



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 1, 2010

Mr. Robert J. Perez
Shelton & Valadez, P.C.
For City of Hondo
600 Navarro, Suite 500
San Antonio, Texas 78205

OR2010-13307

Dear Mr. Perez:

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# 392284.

The City of Hondo (the "city"), which you represent, received a request for all invoices or billing statements from named past or present city attorneys regarding Bobby's Small Engine Repair or a named individual's legal claim against the city. You state the city does not have any information responsive to the portion of the request pertaining to a named past city attorney.¹ You also state the city has provided some of the requested information to the requestor. You claim the submitted attorney fee bills are excepted from disclosure under sections 552.103 and 552.107 of the Government Code, and privileged under rule 503 of the

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure.² We have considered your arguments and reviewed the submitted information.

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

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:

...

(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). The submitted information consists of attorney fee bills. Such information must be released unless it is expressly confidential under other law. Although you assert portions of the submitted fee bills are excepted from disclosure under sections 552.103 and 552.107 of the Government Code, these sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See id.* § 552.007; *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. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (discretionary exceptions generally). As such, sections 552.103 and 552.107 are not "other law" for purposes of section 552.022. Therefore, the city may not withhold any of the information at issue under either section 552.103 or section 552.107 of the Government Code. The Texas Supreme Court, however, has held 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). Therefore, we will consider your arguments under rule 503 of Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure.

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

²Although you also raise section 552.101 of the Government Code in conjunction with the attorney-client privilege, the attorney work product privilege, and sections 552.103 and 552.107 of the Government Code, this office has concluded section 552.101 does not encompass discovery privileges or other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

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

You claim the information you have marked consists of communications between the city attorney and city officials made for the purpose of facilitating the rendition of professional legal services to the city. We note, however, most of the marked information documents communications with an individual who has made legal claims against the city and who you assert is a potential opposing party in litigation you contend the city reasonably anticipates. You have not explained, or otherwise demonstrated, how this individual is a privileged party. Furthermore, the remaining marked information does not reveal communications. Therefore, we find you have failed to establish the applicability of the attorney-client privilege to the

information at issue. Consequently, none of the marked information may be withheld under rule 503 of the Texas Rules of Evidence.

For purposes of section 552.022, information is confidential under rule 192.5 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 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.*

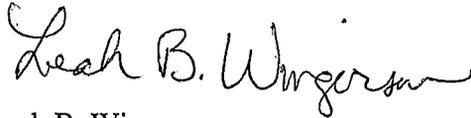
The first prong of the work product test, which requires a governmental body to show the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation there was a substantial chance that litigation would ensue, and (2) the party resisting discovery believed in good faith there was a substantial chance 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 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*, 861 S.W.2d 423, 427.

You contend the information you have marked consists of core work product protected by the attorney work product privilege. You have not, however, explained, nor does the information reflect, the information contains or reveals an attorney's mental impressions, opinions, conclusions, or legal theories. Therefore, we conclude you have failed to establish the applicability of the core work product aspect of the attorney work product privilege and none of the information at issue may be withheld under rule 192.5 of the Texas Rules of Civil Procedure. As you have not claimed any other exceptions to disclosure, the submitted 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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/tp

Ref: ID# 392284

Enc. Submitted documents

c: Requestor
(w/o enclosures)