



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 31, 2010

Mr. John W. Peeler  
Coveler & Katz, P.C.  
Attorney for Montgomery County Emergency Services District 10  
Two Memorial City Plaza  
820 Gessner Road, Suite 1710  
Houston, Texas 77024-8261

OR2010-04551

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# 374769.

The Montgomery County Emergency Services District No. 10 (the "district"), which you represent, received a request for itemized fee bills for legal services to the district from October 1, 2009 to December 31, 2009. You state you will release some information to the requestor. You also state the district is withholding bank account numbers and bank routing numbers under section 552.136 of the Government Code pursuant to Open Records Decision No. 684 (2009).<sup>1</sup> You claim some of the submitted information is privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the submitted information.

Initially, as you acknowledge, the submitted information is subject to section 552.022(a)(16) of the Government Code, which provides that information in a bill for attorney's fees must be released unless it is privileged under the attorney-client privilege or is expressly confidential under other law. *See* 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

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<sup>1</sup>We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including bank account numbers and bank routing numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

“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 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 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state that portions of the submitted attorney fee bills document communications between attorneys for the district, district representatives, and representatives of the Magnolia Volunteer Fire Department (the "department"). You explain that the department, as the district's contracted fire suppression provider, shares a common interest with the district 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 at issue 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 attorney fee bills, we agree that most of the information at issue is protected by the attorney-client privilege. However, we find that the district has failed to demonstrate how the information we have marked documents confidential communications that were made between privileged parties. Accordingly, except for the information we have marked, the district may withhold the information you have marked in the submitted attorney fee bills pursuant to Texas Rule of Evidence 503.

We next address the argument under Texas Rule of Civil Procedure 192.5 for the remaining entries 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 contain the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal

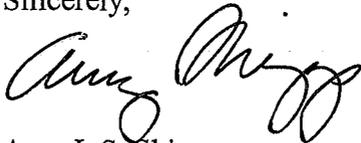
theories. TEX.R.CIV.P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test is confidential under rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in rule 192.5(c). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You contend that the remaining entries at issue in the submitted attorney fee bills consist of attorney work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. Upon review of submitted arguments and the information at issue, we find you have failed to establish that the information at issue consists of core work product for purposes of Texas Rule of Civil Procedure 192.5. Thus, the district may not withhold any of the remaining information under rule 192.5. Accordingly, the information we have marked 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,



Amy L.S. Shipp  
Assistant Attorney General  
Open Records Division

ALS/rl

Ref: ID# 374769

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)