



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 9, 2010

Ms. Stephanie Galanides
City Secretary
City of Heath
200 Laurence Drive
Heath, Texas 75032

OR2010-17023

Dear Ms. Galanides:

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# 399436.

The City of Heath (the "city") received a request for any invoices, statements, letters of engagement, checks, contracts, or correspondence between the city and a specified law firm in the last ten years.¹ You state the city has made a portion of the responsive information available to the requestor. You claim the remaining portions of the submitted information are excepted from disclosure under section 552.107 of the Government Code and privileged under rule 503 of the 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. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304

¹You state the city sought and received clarification from the requestor regarding this request. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010) (where governmental body seeks clarification or narrowing of request for information, ten-day period to request attorney general opinion is measured from the date request is clarified or narrowed).

²Although you raise section 552.101 of the Government Code in conjunction with rule 503, rule 192.5, and section 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).

(providing an interested party may submit comments stating why information should or should not be released).

Initially, we note portions of the submitted information are subject to section 552.022 of the Government Code, which provides in pertinent part as follows:

(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:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege;

(17) information that is also contained in a public court record; and

(18) a settlement agreement to which a governmental body is a party.

Id. § 552.022(a)(3), (16), (17), (18). The submitted information includes payment vouchers, invoices, and a contract relating to the expenditure of public funds by the city that are subject to section 552.022(a)(3) of the Government Code, attorney fee bills that are subject to section 552.022(a)(16), court-filed documents that are subject to section 552.022(a)(17), and a signed settlement agreement to which the city is a party that is subject to section 552.022(a)(18). The city may only withhold the information subject to section 552.022 if it is confidential under "other law."

Section 552.107 of the Government Code is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* 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, section 552.107 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the city may not withhold the information subject to section 552.022 under section 552.107 of the Government Code. However, the Texas Supreme Court has held that 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 Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5 for the information subject to section 552.022.

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). When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* ORD 676 at 6-7.

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).

We have marked the portions of the information subject to section 552.022 which, based upon our review, reveal or consist of communications between individuals identified as city employees and attorneys for the city. We understand this information was intended to be and has remaining confidential. This marked information is subject to the attorney-client privilege, and the city may withhold it under rule 503 of the Texas Rules of Evidence. Although you claim portions of the remaining information subject to section 552.022 are also privileged, you do not explain how this information consists of or reveals communications between or among privileged parties. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must provide reasons why the stated exceptions apply); ORD 676 at 6-7. Accordingly, you have failed to establish that the attorney-client privilege applies to the remaining information subject to section 552.022, and this information may not be withheld under Texas Rule of Evidence 503.

Rule 192.5 of the Texas Rules of Civil Procedure 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* ORD 677 at 9-10. 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's 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 that 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.

Although you mention the work product privilege, you provide no arguments explaining how the information at issue constitutes material prepared or mental impressions developed, or communications made, in anticipation of litigation or for trial. Thus, because you have

provided no arguments explaining the applicability of the work product privilege to the information at issue, none of the submitted information may be withheld on that basis. *See* Gov't Code § 552.301(e)(1)(A).

We next turn to your argument under section 552.107 of the Government Code for the information not subject to section 552.022. Section 552.107 protects information coming within the attorney-client privilege. The test for determining whether information is protected under the attorney-client privilege under section 552.107 is the same as that discussed above under Texas Rule of Evidence 503. First, a governmental body must demonstrate that the information constitutes or documents a communication. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. Lastly, the attorney-client privilege applies only to a confidential communication, meaning it was "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." ORD 676.

Upon review, we have marked the portions of the remaining information which are communications between and among parties identified as privileged within the submitted information and which reflect they were made in the furtherance of the rendition of legal services to the city. We understand these communications were intended to be and have remained confidential. Consequently, we find the city may withhold the communications we marked under section 552.107 of the Government Code. However, upon review, the remaining information either reflects it was communicated with parties who are not identified as privileged or does not appear to have been communicated for the purpose of rendering legal services to the city. You have not provided any arguments explaining how this remaining information at issue satisfies the requirements of the attorney-client privilege. *See* Gov't Code § 552.301(e)(1)(A); ORD 676 at 6-7. Accordingly, you failed to show how any of the remaining information falls within section 552.107, and it may not be withheld on that basis.

Portions of the submitted information also contain private e-mail addresses that may be subject to section 552.137 of the Government Code.³ Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body[,]" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses we marked do not appear to be excepted under subsection (c). Accordingly, unless the owners of these e-mail addresses

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

have consented to their release, the city must withhold the e-mail addresses we marked under section 552.137 of the Government Code.⁴

In summary, the city may withhold the information we marked under Texas Rule of Evidence 503 and section 552.107 of the Government Code. The city must withhold the e-mail addresses we marked under section 552.137 of the Government Code unless the owners of these e-mail addresses have consented to their release. The remaining 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,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/tp

Ref: ID# 399436

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.