section provides in 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:

...
(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(17). The documents that the Litigation Division has submitted at Tab 4 include information that also is contained in a public court record. This information must be released under section 552.022(a)(17) unless any of the information is expressly confidential under other law. Sections 552.103, 552.107, and 552.111 of the Government Code are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See* Gov't Code § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (Gov't Code § 552.103 may be waived); Open Records Decision Nos. 677 at 10-11 (2002) (attorney work-product privilege under Gov't Code § 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to Gov't Code § 552.103 subject to waiver), 470 at 7 (1987) (statutory predecessor to Gov't Code § 552.111 subject to waiver). As such, sections 552.103, 552.107, and 552.111 are not other law that makes information confidential for the purposes of section 552.022. Thus, the commission may not withhold any of the information that is subject to section 552.022(a)(17) under sections 552.103, 552.107, or 552.111.

The Texas Supreme Court has held, however, that the Texas Rules of Evidence and Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The

¹Although the Litigation Division also initially raised sections 552.104 and 552.110, no arguments have been submitted in support of these exceptions. Accordingly, this decision does not address sections 552.104 and 552.110. *See* Gov't Code §§ 552.301(e)(1)(A), .302, .305.

²To the extent that the submitted information consists of representative samples of responsive information, this letter ruling assumes that such information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the commission to withhold any information that is substantially different from the submitted information. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Litigation Division contends that the information that is subject to section 552.022 is protected by the attorney-client and work product privileges. The attorney-client privilege also is found at Texas Rule of Evidence 503. The attorney work product privilege also is found at Texas Rule of Civil Procedure 192.5. Therefore, we will consider whether any of the information that is subject to section 552.022 is confidential under rules 503 and 192.5.

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

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

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

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show 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). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

In this instance, the Litigation Division has not demonstrated that any of the information that is subject to section 552.022 either constitutes or documents a confidential attorney-client communication. We therefore conclude that the commission may not withhold any of that information under Texas Rule of Evidence 503.

Texas Rule of Civil Procedure 192.5 encompasses the attorney work product privilege. For the purpose of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent that the information implicates the core 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 that 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 that the information at issue was created in anticipation of litigation, has two parts. 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 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 that the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney's 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 that 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, no writ).

The Litigation Division has not demonstrated that any of the information that is subject to section 552.022 constitutes core attorney work product, and therefore the commission may not withhold any of that information under Texas Rule of Civil Procedure 192.5. As the Litigation Division asserts no other basis for the withholding of the information that is subject to section 552.022, that information must be released. We have marked the information that the commission must release under section 552.022.

The General Counsel and the Litigation Division seek to withhold most of the remaining information at issue under section 552.103. This exception provides in 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). A governmental body that raises section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See Open Records Decision No. 452 at 4 (1986).* To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* When the governmental body is the prospective plaintiff in the anticipated litigation, 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 if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is "reasonably likely to result").* Among other examples, this office also has concluded that litigation was reasonably anticipated where the prospective opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), *see Open Records Decision No. 336 (1982)*; (2) 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 No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

The General Counsel states that the information that it has submitted relates to a pending lawsuit to which the commission is a party. The General Counsel also indicates, and has submitted documentation for the purpose of demonstrating, that the commission was a party to the pending lawsuit when the commission received this request for information. The Litigation Division states that the remaining information that it has submitted at Tabs 1, 2, 3 and 4 relates to an anticipated cost recovery action that the commission is required to pursue under section 361.197 of the Texas Health and Safety Code. The Litigation Division also states that the cost recovery action was reasonably anticipated when the commission received this request for information.³

Based on the representations of the General Counsel, the submitted documentation of the pending lawsuit, and our review of the information that the General Counsel has submitted, we conclude that the commission may withhold that information at this time under section 552.103. Based on the representations of the Litigation Division and our review of the remaining information that the Litigation Division has submitted at Tabs 1, 2, 3 and 4, we also conclude that the commission may withhold that information at this time under section 552.103.⁴

In reaching these conclusions, we assume that the opposing parties in the pending or anticipated litigation have not seen or had access to any of the information that the General Counsel and Litigation Division seek to withhold under section 552.103. The purpose of this exception is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that relates to the litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing parties in pending or anticipated litigation have seen or had access to information that relates to the litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Furthermore, the applicability of section 552.103 ends when the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

³We note that a contested case under the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, constitutes litigation for purposes of section 552.103 of the Government Code. *See* Open Records Decision No. 588 at 7 (1991) (contested case under statutory predecessor to APA constituted litigation for purposes of statutory predecessor to Gov't Code § 552.103).

⁴As we are able to make this determination, we need not address the other claims of the General Counsel and Litigation Division with regard to the information in question.

Lastly, we address the Litigation Division's claims with respect to the information that it has submitted at Tabs 5 and 6. With respect to Tab 5, the Litigation Division raises section 552.136, which provides as follows:

(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. We have marked account numbers at Tab 5 that the commission must withhold under section 552.136.

With respect to Tab 6, the Litigation Division raises section 552.137. This exception provides as follows:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Section 552.137 excepts from public disclosure certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with a governmental body, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. The types of e-mail addresses listed in section 552.137(c) may not be withheld under section 552.137. Likewise, this exception is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We agree that the highlighted e-mail addresses in the information at Tab 6 are confidential under section 552.137(a). The Litigation Division informs us that the individuals to whom these e-mail addresses belong have not consented to their public disclosure. Therefore, the commission must withhold these e-mail addresses under section 552.137.

In summary: (1) the commission must release the information that is subject to section 552.022(a)(17); (2) the commission may withhold the information submitted by the General Counsel and the remaining information submitted by the Litigation Division at Tabs 1, 2, 3 and 4 under section 552.103; (3) the commission must withhold the marked account numbers under section 552.136; and (4) the commission must withhold the highlighted e-mail addresses under section 552.137. The rest of the submitted information must be released.

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 Dep't of Pub. 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, appearing to read "James W. Morris, III". The signature is written in a cursive style with a large, looping initial "J" and a long horizontal flourish extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 216812

Enc: Submitted documents

c: Ms. Deb Larrabee
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