ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 16, 2009

Mr. James R. Evans, Jr.
Hargrove & Evans, L.L.P.
4425 Mopac South, Building 3, Suite 400
Austin, Texas 78735

OR2009-13064

Dear Mr. Evans:

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# 356242.

The Cameron County Appraisal District (the "district"), which you represent, received a request for "all contracts for legal services between the appraisal district and a private law firm or attorney" in effect at the time of the request or "the most recent bill for legal services from a private law firm or attorney" to the district. You claim that the submitted information is excepted from disclosure under section 552.107 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5.[1] We have considered your arguments and reviewed the submitted information.

Initially, we note the submitted information includes only attorney fee bills. The district did not submit any contracts between the district and outside legal counsel. Therefore, to the extent any information responsive to this category of the request existed on the date the district received this request, we assume you have released it. If you have not released any such information, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also*

[1] Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we note, and you acknowledge, that the submitted attorney fee bills are 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). You assert that the information in the submitted fee bills is protected by section 552.107 of the Government Code. Section 552.107 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision No. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). As such, section 552.107 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold the submitted attorney fee bills under section 552.107 of the Government Code. However, 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 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your arguments under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5.

Rule 503 of the Texas Rules of Evidence encompasses the attorney-client privilege and 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

> (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 "reflect legal services rendered on general matters that are not related to litigation" as well as describing legal services in connection with "specific lawsuits in which the [d]istrict has been served and is a party." You state the bills include references to conferences with the chief appraiser of the district, who is the district's chief administrator. You contend the information you have marked constitutes communications between the district and the district's attorney for the purpose of rendering legal services to the district. You further state these documents are not made available for inspection by anyone except the chief appraiser, the district bookkeeper, the district auditor, and the district's board of directors. Based on your representations and our review, we conclude that some of the information is protected by the attorney-client privilege, and the district may withhold the information we have marked under Texas Rule of Evidence 503. We note, however, that you have failed to identify all of the parties to some of the communications or explain their relationship with the district. *See* Open Records Decision No. 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). We also note that some of the remaining information you have marked under rule 503 does not document a communication. Accordingly, you have failed to establish that the remaining information you have marked documents confidential communications that were made between privileged parties. Therefore, we conclude that Texas Rule of Evidence 503 is not applicable to the remaining information you have marked and it may not be withheld on this basis.

We next address your argument under Texas Rule of Civil Procedure 192.5 for the remaining information you have marked in the submitted attorney fee bills. Rule 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 and (2) consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *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 part of the work product test requires the governmental body to show that the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both parts of the work product test is confidential under rule 192.5, provided that the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp.*, 861 S.W.2d at 427.

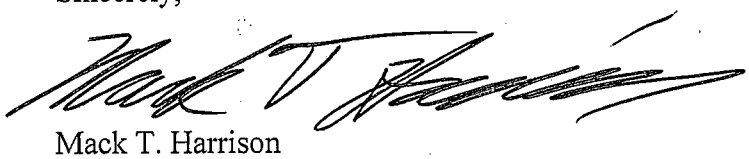
Upon review, we find that you have failed to explain how any portion of the remaining information consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative created for trial or in anticipation of litigation. Thus, the district may not withhold any of the remaining information you have marked under rule 192.5 of the Texas Rules of Civil Procedure.

In summary, the district may withhold the information we have marked in the submitted attorney fee bills under Texas Rule of Evidence 503. 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, toll free, at (888) 672-6787.

Sincerely,



Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/eeg

Ref: ID# 356242

Enc. Submitted documents

c: Requestor
(w/o enclosures)