



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 10, 2008

Mr. Jerry E. Drake
Deputy City Attorney
City of Denton
215 East McKinney
Denton, Texas 76201

OR2008-13970

Dear Mr. Drake:

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#324271.

The City of Denton (the "city") received a request for billing statements related to a lawsuit involving JNC Partners Denton, L.L.C. (the "JNC Partners lawsuit"). You state that you will release some of the information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 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 the arguments you have made and reviewed the submitted information.

Initially, you contend that the information at issue is not responsive to the request. Specifically, you claim the submitted information consists of attorney billings that contain descriptions of tasks related to settlement negotiations which are outside the scope of the referenced litigation. The requestor seeks billing statements "for any work whatsoever" on the JNC Partners lawsuit, including, at a minimum, amounts paid, dates of payments, and to

¹Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 1-2 (1990).

whom payment was made or owed. Upon review, we find that the submitted information constitutes attorney fee bills for legal work performed on matters relating to the JNC Partners lawsuit, and is therefore, responsive to the request. We will therefore consider your arguments against disclosure.

We note that the submitted information is subject to section 552.022 of the Government Code. This section provides in part:

(a) [T]he 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, the information at issue 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. Although you raise sections 552.103, 552.107, and 552.111, these exceptions are discretionary under the Act and may be waived. *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). As such, sections 552.103, 552.107, and 552.111 are not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the city may not withhold any of the submitted information under any of those exceptions.

However, the Texas Supreme Court has held that the Texas Rules of Evidence and the 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). Accordingly, we will consider your arguments under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. You also claim an exception under section 552.101 of the Government Code, which is a confidentiality provision for the purposes of section 552.022. Thus, we will consider whether the city must withhold any of the submitted information under section 552.101.

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 pursuant to rule 503, a governmental body must: (1) demonstrate 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 represent that the submitted information consists of confidential communications between the city's legal counsel and city employees made for the purpose of facilitating the rendition of professional legal services to the city. In this instance, you have marked portions of the submitted fee bills pursuant to rule 503. We note, however, that you have not identified any of the parties involved in the submitted communications. Upon review, we were able to discern the identities of some privileged parties. Thus, some of the submitted information, which we have marked, constitutes privileged attorney-client communications that the city may withhold under rule 503. However, we conclude you have not established

that the remaining information consists of privileged attorney-client communications. Therefore, the city may not withhold this information under rule 503.

We now turn to your arguments for the information not privileged under rule 503 of the Texas Rules of Evidence. For purposes of section 552.022, information is confidential under rule 192.5 of the Texas Rules of Civil Procedure only to the extent the information implicates the core work product aspect of the work product privilege. 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 contains 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 when the governmental body received the request for information 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 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 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). Upon review, we conclude you have failed to demonstrate that the information at issue reflects the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. Therefore, the city may not withhold any of the remaining information under rule 192.5.

Finally, you assert that the remaining information is excepted from disclosure as communications made during an alternative dispute resolution ("ADR"). 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. Section 552.101 encompasses section 154.073 of the Civil Practice and Remedies Code.

Section 154.073 states that a communication made during an ADR procedure is confidential and is not subject to disclosure. *See* Civ. Prac. & Rem. Code § 154.073. Further, in Open Records Decision No. 658 (1998), this office found that communications during the formal settlement process were intended to be confidential. Open Records Decision No. 658 at 4. You have not demonstrated that the information at issue constitutes either a communication relating to the subject matter of the dispute made by a participant in an alternative dispute resolution procedure or a record made at such a procedure. *See* Civ. Prac. & Rem. Code § 154.073(a)-(b). We therefore conclude that the remaining information is not confidential under section 154.073 of the Civil Practice and Remedies Code and may not be withheld from the requestor on that basis under section 552.101 of the Government Code.

In summary, the city may withhold the information marked under Texas Rule of Evidence 503. 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 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,



Christina Alvarado
Assistant Attorney General
Open Records Division

CA/jb

Ref: ID#324271

Enc. Submitted documents

c: Mr. Bob Clifton
c/o Mr. Jerry E. Drake
Deputy City Attorney
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(w/o enclosures)