ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 2, 2009

Mr. C. Patrick Phillips
Assistant City Attorney
City of Fort Worth
1000 Throckmorton, 3rd Floor
Fort Worth, Texas 76102

OR2009-09182

Dear Mr. Phillips:

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# 348226 (City of Fort Worth Request # 3122-09).

The City of Fort Worth (the "city") received a request for documents related to a broken water main near the requestor's residence on December 31, 2008. The city claims the information is excepted from disclosure under sections 552.103, 552.107, 552.111, and 552.136 of the Government Code. We have considered the exceptions the city claims and reviewed the submitted information.

First, we note the submitted information is subject to disclosure under section 552.022(a)(1) of the Government Code, which provides for required disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). In this instance, the submitted information consists of a completed investigation. Sections 552.103, 552.107, and 552.111 are discretionary exceptions and do not make information confidential; therefore, the city may not withhold the information under these exceptions. *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), 473 (1987)

(sections 552.103 and 552.111 may be waived). These documents must therefore be released unless they are expressly made confidential under other law.

The attorney-client and attorney work product privileges are also found in Rule 503 of the Texas Rules of Evidence and Rule 192.5 of the Texas Rules of Civil Procedure, respectively. The Texas Supreme Court held the Texas Rules of Civil Procedure and Texas Rules of Evidence are other laws within the meaning of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Thus, we will determine whether the city may withhold the information under Rules 503 and 192.5. We will also consider the city's section 552.136 claim as it too is other law that makes information confidential.

For the purpose of section 552.022, information is confidential under Rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. ORD 677 at 9-10. 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 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 a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate 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 National 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 contains 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).

The city asserts records of its Risk Management Office consist of core work product. The city explains the Risk Management Office prepared them in investigating the requestor's claim; the city attorney's office authorized, directed, and controlled the review; they are for the exclusive use of the city attorney in evaluating and defending the claim, and they reflect the opinions and mental impressions of the city's attorneys or their representatives. We agree

the city prepared some of the records in anticipation of litigation and they reflect the attorneys' or their representatives' mental impressions. The city may withhold the information we marked under Rule 192.5. However, some of the documents were prepared by the claimant or his representative and not by the city or its representatives; these documents are not protected as the city's core work product. In addition, some of the documents do not reflect or the city has not explained how they reflect the mental impressions of the city's attorneys or their representatives. Therefore, these records are not privileged under Rule 192.5. Yet other documents were prepared in the ordinary course of the city's business and not prepared in anticipation of litigation. In evaluating whether information created in the ordinary course of business was prepared in anticipation of litigation, Texas courts look to the "primary motivating purpose underlying the ordinary business practice" that caused the information to be created. *National Tank,* 851 S.W.2d at 206; ORD 677 at 7. The city does not explain the primary motivating purpose for the routine practice that gave rise to this information. Thus, the work orders are not privileged under Rule 192.5. Finally, the remaining records were not prepared by the Risk Management Office. Because the city asserts Rule 192.5 for records of its Risk Management Office only, the city may not withhold records created by its Water Department.

Next, we consider the city's attorney-client privilege argument for information not subject to the core work product privilege. Rule 503(b)(1) 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
> >
> > (F) among lawyers and their representatives representing the same client.

Tex. R. Evid. 503. 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. Tex. R. Evid. 503(a)(5).

Accordingly, 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. *See* Open Records Decision No. 676 (2002). Upon a demonstration of all three factors, the entire communication is confidential under Rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 4527 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (privilege attaches to complete communication, including factual information).

After review of the remaining information, we agree one communication is between privileged parties made in rendering professional legal services. Furthermore, the city states the communication was intended to be kept confidential and it has remained confidential. Accordingly, the city may withhold the information we marked under Rule 503. However, the city does not assert the privilege for documents originating from the Water Department. Thus, the city may not withhold such documents. Documents provided to and by the claimant are not privileged communications and thus not excepted from disclosure under Rule 503. Lastly, the city failed to explain how the remainder was made for the purpose of facilitating the rendition of professional legal services. Thus, except for the information we marked, the city may not withhold the remainder under Rule 503.

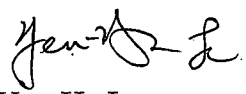
Lastly, we note the remaining information contains bank account and routing numbers excepted from disclosure under section 552.136 of the Government Code. Section 552.136 states "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b). Accordingly, the city must withhold the bank account and routing numbers, which we have marked, under section 552.136 of the Government Code.

In summary, the city may withhold the information we marked under Rules 503 and 192.5. Also, the city must withhold the bank account and routing numbers under section 552.136. The city must release the remainder.[1]

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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/sdk

Ref: ID# 348226

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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[1]We note that the submitted records contain information relating to the requestor that might be excepted from disclosure to the general public under laws and exceptions designed to protect privacy. However, as the subject of the information, the requestor has a special right of access to this information. *See* Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates solely on grounds that information is considered confidential by privacy principles). Therefore, if the city receives a future request for this information from an individual other than the requestor or his authorized representative, the city should again seek our decision.