



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 15, 2012

Ms. Rebecca Brewer  
Abernathy, Roeder, Boyd, & Joplin, P.C.  
P.O. Box 1210  
McKinney, Texas 75070-1210

OR2012-02360

Dear Ms. Brewer:

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# 445489.

The City of Frisco (the "city"), which you represent, received a request for a specified letter sent by Exide Technologies ("Exide") to the city, any permits Exide filed with the city during a specified time period, and any employee memos, documents, or e-mails discussing zoning at the Exide plant during a specified time period. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.111, and 552.137 of the Government Code and privileged pursuant to rule 503 of the Texas Rules of Evidence and

rule 192.5 of the Texas Rules of Civil Procedure.<sup>1</sup> We have considered your arguments and reviewed the submitted information.

Initially, we note portions of the submitted information, which we have marked, are not responsive to the instant request because they do not pertain to the specified time period. The city need not release nonresponsive information in response to this request, and this ruling will not address that information.

Next, we note some of the responsive information consists of a check, a receipt, and a paid invoice, which are subject to section 552.022(a)(3) of the Government Code, which provides that “information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body” is subject to required public disclosure unless it is made confidential under this chapter or “other law.” See Gov’t Code § 552.022(a)(3). Although you raise section 552.103 of the Government Code for this information, section 552.103 is a discretionary exception to disclosure and does not make information confidential under the Act. 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 section 552.103); Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). Therefore, the city may not withhold the information subject to section 552.022(a)(3), which we have marked, under section 552.103 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 address your assertion of the attorney-client privilege under rule 503 and the attorney work product privilege under rule 192.5 for the information subject to section 552.022(a)(3). We note some of the information subject to section 552.022(a)(3) is subject to section 552.136 of the Government Code, which can make information confidential for purposes of section 552.022(a)(3).<sup>2</sup> Thus, we will address the applicability of section 552.136 to the information subject to section 552.022(a)(3). We will also consider your claims under

---

<sup>1</sup>Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence and 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). Thus, we will not address your claim that the submitted information is confidential under section 552.101 in conjunction with these rules. We note that, in this instance, the proper exceptions to raise when asserting the attorney-client privilege or work product privilege for information not subject to section 552.022 of the Government Code are sections 552.107 and 552.111, respectively. See *id.*, Open Records Decision No. 677 (2002). Although you also raise section 552.102 of the Government Code as an exception to disclosure, you make no arguments to support this exception. Therefore, we assume you have withdrawn your claim this section applies to the submitted information.

<sup>2</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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).

You contend the information subject to section 552.022(a)(3) consists of communications between city employees and city attorneys for the purpose of the rendition of legal services

to the city. However, as previously noted, the information at issue consists of an invoice from Exide to the city, a copy of a check from Exide to the city, and a receipt of payment to the city by Exide. You have not explained Exide is a privileged party. Accordingly, upon review, we find you have not demonstrated how the information subject to section 552.022(a)(3) consists of privileged attorney client communications, and the city may not withhold this information under rule 503 of the Texas Rules of Evidence.

You also claim the information subject to section 552.022(a)(3) is confidential pursuant to rule 192.5 of the Texas Rules of Civil Procedure. 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.

You contend the information subject to section 552.022(a)(3) contains the city attorney’s mental impressions, opinions, conclusions, or legal theories. However, as previously noted, the information at issue consists of an invoice from Exide to the city, a copy of a check from Exide to the city, and a receipt of payment to the city by Exide. Upon review, we find you have not demonstrated the information at issue 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 the information subject to section 552.022(a)(3) under rule 192.5 of the Texas Rules of Civil Procedure.

As previously noted, a portion of the information subject to section 552.022(a)(3) contains information subject to section 552.136 of the Government Code. Section 552.136 states “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. Accordingly, we find the city must withhold the bank account and routing numbers we have marked under section 552.136 of the Government Code. The remaining information subject to section 552.022(a)(3) of the Government Code must be released.

