



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 4, 2009

Mr. John W. Peeler
Coveler & Katz, P.C.
Counsel for Montgomery County Emergency Services
District No. 10
Two Memorial City Plaza
820 Gessner Road, Suite 1710
Houston, Texas 77024-8261

OR2009-12531

Dear Mr. Peeler:

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# 354433.

The Montgomery County Emergency Services District No. 10 (the "district"), which you represent, received two requests for itemized fee bills for legal services to the district from January 1, 2009 to May 31, 2009. You indicate that the submitted information is excepted from disclosure under section 552.136 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 submitted arguments and reviewed the submitted information.

Initially, we address your assertion that the submitted information is not responsive to the request. You argue that the submitted fee bills are not addressed to the district, but rather to the Magnolia Volunteer Fire Department (the "department") and, therefore, are not responsive to the request. We note that a governmental body must make a good-faith effort to relate a request for information to responsive information that is within the governmental body's possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). You

¹In making your arguments, you incorporate by reference the arguments made to this office in support of this same position in connection with Open Records Letter No. 2009-12346 (2009).

inform us the fee bills were provided to the district as part of its review of operations funding for the department under the terms of a service agreement between the district and the department. Therefore, we conclude the fee bills are responsive to the request. Thus, we will address the submitted arguments for their exception from disclosure under the Act.

The submitted information consists of attorney fee bills subject to section 552.022(a)(16) of the Government Code. Section 552.022(a)(16) provides for required public disclosure of "information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege," unless the information is expressly confidential under other law. Gov't Code § 552.022(a)(16). 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). We will therefore consider the arguments for the submitted information under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure.

Texas Rule of Evidence 503(b)(1) provides the following:

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).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must do the following: (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, 457 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (privilege attaches to complete communication, including factual information).

You assert the submitted attorney fee bills contain communications between outside counsel and department representatives. As noted above, as its general funding provider, you explain the district shares a common interest with the department concerning the matters addressed in the submitted attorney fee bills. *See* TEX. R. EVID. 503(b)(1)(C) (client has privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for purpose of facilitating rendition of professional legal services to lawyer or representative of lawyer representing another party in pending action and concerning a matter of *common interest* therein) (emphasis added). You state the communications were made for the purpose of facilitating the rendition of professional legal services to both the district and the department. Further, you state that the submitted fee bills were intended to be confidential and have maintained their confidentiality. Upon review of the submitted arguments and the information at issue, we find you have established that the information you seek to withhold, which we have marked, constitutes privileged attorney-client communications. Accordingly, the district may withhold the marked information under rule 503.

We next address the argument under Texas Rule of Civil Procedure 192.5 for the remaining information you seek to withhold within the submitted attorney fee bills. Rule 192.5 encompasses the attorney work product privilege. 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 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 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).

You contend that the attorney fee bills contain attorney work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. Having considered the submitted arguments and reviewed the information at issue, we conclude that the information you seek to withhold, which we have marked, constitutes privileged attorney work product that may be withheld under rule 192.5 of the Texas Rules of Civil Procedure.

Section 552.136 of the Government Code 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." Gov't Code § 552.136; *see id.* § 552.136(a) (defining "access device"). Accordingly, the district must withhold the bank account numbers and the wire transfer numbers we have marked under section 552.136.

In summary, the district may withhold the information we have marked under Texas Rule of Evidence 503. The district may withhold the information we have marked under Texas Rule of Civil Procedure 192.5. The district must withhold the bank account numbers and wire transfer numbers we have marked under section 552.136 of the Government Code. The remaining information 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,



Christina Alvarado
Assistant Attorney General
Open Records Division

CA/rl

Ref: ID# 354433

Enc. Submitted documents

cc: Requestor
(w/o enclosures)