



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 22, 2005

Mr. David K. Walker
Montgomery County Attorney
207 West Phillips
Conroe, Texas 77301

OR2005-11538

Dear Mr. Walker:

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# 238907.

Montgomery County (the "county") received a request for

- 1) the engagement letter executed by plaintiff Montgomery County with the law firm of Stoel Rives LLP;
- 2) any contracts or agreements entered into by Montgomery County with one Charles Hanna, an attorney in the State of Utah, as it relates to the Estate of Ronald V. Jackson;
- 3) any correspondence between Montgomery County and Mr. Charles Hanna and/or his attorney as it relates to the Estate of Ronald V. Jackson;
- 4) an accounting of monies received from Charles Hanna by Montgomery County or the law firm of Stoel Rives LLP on behalf of Montgomery County as a result of any contracts entered into by Charles Hanna and Montgomery County.

You state that you will release some information to the requestor, but claim that the submitted information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code and rule 192.5 of the Texas Rules of Civil Procedure. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that Exhibit 3 contains a settlement agreement. Section 552.022 provides in relevant part:

[T]he following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

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

Gov't Code § 552.022(a)(18). The settlement agreement is subject to section 552.022(a)(18). Accordingly, the settlement agreement, which we have marked, must be released unless it is expressly made confidential under other law. You claim that the settlement agreement is excepted from disclosure under sections 552.103 and 552.111 of the Government Code. Sections 552.103 and 552.111 are discretionary exceptions to disclosure that protect 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); Open Records Decision Nos. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived), 473 (1987) (governmental body may waive section 552.111); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). As such, sections 552.103 and 552.111 are not other law that makes information confidential for the purposes of section 552.022. Therefore, the county may not withhold the settlement agreement pursuant to section 552.103 or section 552.111. You also assert rule 192.5 of the Texas Rules of Civil Procedure for this information. 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, 337 (Tex. 2001). Therefore, we will consider whether the settlement agreement is confidential under rule 192.5.

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). The attorney work product privilege can be waived, however, if the privileged information is voluntarily disclosed in a non-privileged context. *Cf.* Tex. R. Evid. 511; *See also Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 554 (Tex. 1990); *Carmona v. State*, 947 S.W.2d 661, 663 (Tex. App.—Austin 1997, no writ); *Arkla, Inc. v. Harris*, 846 S.W.2d 623, 630 (Tex. App.—Houston [14th Dist.] 1993, no writ); *State v. Peca*, 799 S.W.2d 426, 431 (Tex. App.—El Paso 1990, no writ). As the settlement agreement has been communicated to and signed by the opposing party to the litigation involving the county, we conclude that the

attorney work product privilege has been waived. Accordingly, the settlement agreement must be released.

Turning to the remaining information, section 552.103 of the Government Code 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 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 is pending or reasonably anticipated on the date the governmental body receives the request for information, and (2) the information at issue is related to that litigation. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state and provide documentation showing that the county is currently a party to litigation that is pending in Utah. As such, we conclude that litigation was pending on the date the county received this request for information. Furthermore, we find that the remaining submitted information is related to the litigation for purposes of section 552.103(a). We therefore conclude that the remaining submitted information may be withheld from disclosure pursuant to section 552.103.

Generally, however, 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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, responsive information to which all of the opposing parties in the litigation have had access is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the

applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the county must release the settlement agreement pursuant to section 552.022(a)(3) of the Government Code. The remaining information may be withheld under section 552.103 of the Government Code.

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,

A handwritten signature in black ink, appearing to read 'José Vela III', with a long horizontal flourish extending to the right.

José Vela III
Assistant Attorney General
Open Records Division

JV/krl

Ref: ID# 238907

Enc. Submitted documents

c: Tom Stevens
7904 Phoenix Pass
Austin, TX 78737
(w/o enclosures)