We will now address your arguments against disclosure of the information not subject to section 552.022(a)(3). 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 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, no pet.); *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).*

To establish that litigation is reasonably anticipated for the purposes of section 552.103, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *See Open Records Decision No. 452 at 4 (1986).* In the context of anticipated litigation in which the governmental body

is the prospective plaintiff, the concrete evidence must at least reflect litigation is “realistically contemplated.” *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (finding investigatory file may be withheld if governmental body attorney determines it should be withheld pursuant to Gov’t Code § 552.103 and that litigation is “reasonably likely to result”). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* ORD 452 at 4.

You explain the city is involved in a dispute with Exide concerning Exide’s emissions from its battery recycling plant. You state, and have provided documentation demonstrating, the Texas Commission on Environmental Quality, in cooperation with the city, is in the process of entering into an agreed order requiring Exide to control emissions from its operations. You inform us the order will incorporate federal regulations which would authorize a private lawsuit to enforce Exide’s compliance. You state the city may file suit to ensure Exide’s compliance. You also state the information not subject to section 552.022 is related to the anticipated litigation. Based on your representations and documentation, our review of the information at issue, and the totality of the circumstances, we find the city reasonably anticipated litigation on the date of its receipt of this request for information and the information at issue is related to the anticipated litigation. Therefore, we conclude the city may generally withhold the information not subject to section 552.022(a)(3) under section 552.103 of the Government Code.

However, we note 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 or anticipated 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). In this instance, the opposing party has seen or had access to some of the information at issue. Therefore, the city may not withhold this information, which we have marked, pursuant to section 552.103. Accordingly, except for the information we have marked and the information subject to section 552.022(a)(3), the city may withhold the submitted information under section 552.103 of the Government Code.<sup>3</sup>

We will now address your arguments under section 552.107 of the Government Code for the information the opposing party has had access to or seen, which we have marked. 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

---

<sup>3</sup>As our ruling on this information is dispositive, we need not address the city’s remaining arguments against its disclosure.

“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)(A), (B), (C), (D), (E). 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.* 503(b)(1), 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.” *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 that 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 contend the information we have marked constitutes attorney-client communications made in connection with the rendition of professional legal services to the city. However, the information at issue consists of communications with Exide or documents obtained from Exide. You have not explained how Exide is a privileged party. Accordingly, upon review, we find you have not demonstrated how the information we have marked consists of privileged attorney client communications, and the city may not withhold this information under section 552.107 of the Government Code.

Section 552.111, which excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency,” encompasses the attorney work product privilege in rule 192.5. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); ORD No. 677 at 4-8. Section 552.111 protects work product as defined in rule 192.5(a) 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 the work product aspect of section 552.111 bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD 677 at 6-8. The test to determine whether information was created or developed in anticipation of litigation is the same as that discussed above concerning rule 192.5.

You contend the information we have marked contains the city attorney's mental impressions, opinions, conclusions, or legal theories. However, as previously noted, the information at issue consists of communications with or documents obtained from Exide. Upon review, we find you have not demonstrated the information at issue 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 the information we have marked under section 552.111.

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). *See id.* § 552.137(a)-(c). The e-mail addresses at issue are not a type specifically excluded by section 552.137(c). Accordingly, the city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their disclosure.<sup>4</sup>

In summary, the city must withhold the bank account and routing numbers we have marked under section 552.136 of the Government Code. The city must release the remaining information subject to section 552.022(a)(3) of the Government Code. Except for the information we have marked and the information subject to section 552.022(a)(3) of the Government Code, the city may withhold the submitted information under section 552.103 of the Government Code. The city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their disclosure. The remaining information must be released.

---

<sup>4</sup>We note Open Records Decision No. 684 (2009) was issued as a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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,



Jennifer Luttrall  
Assistant Attorney General  
Open Records Division

JL/dls

Ref: ID# 445489

Enc. Submitted documents

c: Requestor  
(w/o enclosures)