



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 16, 2011

Mr. Paul Tomme
Legal Counsel
Dallas/Fort Worth International Airport
P.O. Box 619428
DFW Airport, Texas 75261-9428

OR2011-13423

Dear Mr. Tomme:

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# 430143.

The Dallas/Fort Worth International Airport Board (the "board") received a request for twenty-five categories of information pertaining to various matters regarding the TGI Friday's and DFW Restaurant joint venture. You state the board will provide some of the requested information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.103, 552.105, and 552.107 of the Government Code, and privileged under rule 192.5 of the Texas Rules of Civil Procedure.¹ We have considered your arguments and reviewed the submitted information.

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

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are

¹Although you also raise section 552.101 of the Government Code in conjunction with the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure, this office has concluded section 552.101 does not encompass discovery privileges. See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

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). The information submitted as Exhibit B consists of completed reports, which must be released under section 552.022(a)(1), unless the information is excepted from disclosure under section 552.108 or is expressly confidential under other law. You assert the reports in Exhibit B are protected by rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court has held 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). Accordingly, we will consider your arguments under rule 192.5 for the information in Exhibit B, along with your arguments for the remaining information not subject to section 552.022.

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*

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

You inform us the board anticipates filing condemnation lawsuits against certain properties in relation to planned renovations at the airport. You explain an attorney for the board requested the information in Exhibit B to assist him in advising the board about the likely costs and ramifications of proceeding with those condemnation procedures. You state, and the submitted information reflects, the information in Exhibit B consists of independent appraisal reports regarding the properties at issue in the condemnation lawsuits that were completed by consultants for the board in anticipation of those condemnation lawsuits. *See* TEX. R. CIV. P. 192.5(a) (party's representatives include consultants, sureties, indemnitors, insurers, employees, or agents). Based on your representations and our review, we find the information in Exhibit B was created in anticipation of litigation and contains an attorney's representative's mental impressions, opinions, conclusions, or legal theories. Therefore, we conclude you have established the applicability of the core work product aspect of the attorney work product privilege to the information in Exhibit B and the board may withhold Exhibit B under rule 192.5 of the Texas Rules of Civil Procedure.

We now address your arguments for the remaining information not subject to section 552.022. You claim the information submitted in Exhibit A is also protected by the attorney work product privilege. Section 552.111 of the Government Code 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.² *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); ORD 677 at 4-8. Rule 192.5 defines work product as:

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for

²Although you claim the information in Exhibit A is protected under rule 192.5 of the Texas Rules of Civil Procedure, we note section 552.111 is the proper provision to address based on the substance of your arguments and the nature of the information at issue.

trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied: (a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation there was a substantial chance litigation would ensue; and (b) the party resisting discovery believed in good faith there was a substantial chance litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation. *See Nat'l Tank Co. 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; ORD 677 at 7.

You state the information in Exhibit A consists of internal financial analyses, drafts, working papers, and related e-mails that were made or prepared by board employees and other representatives in anticipation of the same condemnation lawsuits discussed previously. Based on your representations and our review, we agree the information in Exhibit A was created in anticipation of litigation by party representatives. Accordingly, the board may withhold Exhibit A as attorney work product under section 552.111 of the Government Code.³

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. 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 Open Records Decision No. 676* at 6-7 (2002). First, a governmental body must demonstrate the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. *See TEX. R. EVID. 503(b)(1)*. The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See TEX. R. EVID. 503(b)(1)*. Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.*, meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the

³As our ruling for this information is dispositive, we need not address your remaining argument against disclosure for this information.

rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You assert some of the e-mails submitted in Exhibit C are protected by the attorney-client privilege. You state the information you have marked in Exhibit C consists of communications between board officials, board staff, an attorney for the board, and other attorneys involved in the anticipated condemnation procedures discussed previously. You also state the communications were made in furtherance of the rendition of professional legal services, were made in confidence, and the confidentiality has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the board may withhold the information you have marked in Exhibit C under section 552.107(1) of the Government Code.⁴

We note the remaining information in Exhibit C includes e-mail addresses of members of the public. Section 552.137 of the Government Code 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).⁵ *See Gov’t Code* § 552.137(a)-(c). The e-mail addresses at issue are not specifically excluded by section 552.137(c). As such, the board must withhold these e-mail addresses, which we have marked, under section 552.137 of the Government Code, unless the owners of the addresses have affirmatively consented to their release.⁶ *See id.* § 552.137(b).

⁴As our ruling for this information is dispositive, we need not address your remaining argument against disclosure for this information.

⁵The 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).

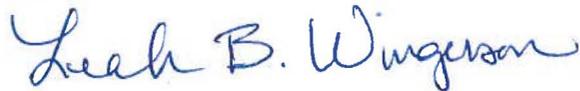
⁶Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

In summary, the board may withhold Exhibit B under rule 192.5 of the Texas Rules of Civil Procedure, Exhibit A under section 552.111 of the Government Code, and the portions of Exhibit C you have marked under section 552.107(1) of the Government Code. The board must withhold the marked e-mail addresses in Exhibit C under section 552.137 of the Government Code, unless the owners of the addresses have affirmatively consented to their release. The board must release the remaining 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,

A handwritten signature in blue ink that reads "Leah B. Wingerson". The signature is written in a cursive, flowing style.

Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 430143

Enc. Submitted documents

c: Requestor
(w/o enclosures)