ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 8, 2008

Ms. Holly C. Lytle
Assistant County Attorney
El Paso County Texas
County Courthouse
500 East San Antonio, Room 503
El Paso, Texas 79901

OR2008-10843

Dear Ms. Lytle:

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# 318794.

The El Paso County Attorney's Office (the "county") received a request for the following information: copies of any statement, interview, or deposition provided to the county by three named individuals in 2008; any agreement between the county and the three named individuals or their attorneys related to any statement, interview, affidavit, or deposition given by the individuals; any correspondence between the county and the three named individuals in 2008; and the contents of file number PI-08-001.[1] You state that you will release most of the requested documents to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from

[1]We note that the requestor made his request for information on May 6, 2008; however, you explain that the county required the requestor to make a deposit for payment of the anticipated costs in accordance with section 552.263 of the Government Code, and that on May 20, 2008, the deposit was received. *See* Gov't Code § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date that the governmental body receives deposit or bond). Thus, we agree that May 20, 2008, is the date the county received this specific request for information.

the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note that the submitted information includes information, which we have marked, that was created after the county received this request on May 20, 2008. The Act does not require the county to release information that did not exist when it received this request or to create responsive information. *See Econ. Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App. — San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983). Thus, the submitted information that was created after the county received this request is not responsive to the request. This decision does not address the public availability of the submitted information that is not responsive to this request, and such information need not be released.

Next, we note that a portion of the submitted information in Attachment I consists of minutes of a public meeting. Section 551.022 of the Open Meetings Act, chapter 551 of the Government Code, expressly provides that the "minutes and tape recordings of an open meeting are public records and shall be available for public inspection and copying on request to the governmental body's chief administrative officer or the officer's designee." Gov't Code § 551.022. Information that is specifically made public by statute may not be withheld from the public under any of the exceptions to public disclosure under chapter 552 of the Government Code. *See, e.g.*, Open Records Decision Nos. 544 (1990), 378 (1983), 161 (1977), 146 (1976). Therefore, the county may not withhold the submitted open meeting minutes, which we have marked, under the claimed exceptions and must release this information to the requestor.

We also note that the submitted information includes documents that are subject to section 552.022 of the Government Code. Section 552.022 of the Government Code provides in relevant part:

> (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:
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> > (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;
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> > . . .
> >
> > (17) information that is also contained in the public court record[.]

Gov't Code § 552.022(a)(3), (17). Although you raise sections 552.103, 552.107, and 552.111 of the Government Code, these exceptions are discretionary exceptions that

protect a governmental body's interests and are therefore not "other law" for purposes of sections 552.022(a)(3) and 552.022(a)(17). *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 10-11 (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 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). Furthermore, although Rule 503 of the Texas Rules of Evidence, which protects information coming within attorney-client privilege, constitutes "other law" for purposes of section 552.022, *see In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001), the privilege is waived to the extent the otherwise privileged information is contained in a court-filed document. *See* TEX. R. EVID. 511.

The Texas Supreme Court has also held that the Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022. For the purpose of section 552.022, information is confidential under rule 192.5 only to the extent information implicates the core work product aspect of the work product privilege. *See* 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 constitutes 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). 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 an attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *Id.*

The first prong of the work product test, which requires the 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 documents at issue contain the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test is confidential under rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in rule 192.5(c). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.— Houston [14th Dist.] 1993, no writ). After review of the information at issue and consideration of your arguments, we conclude that the information at issue reflects the

mental processes, conclusions, strategies, or legal theories of the county's attorneys regarding anticipated litigation. Thus, the information we have marked is protected from disclosure by rule 192.5, and the county may withhold this information on that basis.

You claim that the remaining submitted information in Attachments F, G, H, I, and J is 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.
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> . . .
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> (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.

Id. § 552.103(a), (c). A governmental body that raises section 552.103 has the burden of providing relevant facts and documents sufficient to show that this exception is applicable to the information at issue. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of the governmental body's receipt of the request for the information, and (2) the information at issue is related to the pending or anticipated litigation. *See 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.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990). You argue that the information at issue relates to pending litigation.

You state, and submitted documentation demonstrating, that the county filed in County Court at Law Number 5 in El Paso County, Texas, a Petition to Take Deposition Before Suit pursuant to Texas Rule of Civil Procedure 202. You state that this action is pending. You argue that all of the requested documents at issue are related to this pending action. You state that a hearing on this petition was held on May 9, 2008, and the judge granted the motion for continuance of the hearing on the merits of the petition and ordered the county to provide the requestor with certain documents related to this action. You submitted a copy of the hearing transcript as well as an unsigned copy of the written order. You argue that

"[t]o allow the requestor to obtain more [information] than the judge's order directs would contradict and make worthless the judge's order."

We find that, in this case, the Rule 202 action constitutes litigation for the purposes of section 552.103. While a court has held that Rule 202 does not authorize discovery before suit is filed other than for taking of deposition, *see In re Azko Nobel Chemical, Inc.*, 24 S.W.3d 919 (Tex. App. — Beaumont 2000), the judge in the Rule 202 matter here nevertheless has issued orders concerning the release of information related to the Rule 202 action after hearing arguments on the motion for continuance. Further, after review of the information at issue, we find that it is related to the pending Rule 202 matter. Therefore, based on your arguments and our review of the submitted information, we conclude that the county may withhold the remaining submitted information under section 552.103 of the Government Code. *See* Open Records Decision No. 551 at 3 (1990) ("We do not believe the [Public Information] Act was intended to provide parties involved in litigation any earlier or greater access to information than was already available directly in such litigation.")

We note, however, that once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any submitted 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) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary: (1) pursuant to section 551.022 of the Open Meetings Act, the county must release the submitted open meeting minutes, which we have marked; (2) the county must release the information we have marked pursuant to section 552.022 of the Government Code; and (3) the county must withhold the documents subject to section 552.022 of the Government Code, which we have marked, pursuant to rule 192.5 of the Texas Rules of Civil Procedure. The remaining submitted information may be withheld under section 552.103 of the Government Code.[2]

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

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[2]As our ruling is dispositive, we need not address your remaining arguments against disclosure.

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, 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,

Jessica J. Maloney
Assistant Attorney General
Open Records Division

JJM/jh

Ref: ID# 318794

Enc. Submitted documents

c: Mr. John P. Mobbs
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(w/o enclosures)