



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

July 7, 2008

Ms. Sharon Alexander  
Associate General Counsel  
Texas Department of Transportation  
DeWitt G. Greer State Highway Building  
125 East 11<sup>th</sup> Street  
Austin, Texas 78701

OR2008-09143

Dear Ms. Alexander:

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# 314933.

The Texas Department of Transportation (the "department") received a request for "all internal memos, e-mails, and correspondence, and all correspondence to and from the City of Edinburg and J.E. Saenz and Associates, Inc., relating to right-of-way" for a specified project. You claim that the requested information is excepted from disclosure under sections 552.103, 552.105, 552.107, and 552.111 of the Government Code, and privileged under rule 503 of the Texas Rules of Evidence, and rules 192.3 and 192.5 of the Texas Rules of Civil Procedure.<sup>1</sup> We have considered your claims and reviewed the submitted representative sample of information.<sup>2</sup>

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<sup>1</sup>Although you also argue the attorney-client privilege under section 552.101 of the Government Code, this office has concluded that section 552.107 is the appropriate exception. *See* Open Records Decision No. 676 (2002). Thus, we consider your attorney-client arguments only under section 552.107.

<sup>2</sup>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.

Initially, we note that some of the information at issue is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part, as follows:

(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:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). The submitted appraisal report is subject to section 552.022(a)(1), while the appraiser work order and surveyor work authorization are subject to section 552.022(a)(3). Therefore, the department may only withhold this information if it is confidential under "other law." Sections 552.103, 552.105, 552.107, and 552.111 are discretionary exceptions under the Act and do not constitute "other law" for purposes of section 552.022. 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. 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), 564 (1990) (statutory predecessor to section 552.105 subject to waiver), 542 at 4 (1990) (statutory predecessor to section 552.103 subject to waiver), 470 at 7 (1987) (statutory predecessor to section 552.111 may be waived). Thus, the information subject to section 552.022 may not be withheld under any of these exceptions.

You also contend, however, that all of the information subject to section 552.022 is protected by rules 192.5 and 192.3(e) of the Texas Rules of Civil Procedure, and that the appraisal report is also protected by rule 503 of the Texas Rules of Evidence. The Texas Supreme Court has 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 (Tex. 2001). Thus, we will address your arguments under these rules for the information subject to section 552.022.

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 whose mental impressions or opinions have not been

reviewed by a testifying expert. *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 state that the department obtained expert advice from “consulting experts” in preparation for litigation. We understand you to assert that at this time, the department does not anticipate calling these experts as trial witnesses. Based on your representations, we conclude that the department may withhold the appraisal report under rule 192.3(e) of the Texas Rules of Civil Procedure.<sup>3</sup> You have not established that the appraiser work order and surveyor work authorization which are subject to section 552.022(a)(3) reveal the identity, mental impressions, or opinions of the department’s consulting expert. Therefore, the information subject to section 552.022(a)(3) may not be withheld under rule 192.3(e).

You also claim that the information subject to section 552.022(a)(3) is protected by rule 192.5 of the Texas Rules of Civil Procedure, which encompasses the attorney work product privilege. For the 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 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

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<sup>3</sup>As we are able to reach this conclusion, we do not address your remaining claims for this information.

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 contend that the appraiser work order and surveyor work authorization constitute attorney work product, and state that “[t]hese documents were created in anticipation of litigation[.]” You have not demonstrated, however, that any of the information at issue consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney’s representative. Therefore, none of the information subject to section 552.022(a)(3) may be withheld under rule 192.5 of the Texas Rules of Civil Procedure, and the appraiser work order and surveyor work authorization must be released to the requestor.

You assert that the remaining information is excepted from public disclosure under section 552.103 of the Government Code. Section 552.103 provides in relevant part 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 that the governmental body received 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform us that the remaining information relates to a pending lawsuit to which the department is a party. You state and provide documentation showing that Cause No.

CL06-3841B was pending in the Hidalgo County Court at Law on the date the department received the request for information. Based on your representations and our review of the remaining information, we conclude that the department may withhold the remaining information 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, information that has either been obtained from or provided to the opposing party in the anticipated litigation 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 been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the appraiser work order and surveyor work authorization which are subject to section 552.022(a)(3) of the Government Code must be released to the requestor. The department may withhold (1) the appraisal report which is subject to section 552.022(a)(1) under rule 192.3(e) of the Texas Rules of Civil Procedure, and (2) the remaining information under section 552.103 of the Government Code.<sup>4</sup>

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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,

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<sup>4</sup>As our ruling is dispositive, we do not address your remaining claims.

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 challenge 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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/mcf

Ref: ID# 314933

Enc. Submitted documents

c: Ms. Pilar D. Corpus  
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(w/o enclosures)