



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 21, 2011

Mr. James R. Evans, Jr.  
For Caldwell County Appraisal District  
Hargrove & Evans, L.L.P.  
4425 MoPac South, Building 3, Suite 400  
Austin, Texas 78735

OR2011-10415

Dear Mr. Evans:

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# 424516.

The Caldwell County Appraisal District and the Caldwell County Appraisal Review Board (collectively the "board"), which you represent, received a request for all information relating to the special valuation or reduction in appraised value of properties classified as an ecological laboratory during three specified years, as well as all records pertaining to two specified properties. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code and privileged under rule 192.5 of the Texas Rules of Civil Procedure, rule 503 of the Texas Rules of Evidence, and rule 1.05 of the Texas Disciplinary Rules of Professional Conduct.<sup>1</sup> We have considered your arguments and reviewed the submitted information.

Initially, we note the information you have submitted as Exhibit E consists of attorney fee bills, which are subject to section 552.022(a)(16) of the Government Code. Section 552.022(a)(16) provides for required public disclosure of "information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege," unless the information is expressly confidential under "other law." Gov't Code § 552.022(a)(16). Although you claim section 552.107 of the Government Code for this information, that section is a discretionary exception to disclosure that protects a governmental body's

---

<sup>1</sup>Although you raise section 552.022 of the Government Code, that section does not provide an exception to disclosure. Rather, it sets out the categories of information that are not excepted from disclosure unless they are made confidential under other law. See Gov't Code § 552.022.

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 (2000) (discretionary exceptions generally). As such, section 552.107 is not “other law” that makes information confidential for the purposes of section 552.022(a)(16), and the board may not withhold any of the information in Exhibit E under that exception. However, the Texas Supreme Court has held the Texas Rules of Evidence and the 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 arguments under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. We note, however, the Texas Disciplinary Rules of Professional Conduct are not considered other law for purposes of section 552.022. Therefore, we do not address your argument under rule 1.05, and thus, none of the information at issue may be withheld on this basis. *See* ORD 676 at 3-4.

Texas Rule of Evidence 503 enacts 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 the information you have marked relates to a communication between yourself and the board. You state this communication was made for the rendition of legal services; it was intended to be confidential; and it has remained confidential. Based on your representations and our review, we conclude the information you have marked in Exhibit E may be withheld under Texas Rule of Evidence 503.

Next, we address your argument under Texas Rule of Civil Procedure 192.5, which 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 the information implicates the core work-product aspect of the work-product privilege. See Open Records Decision No. 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 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 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 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 state the information you have marked under rule 192.5 was developed in relation to litigation involving a specific case. However, we find you have failed to demonstrate that any of the information you have marked consists of mental impressions, opinions, conclusions, or legal theories implicating the attorney's core work product. Therefore, we conclude the board may not withhold any of the information you have marked under rule 192.5 of the Texas Rules of Civil Procedure.

We turn next to the information you have submitted in Exhibits D-1 and D-2. Section 552.103 of the Government Code provides:

(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). The governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and provide documentation showing, the information submitted as Exhibit D-1 relates to a pending lawsuit in the District Court of Caldwell County involving the valuation of a specific piece of property and a related 2009 protest filed against the board. You state the information in Exhibit D-1 directly relates to that pending litigation because it addresses the core issue in the case—whether the property at issue qualifies for a special valuation. You further explain the information submitted as Exhibit D-2 relates to a 2010 protest pending before the board regarding the same piece of property and the same issue. You explain regardless of the outcome of the 2010 protest, you expect the issues before the board will be incorporated into the pending litigation. Based on your representations and our

review, we agree section 552.103 of the Government Code is applicable to the information submitted as Exhibits D-1 and D-2.

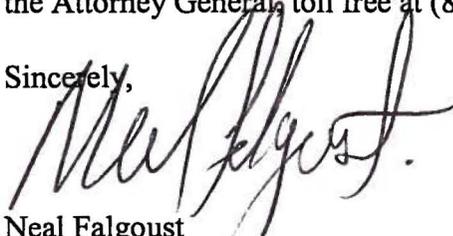
We note, however, that much of the information at issue was sent to or received from the opposing party in the pending litigation. We note that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any information obtained from or provided to the opposing party in the litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982). Accordingly, with the exception of the information obtained from or provided to the opposing party in the litigation, the board may withhold the information submitted in Exhibits D-1 and D-2 under section 552.103 of the Government Code.

In summary, the board may withhold the information you have marked in Exhibit E under rule 503 of the Texas Rules of Evidence. With the exception of the information obtained from or provided to the opposing party in the litigation, the board may withhold the information submitted in Exhibits D-1 and D-2 under section 552.103 of the Government Code. 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](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,



Neal Falgoust  
Assistant Attorney General  
Open Records Division

NF/dls

Ref: ID# 424516

Enc. Submitted documents

c: Requestor  
(w/o enclosures)