



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 3, 2005

Mr. James R. Evans, Jr.
Linebarger Goggan Blair & Sampson, L.L.P.
P.O. Box 17428
Austin, Texas 78760

OR2005-01027

Dear Mr. Evans

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 218198.

The Caldwell County Appraisal District (the "district") received a request for "copies of the bills submitted by Linebarger, Goggan, Blair, and Sampson, LLP defending [the district] and its [sic] employees against allegations of any kind with the Board of Tax Professional Examiners" and copies of the documents authorizing the named law firm to defend the district's employees. You have marked the entries in the submitted fee bills that you state are responsive to the request. You claim that this information is protected from disclosure by the attorney-client privilege and the attorney work product privilege. We have considered your claims and reviewed the submitted information.¹ We have also reviewed comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note the request for information encompasses documents authorizing the named law firm to represent the district's employees. You have not submitted any information responsive to this part of the request for our review. *See* Gov't Code § 552.301(e)(1)(D). Therefore, to the extent responsive information exists, we assume that you have released it

¹We note that you indicate that the remaining portions of the submitted information are not responsive to the request. Accordingly, this ruling does not address the public availability of that particular information, and the district need not release it to the requestor in response to this ruling. We further note that subsequent references to the "submitted information" refer to the portions of the submitted information that are responsive to the request for information.

to the requestor. However, if the information exists and the district has not released such information to the requestor, the district 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).

As you acknowledge, the submitted attorney fee bills are 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:

.....

(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). Because the submitted information consists of the district's attorney fee bills, the district must release this information under section 552.022(a)(16) unless it is expressly confidential under other law. The district contends that the fee bills contain information that is protected by the attorney-client privilege and the attorney work product privilege. The Texas Supreme Court has held 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 attorney-client privilege is found at Texas Rule of Evidence 503, and the attorney work product privilege is found at Texas Rule of Civil Procedure 192.5. Accordingly, we will consider your claims under Rule 503 and Rule 192.5.

Rule 503 of the Texas Rule of Evidence encompasses the attorney-client privilege and provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made 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).

You assert that the submitted information includes confidential communications between representatives of the district and its attorney. Based on your representations and our review of the submitted information, we agree that the attorney fee bills at issue contain information that is protected by the attorney-client privilege. We have marked the information the district may withhold pursuant to 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 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).

You inform us that some of the information at issue in the submitted fee bills was developed in anticipation of administrative proceedings before the Texas Board of Tax Professional Examiners. *See* 22 TEX. ADMIN. CODE § 629. You also assert that these matters were ongoing before the district received the request for information and that this information reveals the thought processes of the district's attorney or attorney's representatives. Having considered your arguments and reviewed the information at issue, we find that the district has failed to demonstrate that this information contains the attorney's or attorney's representatives mental impressions, opinions, conclusions, or legal theories. Therefore, none of the information at issue may be withheld under Rule 192.5. As you raise no other exceptions to disclosure for this information, it must be released to the requestor.

In summary, we have marked the portions of the submitted attorney fee bills that are protected by the attorney-client privilege and may be withheld under Rule 503 of the Texas Rules of Evidence. The remainder of the responsive 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).

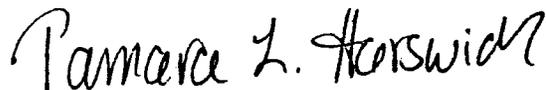
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 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,



Tamara L. Harswick
Assistant Attorney General
Open Records Division

TLH/sdk

Ref: ID# 218198

Enc. Submitted documents

c: Mr. John T. Manning
1011 Lovers Lane
Lockhart, Texas 78644
(w/o enclosures)