ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 8, 2009

Mr. Jesús Toscano, Jr.
Administrative Assistant City Attorney
City of Dallas
1500 Marilla, Room 7DN
Dallas, Texas 75201

OR2009-06180

Dear Mr. Toscano:

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# 342506.

The City of Dallas (the "city") received a request for five categories of information relating to a specified law firm's work on a specified case. You state that you will provide the requestor with some of the requested information. You claim that the remaining information is privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the submitted representative sample of information.[1] We have also considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit written comments concerning disclosure of requested information).

Initially, we note that there is a pending lawsuit filed against our office: *City of Dallas v. Greg Abbott*, Cause No. D-1-GV-08-002830, District Court, 201st Judicial District, Travis County, Texas. To the extent that any portion of the requested information is identical to the

[1]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.

information at issue in the pending litigation, we decline to issue a decision regarding such information and will allow the trial court to resolve the issue of whether this portion of the information at issue must be released.

We will now address the submitted arguments regarding the information not at issue in the pending litigation. First, the requestor argues that the city is not a client of the law firm whose information is at issue, and therefore, none of the information at issue can consist of privileged attorney-client communications or attorney work product under Texas Rule of Evidence 503 or Texas Rule of Civil Procedure 192.5, respectively. After reviewing the requestor's arguments and the material presented to us, we are unable to conclude that there is no attorney-client relationship between the city and the law firm at issue. Accordingly, we will address the city's arguments and review the information to determine whether any of it is excepted from disclosure under the attorney-client or work product privileges.

Next, you acknowledge that the information at issue is subject to section 552.022 of the Government Code, which provides in pertinent 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:
>
> > (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). The submitted information consists of attorney fee bills, which are made public under section 552.022(a)(16). Section 552.022 provides for the required public disclosure of this information, unless it is expressly confidential under other law. *Id.* 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 assertion of the attorney-client privilege under Texas Rule of Evidence 503 and the attorney work product privilege under Texas Rule of Civil Procedure 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). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state that the submitted attorney fee bills document communications between the city's outside legal counsel and the City Attorney's office that were made in connection with the rendition of professional legal services to the city. You also assert that the communications were confidential. We note, however, that you have failed to identify any of the parties to the communications in the submitted attorney fee bills. *See* ORD 676 at 8 (governmental body must inform this office of identities and capacities of individuals to whom each communication at issue has been made; this office cannot necessarily assume that communication was made only among categories of individuals identified in rule 503); *see generally* Open Records Decision No. 150 (1977) (stating that predecessor to the Act places burden on governmental body to establish why and how exception applies to requested information); *Strong v. State*, 773 S.W.2d 543, 552 (Tex. Crim. App. 1989) (burden of establishing attorney-client privilege is on party asserting it). However, upon review, we have been able to discern from the face of the documents that certain individuals are

privileged parties. Accordingly, the city may withhold the information we have marked on the basis of the attorney-client privilege under Texas Rule of Evidence 503. We find, however, that you have not demonstrated how any of the remaining information constitutes privileged attorney-client communications.

Rule 192.5 of the Texas Rules of Civil Procedure encompasses the attorney work product privilege. For purposes of section 552.022 of the Government Code, information may be withheld 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.*

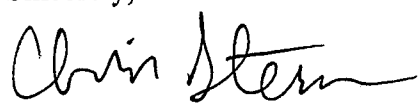
The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that (1) a reasonable person would have concluded from the totality of the circumstances surrounding 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 may be withheld 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). *Caldwell*, 861 S.W.2d at 427. You contend that the attorney fee bills contain core attorney work product that is protected by rule 192.5. Having considered your representations and reviewed the information at issue, we find you have not established that the remaining information consists of privileged core work product. Therefore, the city may not withhold any of the remaining information under rule 192.5.

In summary, the city may withhold the information we have marked pursuant to Texas Rule of Evidence 503. The remaining information must be released to the requestor.

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,



Christopher D. Sterner
Assistant Attorney General
Open Records Division

CDSA/eeg

Ref: ID# 342506

Enc. Submitted documents

c: Requestor
(w/o enclosures)