



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 24, 2009

Ms. Amy L. Sims
City of Lubbock
P.O. Box 2000
Lubbock, Texas 79457

OR2009-10302

Dear Ms. Sims:

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# 350115.

The City of Lubbock (the "city") received a request for nine categories of information related to litigation involving the city and four named entities. You state that, as of the date of the request, the city did not maintain information responsive to a portion of the request.¹ You claim that the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code and privileged under rule 192.3(e) of the Texas Rules of Civil Procedure.² You also explain that the submitted information may contain a third party's proprietary information subject to exception under the Act. Accordingly, you have notified Benefit Partners, Inc., ("Benefit") of this request for

¹We note the Act does not require a governmental body to release information that did not exist at the time the request for information was received or create new information in response to a request. *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), 452 at 3 (1986), 362 at 2 (1983). We further note that a governmental body is not required to obtain information not in its possession. Open Records Decision No. 558 (1990).

²Although your brief raises section 552.101 of the Government Code, you do not explain how this exception is applicable to any of the submitted information. Accordingly, we understand you to have withdrawn your argument under this section. We also note that your brief purports to raise section 552.305 of the Government Code as an exception against disclosure; however, this is a procedural section and is not itself an exception against disclosure.

information and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note that you have not submitted any information responsive to item (7) of the request: "All Request for Proposals and Responses to Requests for Proposals as well as Requests for Qualifications and Responses to Requests for Qualifications related to legal and consulting services procured by or contracted for by the [city], relating to each legal proceeding, litigation, or arbitration involving the [city and four named entities]." This information is also not among the categories of information that you state the city does not maintain. Therefore, to the extent the city maintained any information responsive to this item on the date the city received the request, we assume the city has already released such information. If the city has not released any such information, it must do so at this time. *See* Gov't Code § 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply, it must release information as soon as possible).

We next note that the submitted information includes Benefit's response to the city's RFQ #05-041-VK. This information was the subject of a previous request, as a result of which this office issued Open Records Letter No. 2005-10149 (2005). In that ruling, we determined that the city must withhold certain information under sections 552.110 and 552.136 of the Government Code, and must release the remainder of Benefit's response, but must comply with copyright law in releasing this information. As we have no indication that there has been any change in the law, facts, or circumstances on which the previous ruling was based, we conclude that the city must rely on Open Records Letter No. 2005-10149 as a previous determination and continue to treat the previously ruled upon information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent that the submitted information is not subject to Open Records Letter No. 2005-10149, we will address your arguments against disclosure.

We next note that portions of the submitted information, which we have marked, are subject to section 552.022 of the Government Code, which provides in relevant part:

[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:

. . . .

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

. . . .

(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)(3), (16). You raise sections 552.103, 552.107, and 552.111 of the Government Code as exceptions against disclosure of this information. However, each of these exceptions is discretionary, may be waived by the governmental body, and is not "other law" for purposes of section 552.022. *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. 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 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). Therefore, the city may not withhold the information subject to section 552.022 under sections 552.103, 552.107, or 552.111 of the Government Code. However, the Texas Supreme Court has held that the Texas Rules of Civil Procedure and Texas Rules of Evidence 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 is also found under rule 503 of the Texas Rules of Evidence and the attorney work product privilege is also found under rule 192.5 of the Texas Rules of Civil Procedure. Accordingly, we will consider your assertion of these privileges under rule 503 and rule 192.5 for the submitted information subject to section 552.022. We will also consider whether any of this information is excepted from disclosure under sections 552.130 and 552.136 of the Government Code, which are also "other law" for section 552.022 purposes.³

For the purposes 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

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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 that "[s]ome of the requested information" consists of core work product. Upon review of the submitted information, we find the city has failed to establish that any of the submitted information was prepared by city attorneys or their representatives in anticipation of litigation and reflects the attorneys' or their representatives' mental impressions. Therefore, the city may not withhold any of the submitted information under Rule 192.5.

Next, we consider the city's attorney-client privilege argument. 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).

You state that the highlighted portions of the submitted attorney fee bills consist of confidential attorney-client communications. You inform us that these communications "were made by and for the attorneys and the City, its employees and officials clients." You have identified some of the parties to these communications and you have indicated that these communications were intended to be and have remained confidential and have not been revealed to any third party. *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) (predecessor to 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). Accordingly, we conclude that you have established that the information we have marked under rule 503 constitutes privileged attorney-client communications. However, you have failed to establish that any of the remaining information consists of privileged attorney-client communications, and the city may not withhold any of the remaining information on this basis.

The consulting expert privilege, found in Rule 192.3(e) of the Texas Rules of Civil Procedure, provides that a party to litigation is not required to disclose the identity, mental impressions, and opinions of consulting experts whose mental impressions or opinions have not been reviewed by a testifying expert. TEX. R. CIV. P. 192.3(e). A "consulting expert" is defined as "an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert." *Id.* 192.7.

You inform us that some of the submitted information reveals the identity of experts contracted with the city for litigation-related consulting. You state that "[a]t this time, it is unknown which of [the city's] contracted experts will testify at trial or the arbitration." Based on these representations, we conclude that the city may withhold the information we have marked under rule 192.3(e), which identifies the city's consultants, to the extent such consultants are not testifying experts. *See id.*

We note that portions of the submitted information may be subject to section 552.130 of the Government Code, which exempts from disclosure information related to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *Id.* § 552.130(a)(1), (2). We have marked license plate numbers that the city must withhold pursuant to section 552.130, to the extent such numbers are associated with Texas-registered vehicles.

Finally, we note that some of the submitted information is subject to section 552.136(b) of the Government Code, which states that "[n]otwithstanding any other provision of [the Act], 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); *see id.* § 552.136(a) (defining "access device"). This office has determined that insurance policy numbers constitute access device numbers for purposes of section 552.136. Therefore, the city must withhold the information we have marked pursuant to section 552.136.

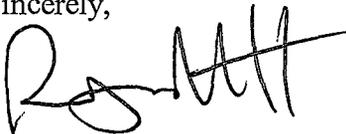
In summary, the city: (1) must rely on Open Records Letter No. 2005-10149 as a previous determination and continue to treat the previously ruled upon information in accordance with that ruling; (2) may withhold the information we have marked under the attorney-client privilege of rule 503 of the Texas Rules of Evidence; (3) may withhold the information we have marked under Texas Rule of Civil Procedure 192.3(e), to the extent the identified consultants are not testifying experts; (4) must withhold the information we have marked under section 552.130 of the Government Code, but only to the extent this information

relates to a Texas-registered motor vehicle; (5) must withhold the information we have marked under section 552.136 of the Government Code; and (6) must release the remainder of the submitted information.

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,



Ryan T. Mitchell
Assistant Attorney General
Open Records Division

RTM/rl

Ref: ID# 350115

Enc. Submitted documents

cc: Requestor
(w/o enclosures)