



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 22, 2011

Mr. Ronald J. Bounds
Assistant City Attorney
City of Corpus Christi
P.O. Box 9277
Corpus Christi, Texas 78469-9277

OR2011-18861

Dear Mr. Bounds:

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# 439931.

The City of Corpus Christi (the "city") received a request for "written or electronic correspondence to or from city staff to another member of staff or from any member of the city council or mayor and any meetings held regarding a lawsuit filed by [a named individual] in reference to the Aquarius Street Project" during a specified time period. You state the city has released some of the requested information. You claim the remaining requested information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Portions of the submitted documents, which we have marked, are not responsive to the instant request for information because they were created after the date the request was received. This ruling does not address the public availability of any information that is not

¹We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

responsive to the request and the city is not required to release that information in response to this request.

We note some of the remaining responsive information consists of copies of city ordinances. Because laws and ordinances are binding on members of the public, they are matters of public record and may not be withheld from disclosure under the Act. *See* Open Records Decision Nos. 551 at 2-3 (1990) (laws or ordinances are open records), 221 at 1 (1979) (official records of governmental body's public proceedings are among most open of records). Therefore, the submitted city ordinances, which we have marked, must be released.

We also note that some of the responsive information falls within the scope of section 552.022 of the Government Code, which provides that certain categories of information are public information and not excepted from required disclosure unless they are made confidential under chapter 552 or by other law. Gov't Code § 552.022(a). Section 552.022(a)(3) of the Government Code provides for required public disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]" *Id.* § 552.022(a)(3). We have marked information that is subject to section 552.022(a)(3). Section 552.022(a)(4) of the Government Code provides for required disclosure of "the name of each official and the final record of voting on all proceedings in a governmental body[.]" *Id.* § 552.022(a)(4). We have marked a record of voting by the city council that is subject to section 552.022(a)(4).

Although the city seeks to withhold the information that is subject to sections 552.022(a)(3) and 552.022(a)(4) under sections 552.103, 552.107(1), and 552.111 of the Government Code, those 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 Gov't Code § 552.103); Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 663 at 5 (1999) (governmental body may waive section 552.111), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103, 552.107, and 552.111 do not make information confidential for the purposes of section 552.022(a)(3) and (a)(4). Therefore, the city may not withhold any of the information subject to 552.022 under section 552.103, section 552.107, or section 552.111 of the Government Code. 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). Accordingly, we will consider your assertion 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 for the information subject to section 552.022. We will also consider your claims under sections 552.103, 552.107, and 552.111 for the information not subject to section 552.022 of the Government Code.

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). Upon review, we find you have not demonstrated how the information we marked under section 552.022 consists of attorney-client privileged communications. Accordingly, the city may not withhold this information under rule 503 of the Texas Rules of Evidence.

Rule 192.5 encompasses the attorney work-product privilege. 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. *See* Open Records Decision No. 677 at 9–10 (2002). 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. Upon review, we find you have not demonstrated the information subject to section 552.022 consists of mental impressions, opinions, conclusions, or legal theories of an attorney or a representative of an attorney prepared in anticipation of litigation or for trial. Accordingly, the city may not withhold this information under rule 192.5 of the Texas Rules of Civil Procedure. As you raise no other exceptions for the information subject to section 552.022, this information must be released.

We turn next to the remaining information not subject to section 552.022. Section 552.103 of the Government Code provides in part:

- (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). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

You state, and have provided a pleading demonstrating, that a lawsuit styled *Mike Hummell and David Barabino v. City of Corpus Christi*, Cause No. 2011-CCV61933-2 was filed in the County Court of Law No. 2 of Nueces County, prior to the city's receipt of this request for information. Thus, we agree litigation was pending when the city received the instant request. Based on our review of the pleading you provided and the remaining information, we find that the remaining responsive information is related to litigation to which the city is a party. We therefore conclude the city may withhold the remaining responsive information under section 552.103 of the Government Code.²

In reaching this conclusion, we assume that the opposing party in the pending litigation has not seen or had access to any of the information at issue. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. If the opposing party has seen or had access to information relating to pending litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We note that the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

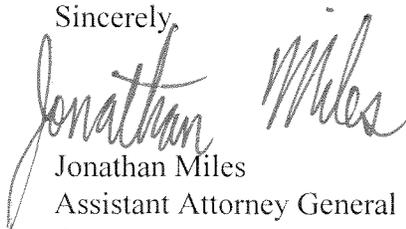
²As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

In summary, the city must release the marked ordinances and the information we marked under section 552.022 of the Government Code. The city may withhold the remaining responsive information under section 552.103 of the Government Code.

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 cursive script that reads "Jonathan Miles". The signature is written in black ink and is positioned to the left of the typed name.

Jonathan Miles
Assistant Attorney General
Open Records Division

JM/agn

Ref: ID# 439931

Enc. Submitted documents

c: Requestor
(w/o enclosures)