ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 24, 2006

Ms. Lisa Morris
Records Manager
Community Association of the Woodlands, Texas
2201 Lake Woodlands Drive
The Woodlands, Texas 77380-1118

OR2006-09753

Dear Ms. Morris:

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# 257664.

The Community Associations of the Woodlands, Texas (the "CATW") received a request for a copy of all expenditures associated with any research, consulting fees, or any other fees associated with *The Woodlands Monitor* website (the "website"); the billing hours associated with the work of four named individuals pertaining to the website; all itemized bills, invoices, and statements associated with the Woodlands Community Association's ("WCA") check #35781 paid to legal counsel; and all other records, itemized bills, receipts, invoices, and statements of any individual's involvement with the website. You state that you have released some responsive information to the requestor. You state that the CATW does not maintain information responsive to portions of the request.[1] You claim that the remaining requested information is not subject to the Act. In the alternative, you claim that the remaining requested information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered your arguments and reviewed the submitted information. We have also considered comments received by the requestor.

[1]We note that the Act does not require a governmental body to release information that did not exist when it received the request for information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 05 at 2 (1992), 555 at 1 (1990), 452 at (1986), 362 at 2 (1983).

See Gov't Code § 552.304 (interested third party may submit comments explaining why requested information should or should not be released).

Initially, we note that portions of the submitted information are not responsive to the present request. In this instance, the requestor seeks information pertaining to billing statements associated with a specified website and the WCA. This ruling does not address the public availability of the information that is not responsive to the request, and the CATW is not required to release this information, which we have marked, in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.–San Antonio 1978, writ dism'd).

Next, we address your assertion that the remaining submitted information is not subject to the Act. The Act is applicable to "public information." *See* Gov't Code § 552.021. Section 552.002 of the Act provides that "public information" consists of

> information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:
>
> (1) by a governmental body; or
>
> (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.002(a). Thus, virtually all of the information that is in a governmental body's physical possession constitutes public information that is subject to the Act. *Id.* § 552.002(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). You contend that the information at issue is not subject to the Act because "the information requested is a record of the CATW, a service provider for the WCA." We note, however, that the Act also is applicable to information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see also* Open Records Decision No. 462 at 4 (1987). You state that the CATW provides services pursuant to an agreement with the WCA, and you acknowledge that the WCA is a governmental body subject to the Act. You do not explain that the information at issue was not collected, assembled, or maintained for the WCA, and you do not assert that the WCA does not have a right of access to such information. Therefore, we conclude that the submitted information is subject to the Act. Thus, we will consider your claimed exceptions to disclosure.

We first note, however, that the submitted information falls within the scope of section 552.022 of the Government Code. Section 552.022(a) 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). Although the CATW claims an exception to disclosure under section 552.107 of the Government Code, this section is a discretionary exception that a governmental body may waive. *See id.* § 552.007; Open Records Decision Nos. 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). As such, section 552.107 is not other law that makes information expressly confidential for the purposes of section 552.022. Therefore, the CATW may not withhold any of the information that is subject to section 552.022 under section 552.107 of the Government Code.

The Texas Supreme Court has held, however, that the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your assertions of the attorney-client privilege under Texas Rule of Evidence 503 and the attorney work product privilege under Texas Rule of Civil Procedure 192.5 for the information that is subject to 552.022. We will also consider your arguments under section 552.101 for this information, as section 552.101 also constitutes "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. The CATW does not cite to any specific law that makes any portion of the information at issue confidential under section 552.101. Therefore, we conclude that the CATW may not withhold any portion of the submitted information under section 552.101.

You contend that the attorney fee bills are protected by the attorney-client and attorney work product privileges. Rule 503 of the Texas Rules of Evidence 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 contend that the attorney fee bills reveal confidential attorney-client communications between privileged parties. However, you have failed to explain how the information at issue in the submitted fee bills pertains to communications involving parties in a privileged attorney-client relationship, and you have not identified several of the parties at issue. Thus, you have not adequately explained how the information in the submitted fee bills reveals confidential attorney-client communications. We therefore find the information at issue in the submitted attorney fee bills is not protected by the attorney-client privilege and may not be withheld on that basis.

We next address your claim under Rule 192.5 with respect to the submitted information subject to section 552.022. 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). However, we find that you have failed to demonstrate the applicability of the work product privilege to any portion of the submitted information, and therefore, none of it may be withheld on this basis. As you raise no further exceptions to disclosure, 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, 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,

Lisa V. Cubriel
Assistant Attorney General
Open Records Division

LVC/eb

Ref: ID# 257664

Enc. Submitted documents

c: Mr. Foster McNair
135 East Mistybreeze Circle
The Woodlands, Texas 77381
(w/o enclosures)