



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 15, 2007

Mr. Richard J. Navarro  
Denton, Navarro, Rocha & Bernal  
701 East Harrison, Suite 100  
Harlingen, Texas 78550-9151

OR2007-05986

Dear Mr. Navarro:

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# 278592.

The City of McAllen (the "city"), which you represent, received a request for "a copy of any and all records of meetings between the McAllen Police Officer's Union [{"MPOU"}] and city negotiators occurring since November 2006 regarding the ongoing contract dispute between both parties" and "a copy of any and all invoices submitted by [a named attorney] to the city for efforts in his roll as the attorney representing [the city] in the lawsuit filed by MPOU." You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code and Texas Rule of Evidence 503 and Texas Rules of Civil Procedure 192.3 and 192.5. We have considered your arguments and reviewed the submitted information.

Initially, we note that the Exhibit C is 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). In this instance, Exhibit C consists of attorney fee bills. Thus, the city must release this information pursuant to section 552.022(a)(16) unless it is expressly confidential under other law.

The city seeks to withhold this information under Texas Rule of Evidence 503 and Texas Rules of Civil Procedure 192.3 and 192.5. 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 pursuant to rule 503, rule 192.3, and rule 192.5 for the attorney fee bills.

Rule 503 of the Texas Rules 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 indicate that the attorney fee bills in Exhibit C contain confidential communications between the city's attorneys and the city that were made for the purposes of facilitating the rendition of professional legal services to the city. Based on your representations and our review of the submitted information, we agree that the attorney fee bills contain information that reveals confidential communications between privileged parties. Accordingly, we have marked the information that is protected by the attorney-client privilege and may therefore be withheld pursuant to rule 503 of the Texas Rules of Evidence. The remaining information, however, does not consist of or reveal confidential attorney-client communications. Accordingly, none of the remaining information in Exhibit C may be withheld under Texas Rule of Evidence 503.

Next, 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.*, 861 S.W.2d at 427.

You claim that some of the remaining portions of the submitted fee bills contain core attorney work product that is protected by rule 192.5. Although you argue that portions of the remaining submitted information reveal the mental impressions, opinions, conclusions, or legal theories of the city’s attorneys regarding anticipated litigation, upon review, we find that none of the remaining information is protected by the attorney work product privilege. Therefore, none of the remaining information in Exhibit C may be withheld under Texas Rule of Civil Procedure 192.5.

We next consider your claim under the consulting expert privilege for portions of the remaining information in the attorney fee bills in Exhibit C. The consulting expert privilege is found in rule 192.3(e) of the Texas Rules of Civil Procedure. A party to litigation is not required to disclose the identity, mental impressions, and opinions of consulting experts. *See* TEX. R. CIV. P. 192.3(e). A “consulting expert” is defined as “an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert.” TEX. R. CIV. P. 192.7. You indicate that the city contracted for advice and consulting services from an expert consultant regarding the pending lawsuit between the city and the MPOU. You state that the services provided by the city’s consultant were provided in anticipation of and in preparation for this litigation. You indicate that this expert “has no personal knowledge of the facts leading to the lawsuit, other than the information provided,” and thus, will not be called as a witness at trial. Based on your representations and our review, we find that portions of the remaining information in Exhibit C reveal the identity and opinions of the city’s consulting expert. Accordingly, the city may withhold this information, which we have marked, pursuant to rule 192.3(e) of the Texas Rules of Civil Procedure. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). None of the remaining information, however, reveals the identity and opinions of the city’s consulting expert. Therefore, none of the remaining information in Exhibit C may be withheld under Texas Rule of Civil Procedure 192.3.

We now turn to your claimed exceptions with respect to the remaining submitted information, which is not subject to section 552.022. You contend that Exhibits D and E are excepted from disclosure under section 552.103 of the Government Code, which 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 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).

You state and provide documentation showing that a lawsuit was filed against the city on August 24, 2006, in the 398<sup>th</sup> Judicial District of Hidalgo County. Based on this representation and our review, we agree that litigation was pending when the city received the present request. You also explain how Exhibits D and E relate to the pending litigation for the purposes of section 552.103. We note, however, that 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). In this instance, Exhibit D is a meeting sign-in sheet that was signed, and thus seen, by all parties. Further, portions of Exhibit E consist of a draft of a labor agreement that was provided to all parties. The yellow highlighted portions of Exhibit E, however, consist of notes written by a city attorney and not provided to all parties. 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). Accordingly, the city may only withhold the yellow highlighted information in Exhibit E under section 552.103 of the Government Code.<sup>1</sup> The city may not withhold Exhibit D or the remaining portions of Exhibit E under section 552.103 of the Government Code.

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<sup>1</sup>Because our ruling is dispositive, we need not address your remaining arguments for this information.

In summary, the city may withhold the information we have marked in the attorney fee bills under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.3. The city may withhold the highlighted information in Exhibit E under section 552.103 of the Government Code. As you do not raise any other exceptions against disclosure, the remaining 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).

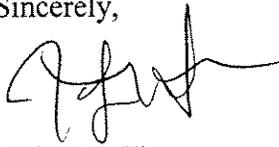
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,

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

Jaclyn N. Thompson  
Assistant Attorney General  
Open Records Division

JNT/ma

Ref: ID# 278592

Enc. Submitted documents

c: Mr. Jeremy Roebuck  
Staff Writer  
The Monitor  
McAllen, Texas 78504  
(w/o enclosures)