



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 1, 2008

Mr. John Danner
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283

OR2008-13466

Dear Mr. Danner:

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# 323198.

The City of San Antonio (the "city") received a request for information relating to the Lackland Heights area, including records regarding an item on a specified city council agenda, the creation of Lackland Hills Tax Increment Reinvestment Zone #13, a vested rights permit, and drainage or flooding issues. You claim that the requested information is excepted from disclosure under sections 552.103, 552.106, 552.107, and 552.111 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5.¹ We have considered your arguments and reviewed the information you submitted.

We first note that some of the submitted information was created subsequent to the city's receipt of this request for information. The Act does not require a governmental body to release information that did not exist when it received a request or to create responsive

¹We note that the city also claims the attorney work product privilege under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 does not encompass discovery privileges. *See* Open Records Decision No. 676 at 1-3 (2002). The proper exception under which to claim the attorney work product privilege is section 552.111. *See* Open Records Decision No. 677 at 4 (2002).

information.² Thus, information that did not exist when the city received this request is not responsive to the request. This decision does not address the public availability of the non-responsive information that we have marked, and that information need not be released.

We next note that the submitted information includes copies of city ordinances. Because laws and ordinances are binding on members of the public, they are matters of public record and may not be withheld from disclosure under the Act. *See* Open Records Decision Nos. 551 at 2-3 (1990) (laws or ordinances are open records), 221 at 1 (1979) (official records of governmental body's public proceedings are among most open of records). Therefore, the ordinances that we have marked must be released.

The submitted documents also include a copy of the minutes of a meeting. The minutes of a governmental entity's public meetings are specifically made public under the Open Meetings Act, chapter 551 of the Government Code. *See* Gov't Code § 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying on request to governmental body's chief administrative officer or officer's designee). As a general rule, the exceptions to disclosure found in the Act do not apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the meeting minutes that we have marked also must be released.

We next note that some of 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:

...

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

(4) the name of each official and the final record of voting on all proceedings in a governmental body; [and]

...

(17) information that is also contained in a public court record[.]

²*See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

Gov't Code § 552.022(a)(3), (4), (17). Although you seek to withhold the information that is subject to section 552.022 under sections 552.103, 552.106, 552.107, and 552.111 of the Government Code, those 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 Gov't Code § 552.103); Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under Gov't Code § 552.111 may be waived), 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), 470 at 7 (1987) (statutory predecessor to Gov't Code § 552.111 subject to waiver). As such, those sections are not other law that makes information expressly confidential for purposes of section 552.022. Therefore, the city may not withhold any of the information that is subject to section 552.022 under section 552.103, section 552.106, section 552.107, or section 552.111.

The Texas Supreme Court has held, however, that the Texas Rules of Evidence and 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). The attorney-client privilege also is found at Texas Rule of Evidence 503, and the attorney work product privilege also is found at Texas Rule of Civil Procedure 192.5. Accordingly, we will determine whether the city may withhold any of the information that is subject to section 552.022 under rule 503 or rule 192.5.

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

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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

In this instance, some of the information that is subject to section 552.022 of the Government Code is attached to information that you seek to withhold as privileged attorney-client communications. You indicate that these communications were made in connection with the rendition of professional legal services to the city. You have identified attorneys for and representatives of the city who are parties to the communications. You state that the attorney-client privilege has not been waived. Based on your representations and our review of the information at issue, we have marked information that the city may withhold under rule 503.

Texas Rule of Civil Procedure 192.5 encompasses the attorney work product privilege. For the purposes of section 552.022, 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* ORD 677 at 9-10. 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 at 427.

You contend that some of the submitted information was prepared in anticipation or in the course of litigation. Having considered your arguments, we conclude that you have not demonstrated that any of the remaining information that is subject to section 552.022 of the Government Code reflects the mental impressions, opinions, conclusions, or legal theories of an attorney for the city or an attorney’s representative. Therefore, the city may not withhold any of the submitted information under rule 192.5. Accordingly, the city must release the remaining information that is subject to section 552.022. We have marked that information.

With respect to the rest of the submitted information, we address your claim under section 552.103 of the Government Code, which provides in part:

(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 that seeks to withhold information under section 552.103 must provide relevant facts and documentation sufficient to establish the applicability of the exception 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 its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (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 ORD 551 at 4.

You contend that the remaining information is related to a pending lawsuit styled *Peter Adolfson et al. v. Roy Rosin, Rosin-Johnson, Inc., Lackland Hills Joint Venture, and City of San Antonio*, Cause No. 2008-CI-02481, 37th Judicial District Court, Bexar County. You have submitted documentation reflecting that the city was a party to the lawsuit on the date of its receipt of this request for information. Based on your representations, the submitted documentation, and our review of the information at issue, we conclude that the city may withhold the remaining information under section 552.103.

In reaching this conclusion, we assume that the opposing parties to the pending litigation have not seen or had access to any of the remaining information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. See ORD 551 at 4-5. If the opposing parties have seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. See Open Records Decision Nos. 349 (1982), 320 (1982). We also note that the applicability of section 552.103 ends when the related litigation concludes. See Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary: (1) the city must release the marked ordinances and meeting minutes; (2) the city may withhold the information that we have marked under Texas Rule of Evidence 503; (3) the city must release the information that we have marked under section 552.022 of the Government Code; and (4) the city may withhold the rest of the submitted information under section 552.103 of the Government Code. As we are able to make these determinations, we do not address your other arguments against disclosure.

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).

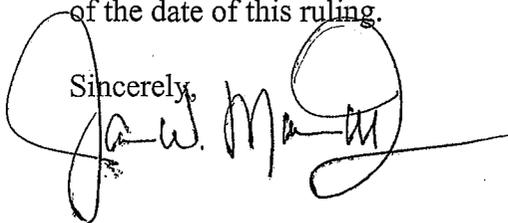
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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

A handwritten signature in black ink, appearing to read 'J.W. Morris, III', with a large, stylized flourish extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/jh

Ref: ID# 323198

Enc: Submitted documents

c: Ms. Mitsuko Ramos
100 West Houston Suite 1250
San Antonio, Texas 78205
(w/o enclosures)