



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 31, 2009

Ms. Katherine T. Mize
Adams and Reese, LLP
One Houston Center
1221 McKinney, Suite 4400
Houston, Texas 77010

OR2009-04190

Dear Ms. Mize:

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# 338558.

The City of Bay City (the "city"), which you represent, received a request for (1) credit card statements for a specified time period for five named city employees, including receipts and reimbursements; and (2) invoices to the city for a specified time period from the company of a named city employee, including all checks written to that company and to a named city employee in his capacity as an independent contractor for the city. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.117, 552.136, and 552.147 of the Government Code and privileged pursuant to rule 192.5 of the Texas Civil Rules of Procedure.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note that the city has filed a lawsuit against this office styled: *City of Bay City v. Attorney Gen. of Tex.*, No. D-1-GN-08-004258, 345th Dist. Ct., Travis County, Texas. Most of the information responsive to the present request is at issue in the lawsuit. It is the policy of this office not to address issues that are being considered in pending litigation. Accordingly, we will allow the trial court to resolve the issue of whether the information that

¹Although you raise section 552.101 of the Government Code, you have not asserted any law under which any of the information at issue is considered to be confidential for purposes of section 552.101. Thus, we assume you no longer claim this exception. See Gov't Code §§ 552.301, .302.

²We 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.

is at issue in the lawsuit, which we have marked, must be released to the public. We note, however, that the remaining information is not at issue in the lawsuit. Therefore, we will address your arguments to withhold the remaining information under the Act.

Next, we note that a portion of the submitted information is not responsive to the instant request for information because it was created outside the specified time period. We have marked this non-responsive information. The city need not release non-responsive information in response to this request and this ruling will not address it.³

We next note that the remaining submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides in part:

(a) 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[.]

Gov't Code § 552.022(a)(3). The remaining submitted information includes purchase orders, credit card statements, and receipts which must be released under section 552.022(a)(3) unless the information is expressly confidential under other law. Although you raise section 552.103 of the Government Code, section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests 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); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, section 552.103 is not “other law” that makes information confidential for the purposes of section 552.022. Therefore, the city may not withhold the remaining information on that basis. However, you also raise sections 552.117 and 552.136 for portions of the information subject to section 552.022. Because sections 552.117 and 552.136 are “other law” for the purposes of section 552.022(a)(3), we will address the applicability of these sections to this information. Furthermore, the Texas Supreme Court has held that the Texas Rules of Civil Procedure are “other law” that makes information expressly confidential for the purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); *see also* Open Records Decision No. 676 (2002). Accordingly, we will also consider your arguments under Texas Rule of Civil Procedure 192.5 with respect to the remaining submitted information.

³Therefore, we do not address your argument under section 552.147 of the Government Code, except to note section 552.147(b) authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

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 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). *See Pittsburgh Corning Corp.*, 861 S.W.2d at 427.

You state the city has retained counsel to prepare a lawsuit and the requested information was collected and compiled at the direction of counsel. We note the information at issue consists of credit card statements, receipts, and purchase orders created and received by the city in conducting its ordinary course of business. In Open Records Decision No. 677, our office held information created in a governmental body's ordinary course of business may be considered to have been prepared in anticipation of litigation, and thus constitutes attorney work product, if the governmental body explains to this office the primary motivating purpose for the routine practice that gave rise to the information. ORD 677 at 8; *see also Brotherton*, 851 S.W.2d at 206. You have not explained that the city's primary motivating purpose for the creation of this information is anticipation of litigation. Thus, we conclude you have not demonstrated the remaining information consists of core work product for purposes of Texas Rule of Civil Procedure 192.5, and it may not be withheld on this basis.

Section 552.117(a)(1) excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). However, you have failed to demonstrate how any of the remaining information consists of the current and former home addresses and telephone numbers, social security numbers, or family member information of current or former city officials or employees. Thus, none of the remaining information may be withheld under section 552.117 of the Government Code.

Section 552.136 states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” *Id.* § 552.136. Accordingly, we find that the city must withhold the credit card account numbers we have marked under section 552.136 of the Government Code.

In summary, the city must withhold the information we have marked under section 552.136 of the Government Code. The remaining responsive information that is not subject to the pending litigation between the city and our office must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Greg Henderson
Assistant Attorney General
Open Records Division

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