



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 29, 2006

Ms. Ann Greenberg  
Walsh, Anderson, Schulze & Aldridge, P.C.  
P. O. Box 2156  
Austin, Texas 78768

OR2006-03116

Dear Ms. Greenberg:

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# 245129.

The City of Chireno (the "city"), which you represent, received a request for "the bills that [a named attorney's] office has submitted to the City of Chireno since August 2005 [and] the budget for the City of Chireno and Chireno Natural Gas for the fiscal year 2006." You state that the city has provided the requestor with the budget information requested. However, you claim that the submitted attorney fee bills are excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code, as well as Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. We have considered the exception you claim and reviewed the submitted information.

Initially, we address your statement that the named attorney entered into a Confidentiality Statement and Alternative Dispute Resolution Invitation before the Texas Workforce Commission Civil Rights Division on behalf of the city. We note that a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."). Furthermore, information is not confidential under the Act simply because the party submitting the information to a governmental body anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). Accordingly, the submitted

information may not be withheld from disclosure on the basis of the Confidentiality Statement and Alternative Dispute Resolution Invitation.<sup>1</sup>

Next, we note that submitted information consists entirely of attorney fee bills that are subject to section 552.022 of the Government Code. Section 552.022(a)(16) provides for the required public disclosure of “information that is in a bill for attorney’s fees and that is not privileged under the attorney-client privilege,” unless the information is expressly confidential under other law. Gov’t Code § 552.022(a)(16). Although you seek to withhold the submitted information under sections 552.103, 552.107, and 552.111 of the Government Code, these sections are discretionary exceptions to disclosure that a governmental body may waive. *See id.* § 552.007; *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. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (discretionary exceptions generally). Accordingly, sections 552.103, 552.107, and 552.111 are not other law that makes information expressly confidential for purposes of section 552.022. Therefore, the city may not withhold any of the submitted information under section 552.103, section 552.107, or section 552.111.

Section 552.101 constitutes other law for purposes of section 552.022. This provision excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. You only claim section 552.101 excepts the submitted information in conjunction with the attorney-client privilege found at Texas Rule of Evidence 503, and the attorney work product privilege found at Texas Rule of Civil Procedure 192.5. However, section 552.101 does not encompass the attorney-client and attorney work product privileges. *See* Open Records Decision No. 676 at 1-3 (2002) (section 552.101 does not encompass discovery privileges). Accordingly, the submitted information may not be withheld under section 552.101 on the basis you claim. However, you also argue that rule 503 and rule 192.5 protect the submitted information independently of section 552.101. The Texas Supreme Court has held that the Texas Rules of Evidence and 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). Accordingly, we will address the applicability of the attorney-client privilege under rule 503 and the attorney work product privilege under rule 192.5.

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

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<sup>1</sup>We note that the Confidentiality Statement, submitted in support of your arguments, expressly provides it is subject to the Act.

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 inform us that the submitted attorney fee bills contain information that would reveal confidential communications between the city's attorneys and staff and city representatives that were made for the purposes of facilitating the rendition of professional legal services to the city. We note that you have not identified several of the individuals listed in the fee bills. We have, however, been able to identify some of these unidentified individuals as representatives of the city or its attorneys. *See* Open Records Decision Nos. 542 (1990)

(stating that governmental body has burden of establishing that exception applies to requested information), 532 (1989), 515 (1988), 252 (1980). Only communications between the city and its attorneys, and their respective representatives, may be withheld under the attorney-client privilege. *See* Tex. R. Evid. 503. Based on your representations and our review of the information at issue, we have marked the information that the city may withhold on the basis of the attorney-client privilege under Texas Rule of Evidence 503.

Texas Rule of Civil Procedure 192.5 encompasses the attorney work product privilege. For purposes 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 prong 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 claim that the submitted fee bills contain core attorney work product that is protected by rule 192.5. You indicate that the fee bills contain information that was developed in anticipation of litigation involving the requestor, who filed a complaint on August 16, 2005 against the city with the Texas Workforce Commission Civil Rights Division and the United

States Equal Employment Opportunity Commission. You argue that the fee bills also reveal the mental impressions, opinions, conclusions, or legal theories of the city's attorneys regarding the anticipated litigation. Based on your representations and our review of the remaining information in question, we have marked the information that the city may withhold as core attorney work product under Texas Rule of Civil Procedure 192.5.

In summary, the city may withhold the marked information that is protected by Texas Rule Evidence 503. The city may also withhold the marked information that is protected by Texas Rule of Civil Procedure 192.5. The remaining 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, 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,



Ramsey A. Abarca  
Assistant Attorney General  
Open Records Division

RAA/krl

Ref: ID# 245129

Enc. Submitted documents

c: Ms. Kim Johnson  
354 Depot Street  
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(w/o enclosures)