



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 14, 2010

Ms. Rebecca Brewer
Abernathy, Roeder, Boyd & Joplin, P.C.
Attorney for City of Weston
P.O. Box 1210
McKinney, Texas 75070-1210

OR2010-04848

Dear Ms. Brewer:

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# 375716.

The City of Weston (the "city"), which you represent, received a request for seven categories of information related to the city's expenses. You claim that a portion of the submitted information is privileged under Texas Rule of Civil Procedure 192.5 and Texas Rule of Evidence 503.¹ We have considered your arguments and reviewed the submitted information.

Initially, we note you have only submitted to this office information related to one category of the instant request, specifically all invoices submitted by Abnerathy, Roeder, Boyd, and Joplin, P.C. to the city, regardless of status. Thus, to the extent any additional information responsive to the remaining six categories of the request existed on the date the city 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* 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).

¹Although you raise section 552.101 of the Government Code in conjunction with both rules, 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). Thus, we will not address your claim that the submitted information is confidential under section 552.101 in conjunction with these rules.

We also note that a portion of the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2010-05203 (2010). In Open Records Letter No. 2010-05203, we ruled that, because the city failed to comply with section 552.301 of the Government Code by failing to timely request a ruling from this office, the submitted information was presumed public under section 552.302 and must be released. As we have no indication the law, facts, and circumstances on which the prior ruling was based have changed, the city must continue to rely on that ruling as a previous determination and release the previously ruled upon information in accordance with Open Records Letter No. 2010-05203. *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).

The submitted information consists of attorney fee bills 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 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). Therefore, we will consider whether the city may withhold any of the information in the attorney fee bills 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 contain confidential communications between the city's outside attorneys, special counsel, and city employees. You state that these communications were made for the purpose of facilitating the rendition of professional legal services to the city. Further, you state that the submitted fee bills were intended to be, and have remained, confidential. We note that you have not specifically identified, by name, any of the privileged parties. We are unable to discern who the privileged parties are with the exception of the attorneys and law firm employees listed as providing legal services in the submitted fee bills and certain city employees and representatives we are able to identify from the submitted information. Accordingly, we have marked the information that we discern is protected by the attorney-client privilege and may therefore be withheld pursuant to rule 503 of the Texas Rules of Evidence. However, we find you have failed to demonstrate that any of the remaining information documents privileged attorney-client communications. Accordingly, none of the remaining information 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 city may not withhold any of the remaining information under Texas Rule of Civil Procedure 192.5.

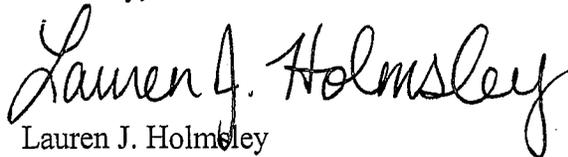
In summary, the city may withhold the information we have marked on the basis of the attorney-client privilege pursuant to Texas Rule of Evidence 503. The remaining information must be released.

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,

A handwritten signature in cursive script that reads "Lauren J. Holmsley". The signature is written in black ink and is positioned above the typed name.

Lauren J. Holmsley
Assistant Attorney General
Open Records Division

LJH/jb

Ref: ID# 375716

Enc. Submitted documents

c: Requestor
(w/o enclosures)