



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 9, 2011

Ms. Jacqueline Hojem
Public Information Officer
Metropolitan Transit Authority of Harris County
P.O. Box 61429
Houston, Texas 77208

OR2011-03274

Dear Ms. Hojem:

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# 410964 (MTA No. 2011-0067).

The Metropolitan Transit Authority of Harris County (the "authority") received a request for invoices and monthly statements revealing the authority's legal costs in two specified matters. You state the authority has released some responsive information to the requestor. You claim the information you marked is excepted from disclosure under sections 552.107 and 552.111 of the Government Code and 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.

We note, and you acknowledge, the information you seek to withhold is subject to section 552.022 of the Government Code. This section provides, in pertinent part:

- (a) [T]he 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). In this instance, the information you marked consists of entries in attorney fee bills that are subject to section 552.022(a)(16). Therefore, this information must be released under section 552.022 unless it is confidential under "other law." Although you raise sections 552.107 and 552.111 of the Government Code, these are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See* Open Records Decision Nos. 677 at 10-11 (2002) (attorney work-product privilege under section 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.107 and 552.111 are not "other law" that make information confidential for the purposes of section 552.022. Therefore, the authority may not withhold the marked fee bill entries under section 552.107 or section 552.111 of the Government Code. You also raise rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court has held the Texas Rules of Evidence and Texas Rules of Civil Procedure are "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 your assertions of the attorney-client privilege under rule 503 of the Texas Rules of Evidence and the attorney work product privilege under 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 it is 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You assert portions of the submitted fee bills document privileged attorney-client communications. You identify the parties to these communications as the authority's staff, clients, client representatives, lawyers, and lawyer representatives. You state the communications at issue were made in furtherance of the rendition of legal services. Further, you state matters referenced in the fee bills were intended to be, and have remained, confidential. Based on your representations and our review of the information at issue, we find the authority may withhold the information we have marked under Texas Rule of Evidence 503. However, you do not explain how the remaining information you marked reveals the content of communications. Therefore, because you failed to provide this office with the necessary facts to demonstrate the elements of the attorney-client privilege with respect to the remaining information you marked, this information is not privileged under rule 503 and may not be withheld on this basis.

We next address your arguments under Texas Rule of Civil Procedure 192.5 for the remaining information at issue. Rule 192.5 encompasses the attorney work product privilege. For purposes of section 552.022 of the Government Code, information in an attorney fee bill 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 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.

You contend the remaining information you marked contains attorney core work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. You state the information you have marked is related to pending litigation involving the authority, and was prepared or developed to prepare the authority for trial. Upon review, we find the authority may withhold the information we have marked pursuant to rule 192.5. However, we find you have failed to demonstrate that any of the remaining information 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. Consequently, none of the remaining information at issue may be withheld pursuant to rule 192.5.

In summary, the authority may withhold the information we have marked under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. The remaining information 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, 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 black ink, appearing to read "Bob Davis", written in a cursive style.

Bob Davis
Assistant Attorney General
Open Records Division

RSD/tf

Ref: ID# 410964

Enc. Submitted documents

c: Requestor
(w/o enclosures)