



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 6, 2012

Ms. Jennafer G. Tallant
Counsel for the Town of Hollywood Park
Denton, Navarro, Rocha & Bernal
2517 North Main Avenue
San Antonio, Texas 78212-4685

OR2012-08707

Dear Ms. Tallant:

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# 455764.

The Town of Hollywood Park (the "town"), which you represent, received a request for billing invoices submitted by a specified law firm for consultations related to the Open Meeting Act as well as the total amounts billed for all work performed by the law firm during a specified period of time. You state the town does not have some of the requested information.¹ You state you are releasing the total amounts billed during the specified time period. You claim that portions of the remaining requested information are excepted from disclosure under section 552.107 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure. We have considered your arguments and reviewed the submitted information.

Initially, we note you have marked portions of the submitted information as non-responsive because they do not pertain to the legal matter specified in the request. This ruling does not address the public availability of any information that is not responsive to the request, and the town need not release such information.

¹The Act does not require a governmental body to disclose information that did not exist when the request for information was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

Next, we note, and you acknowledge, the responsive information is 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 confidential under the Act or other law. Gov’t Code § 552.022(a)(16). The responsive information consists of attorney fee bills. Section 552.107 of the Government Code is a discretionary exception to disclosure that protects a governmental body’s 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). Therefore, the town may not withhold the responsive fee bills under section 552.107. However, you also raise rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure for portions of the submitted information. The Texas Supreme Court has held that 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 Texas Rule of Evidence 503 and the attorney work product privilege under Texas Rule of Civil Procedure 192.5.

Texas Rule of Evidence 503 encompasses the attorney-client privilege, providing in relevant part:

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

You state the responsive attorney fee bills contain confidential communications between the town's outside attorneys and employees and officials of the town. You state these communications were made for the purpose of facilitating the rendition of professional legal services to the town. Further, you state that the fee bills were intended to be, and have remained, confidential. Accordingly, the town may withhold the information we have marked on the basis of the attorney-client privilege under Texas Rule of Evidence 503. However, the remaining information at issue documents communications with individuals you have not demonstrated are clients, client representatives, lawyers, or lawyer representatives or does not reveal privileged communications. Thus, you have not shown how the remaining information at issue documents privileged attorney-client communications, and none of the remaining responsive information may be withheld under Texas Rule of Evidence 503.

Next, we address your argument under Texas Rule of Civil Procedure 192.5 for the remaining information you have marked in the responsive attorney fee bills. Rule 192.5 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 that 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 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’s 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 that 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.

In this instance, you state the information at issue pertains to information that attorneys for the town prepared in anticipation of litigation. You further assert that the information you marked consists of mental impressions, opinion, conclusions, and legal theories of attorneys for the town and attorney’s representatives. Upon review, we find you have failed to demonstrate that any of the remaining information in the responsive attorney fee bills 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. We, therefore, conclude the town may not withhold any of the remaining responsive information under rule 192.5 of the Texas Rules of Civil Procedure.

In summary, the town may withhold the information we have marked under rule 503 of the Texas Rules of Evidence. The remaining responsive 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, 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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/som

Ref: ID# 455764

Enc. Submitted documents

cc: Requestor
(w/o enclosures)