



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 27, 2010

Mr. Gary Henrichson
Assistant City Attorney
City of McAllen
P.O. Box 220
McAllen, Texas 78501

OR2010-11255

Dear Mr. Henrichson:

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# 388282 (McAllen Open Records Request No. W002576-050710).

The City of McAllen (the "city") received a request for information pertaining to the demolition of a structure at a specified address. You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code and privileged under Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the submitted information.

Initially, we note portions of the submitted information consist of the minutes and agenda of a public meeting of the city's Building Board of Adjustments and Appeals. The minutes and agendas of a governmental body's public meetings are specifically made public under the Open Meetings Act, chapter 551 of the Government Code. *See* Gov't Code §§ 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying upon request), .043 (notice of meeting of governmental body must be posted in a place readily accessible to general public at least 72 hours before scheduled time of meeting), .053-.054 (district governing bodies required to post notice of meeting at a place convenient to the public in administrative office of district). Accordingly, the minutes and agendas of the public meeting, which we have marked, must be released in accordance with section 551.022 of the Government Code.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code, which provides in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). In this instance, the submitted information includes completed reports, which fall within the purview of section 552.022(a)(1). The city may only withhold the information subject to subsection 552.022(a)(1) if it is excepted from disclosure under section 552.108 of the Government Code or is expressly made confidential under other law. You claim the information subject to section 552.022 is excepted from disclosure under sections 552.103 and 552.111 of the Government Code. However, Sections 552.103 and 552.111 are discretionary exceptions that protect a governmental body's interest and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 552 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). As such, sections 552.103 and 552.111 do not constitute other law that makes information confidential for the purposes of section 552.022(a)(1). Consequently, the information we have marked as subject to section 552.022 may not be withheld under section 552.103 or section 552.111 of the Government Code. The Texas Supreme Court has held, however, that the Texas Rules of Civil Procedure are "other law" that makes information confidential for the purposes of section 552.022(a). *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). You also claim the attorney work product privilege pursuant to Texas Rule of Civil Procedure 192.5. Accordingly, we will consider your assertions of that privilege under rule 192.5 for the information subject to section 552.022.

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 when the governmental body received the request for information 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 generally claim that the information subject to section 552.022, which consists of inspection reports and a title report pertaining to the demolition of a structure by the city, is confidential under rule 192.5. However, you do not explain how this information reflects the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. Thus, we find the city has failed to demonstrate the applicability of the attorney work product privilege to the information at issue. Accordingly, the city may not withhold the information we have marked as subject to section 552.022 of the Government Code under Texas Rule of Civil Procedure 192.5. As you raise no other exceptions to its disclosure, the information we have marked as subject to section 552.022 must be released.

Next, we will consider your claims under sections 552.103 and 552.111 of the Government Code for the remaining information that is not subject to section 552.022(a)(1). Section 552.103 of the Government Code provides in relevant part as follows:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). To establish litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); see Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. Open Records Decision No. 331 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. ORD 452 at 4. This office has concluded that a governmental body's receipt of a claim letter that it represents to be in compliance with the notice requirements of the Texas Tort Claims Act (the "TTCA"), chapter 101 of the Civil Practice and Remedies Code, is sufficient to establish that litigation is reasonably anticipated. If this representation is not made, then the receipt of the claim letter is a factor that we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established that litigation is reasonably anticipated. See Open Records Decision No. 638 at 4 (1996).

You assert the city reasonably anticipates litigation involving the requestor's client pertaining to the city's demolition of a structure it had deemed unsafe. You state, and provide documentation, that the requestor sent the city a notice of claim for property damage in accordance with the TTCA prior to the city's receipt of the request at issue. You also assert that the submitted information directly relates to the requestor's stated claims for property damage related to the demolition. Based on your representations and our review of the

information at issue, we find that the remaining information not subject to section 552.022 is related to litigation that the city reasonably anticipated when it received the instant request for information. We therefore conclude that section 552.103 of the Government Code is generally applicable to the remaining information.

In this instance, however, the opposing party in the pending litigation has seen or had access to some of the remaining documents. We note that the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Consequently, if the opposing party has previously seen or had access to the information, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the city may not withhold the submitted information the opposing party has seen or had access to under section 552.103. However, the city may withhold the information we have marked under section 552.103.¹ We note that the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You claim the remaining information, which is not subject to section 552.022, is excepted under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency," and encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). The elements of and test for the attorney work product privilege under section 552.111 are the same as those for rule 192.5 outlined above. We note the remaining information consists of letters to the city from the requestor. We conclude the city has failed to demonstrate the applicability of the attorney work product privilege to this information. Thus, the city may not withhold the remaining information not subject to section 552.022 under section 552.111 of the Government Code. As you raise no further exceptions to disclosure of this information, it must be released.

In summary, the minutes and agendas of the public meetings, which we have marked, must be released in accordance with section 551.022 of the Government Code. The city must also release the information we have marked under section 552.022(a)(1) of the Government Code. The city may withhold the information we have marked under section 552.103 of the Government Code. The remaining information must be released.

¹As our ruling is dispositive for the remaining information not subject to section 552.022, we need not address your remaining arguments against the disclosure of this information.

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,


Laura Ream Lemus
Assistant Attorney General
Open Records Division

LRL/jb

Ref: ID# 388282

Enc. Submitted documents

c: Requestor
(w/o enclosures)