



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 23, 2010

Mr. Wm. Hulse Wagner  
McLeod, Alexander, Powel & Apffel  
Attorney for Port of Galveston  
1415 Louisiana, Suite 3600  
Houston, Texas 77002

OR2010-02656

Dear Mr. Wagner:

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# 370989 (ORR#).

The Port of Galveston (the "port"), which you represent, received a request for recordings, transcripts, and minutes of board meetings, invoices from law firms related to two specified topics, and records of payments or expenditures of funds related to specified legislative issues during a specified time period. You state you have released a portion of the requested information. You claim portions of the submitted information are excepted from disclosure under sections 552.107 and 552.111 of the Government Code, as well as privileged under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

You inform us on December 2, 2009, the port sought clarification of the request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). On December 28, 2009, the requestor responded to the port's request for information. You state, and provide documentation showing, on January 11, 2010, the port responded to the requestor's clarification by providing additional information responsive to the portions of the request that were clarified.

Accordingly, we will address the port's arguments with respect to the submitted information.

Initially, we note the submitted information is subject to section 552.022 of the Government Code. This section provides, in pertinent part:

(a) [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:

...

(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). In this instance, the information at issue consists of attorney fee bills. Therefore, the information must be released under section 552.022 unless it is confidential under other law. Sections 552.107 and 552.111 of the Government Code are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See id.* § 552.007; Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 663 at 5 (1999) (governmental body may waive section 552.111), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.107 and 552.111 are not other laws that make information confidential for the purposes of section 552.022(a)(16). Therefore, the port may not withhold any of the submitted information under section 552.107 or section 552.111 of the Government Code. You seek to withhold portions of the submitted information under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court has held the Texas Rules of Evidence and 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 your assertions of the attorney-client privilege under rule 503 of the Texas Rules of Evidence and the attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure.

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 it is 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 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 the communication is confidential by explaining it was not intended to be disclosed to third persons and 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You assert portions of the submitted fee bills, which you have marked, include privileged attorney-client communications between port personnel and its outside counsel and staff. You indicate the communications at issue were made in anticipation of litigation or for trial between the port and its representatives that were not intended to be disclosed to third parties. Based on your representations and our review of the information at issue, we find the port has established the information we have marked is protected by the attorney-client privilege. Thus, the port may withhold the information we have marked pursuant to rule 503 of the Texas Rules of Evidence. However, the remaining information documents communications with individuals you have not demonstrated are privileged parties or does not reveal privileged communications. Accordingly, none of the remaining information at issue may be withheld under Texas Rule of Evidence 503.

We next address your arguments under Texas Rule of Civil Procedure 192.5 for the information 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 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.

In this instance, we find none of the remaining information in the submitted fee bills consists of mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative that were created for trial or in anticipation of litigation. We therefore conclude the port may not withhold any of the remaining information it has marked under Texas Rule of Civil Procedure 192.5.

In summary, the port may withhold the information we have marked on the basis of the attorney-client privilege 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](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,



Claire V. Morris Sloan  
Assistant Attorney General  
Open Records Division

CVMS/rl

Ref: ID# 370989

Enc. Submitted documents

c: Requestor  
(w/o enclosures)