



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 27, 2005

Mr. Chris Raesz
Law Offices of Chris Raesz, P.C.
306 North Carroll Boulevard
Denton, Texas 76201

OR2005-08761

Dear Mr. Raesz:

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# 233148.

The Town of Lakewood Village (the "town"), which you represent, received a request for twenty-one various categories of information, including documents regarding water and sewer fees. You state that you have no information responsive to items 4, 6, 14, and 15.¹ You state that you have released information responsive to items 5, 8, and 9. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, and 552.111 of the Government Code.² We have considered the

¹We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

²We note you also assert the attorney-client privilege under section 552.101 of the Government Code. Section 552.107 is the proper exception for your attorney-client privilege claim in this instance. See Open Records Decision No. 676 (2002). You also raise section 552.101 in order to claim that the requested fee bills are privileged attorney work product. However, section 552.101 does not incorporate the attorney work product privilege. See Open Records Decision No. 575 at 2 (1990) (stating that statutory predecessor to section 552.101 does not encompass discovery privileges). The proper exception to raise when claiming attorney work product is section 552.111 of the Government Code. *Id.*; Gov't Code § 552.111. Accordingly, we interpret your claim of the attorney work product privilege as an assertion of that privilege as it is encompassed by section 552.111.

exceptions you claim and reviewed the submitted representative sample of information.³ We have also received and considered comments submitted on behalf of the requestor. *See* Gov't Code § 552.304 (allowing interested party to submit comments indicating why requested information should or should not be released).

Initially, we note that the submitted information includes the minutes of a town council meeting. The minutes of a public meeting are made public by statute. Gov't Code § 551.022. The minutes of a public meeting of a governmental body are public records when entered, and public access may not be delayed until formal approval is obtained. Open Records Decision No. 225 (1979). You state that Exhibit Q contains "approved minutes of the town council meeting of October 14, 2004." Accordingly, Exhibit Q must be released pursuant to section 551.022.

We also note that the you have redacted information in the fee bills submitted as Exhibit S. In his request, the requestor seeks all attorney fee bills for a specified town attorney, but limits his request to "information . . . that is not privileged under [the] attorney-client privilege." We understand you to represent that the information you have redacted reveals privileged attorney-client communications. Therefore, based on your representation, we find that the redacted information is not responsive to the request and need not be released to the requestor. Accordingly, we need not address your arguments under section 552.107 for this information.

Next, we note that you have not submitted information that is fully responsive to the request for the name, sex, ethnicity, salary, title, and dates of hire of all independent contractors from 2001 to the present. Pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. While Exhibit T includes the name, salary, and date of hire of an independent contractor, it does not include the other requested categories of information. Consequently, we conclude that the town failed to comply with the procedural requirements of section 552.301 with respect to this information.

³ We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). You claim that the information at issue is excepted from disclosure under section 552.103 of the Government Code; however, section 552.103 is a discretionary exception to public disclosure that protects a governmental body's interests and may be waived. *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 section 552.103). As you claim no additional exceptions to disclosure for this information, the requested sex, ethnicity, and title of independent contractors hired by the city must be released to the requestor.

Portions of the remaining submitted information are subject to section 552.022 of the Government Code, which provides in relevant part:

(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:

...

(2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body;

(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;

...

(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)(2)-(3), (5), (16). Section 552.022(a)(2) makes expressly public the requested names, sex, ethnicity, salary, title, and dates of employment of town employees and officers. A portion of Exhibit K and all of Exhibits N and T consist of information in an account, voucher, or contract relating to the receipt or expenditure of public funds by the town and are therefore subject to section 552.022(a)(3). Exhibit R consists of a completed estimate of the need for public funds and is therefore subject to section 552.022(a)(5). Finally, Exhibit S consists of attorney fee bills that are subject to section 552.022(a)(16). Pursuant to section 552.022, this information is required to be released unless it is expressly confidential under "other law." Sections 552.103 and 552.111 of the Government Code are discretionary exceptions to public disclosure that protect a governmental body's interests and may be waived. See Gov't Code § 552.007; *Dallas Area Rapid Transit*, 4 S.W.3d at 475-76 (Tex. App.—Dallas 1999, no pet.); Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 665 at 2 n.5 (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to section 552.103 subject to waiver), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). Accordingly, none of the information that is subject to section 552.022 may be withheld under section 552.103 or 552.111. However, the Texas Supreme Court has held that the Texas Rules of Civil Procedure 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 privilege is also found at rule 192.5 of the Texas Rules of Civil Procedure. Accordingly, we will consider whether the town may withhold the submitted attorney fee bills pursuant to rule 192.5. Additionally, because section 552.102 is "other law" for purposes of section 552.022, we will consider your claim under that exception for the information submitted as Exhibit O, which includes information that is subject to section 552.022(a)(2).

For the purpose of section 552.022, information is confidential under rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. Open Records Decision No. 677 at 9-10 (2002). Core work product is defined as 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. 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 when the governmental body received the request for information and (2) consists of an attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *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 prong of the work product test requires the governmental body to show that the documents at issue contain the attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both prongs of 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).

You inform us that the information in the submitted fee bills relates to anticipated litigation. However, upon review of the responsive information in these fee bills, we find that none of this information contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney’s representatives. Accordingly, none of the information in these fee bills is protected under rule 192.5.

We note that Exhibit O consists of an Employment Eligibility Verification, Form I-9, that includes section 552.022(a)(2) information but is confidential under section 552.101 of the Government Code, which is “other law” for purposes of section 552.022. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information other statutes make confidential. Title 8, section 1324a of the United States Code provides that this form “may not be used for purposes other than for enforcement of this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5); *see* 8 C.F.R. § 274a.2(b)(4). Release of this form in this instance would be “for purposes other than for enforcement” of the referenced federal statutes. Accordingly, we conclude that this form, which we have marked, is confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system.⁴

We now turn to your arguments regarding the remaining submitted information that is not subject to section 552.022 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

⁴As we are able to make this determination, we need not address your section 552.102 claim against disclosure.

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 has 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 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, no pet.); *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).

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.* 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.⁵ Open Records Decision No. 555 (1990); see Open Records Decision No. 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).

In this instance, although you indicate that no lawsuit had been filed against the town at the time that the town received this request, you inform us that the requestor has sent several

⁵ In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, see Open Records Decision No. 336 (1982); 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 threatened to sue on several occasions and hired an attorney, see Open Records Decision No. 288 (1981).

letters to the town protesting the amounts charged for building permit and impact fees. In a letter dated March 30, 2005, an attorney for the requestor enclosed a petition regarding the disputed fees at issue and stated that he would file the petition if the town did not respond by a certain date to his client's complaints. You have submitted copies of these letters, which the town received prior to the date that the town received this request. Based upon your representations and the totality of the circumstances, we conclude that the town reasonably anticipated litigation on the date that it received this request for information. We also find that the information at issue relates to the anticipated litigation. Accordingly, we conclude that town may withhold the information at issue, which we have marked, pursuant to section 552.103.

We note, however, that once information has been obtained by all parties to the anticipated 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 other parties in 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 concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, Exhibit O is confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system. The information we have marked may be withheld under section 552.103 of the Government Code. The remaining 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, upon receiving this ruling, the governmental body

will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



Caroline E. Cho
Assistant Attorney General
Open Records Division

CEC/sdk

Ref: ID# 233148

Enc. Submitted documents

c: Mr. Russell H. Daniels
Counsel to Walsh Custom Homes, Inc.
Bush & Motes, P.C.
4025 Woodland Park Boulevard, Suite 190
Arlington, Texas 76013
(w/o enclosures)