



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 20, 2012

Ms. Amy L. Sims
Assistant City Attorney
City of Lubbock
P.O. Box 2000
Lubbock, Texas 79457

OR2012-09483

Dear Ms. Sims:

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# 456599.

The City of Lubbock (the "city") received a request for (1) a list of legal fees incurred by the city in regards to a specified litigation since 2004 and (2) records of all fees pertaining to any settlement with a named individual or group associated with that individual since 2004. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

We first note the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

¹Although you also raise section 552.101 of the Government Code, you have provided no arguments to support this exception. Therefore, we assume you have withdrawn your claim this section applies to the submitted information. See Gov't Code §§ 552.301, .302.

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body; [and]

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code §§ 552.022(a)(3), (16). Most of the submitted information consists of fee bills subject to section 552.022(a)(16). The remaining submitted information consists of information in accounts or vouchers relating to the expenditure of city funds and is subject to section 552.022(a)(3). Thus, the submitted information must be released unless it is made confidential under the Act or other law. *See id.* §§ 552.022(a)(3), (16). You seek to withhold the submitted information under sections 552.103, 552.107, and 552.111 of the Government Code. However, sections 552.103, 552.107, and 552.111 are discretionary exceptions and do not make information confidential under the Act. *See 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); *see also* Open Records Decision Nos. 677 (2002) (governmental body may waive attorney work product privilege under section 552.111), 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the submitted information may not be withheld under section 552.103, section 552.107, or section 552.111 of the Government Code. The Texas Supreme Court has held, however, 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 attorney-client privilege claim under rule 503 of the Texas Rules of Evidence and attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure for the submitted fee bills. Further, as sections 552.130, 552.136, and 552.137 of the Government Code make information confidential under the Act, we will consider the applicability of these exceptions to the submitted information.²

Rule 503(b)(1) provides as follows:

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

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 state the attorney fee bills contain confidential communications between the city, its consultants, and the city's legal counsel. You state these communications were made for the purpose of facilitating the rendition of professional legal services to the city. Accordingly, the city may withhold most of the information you have highlighted, except where we have marked, in the attorney fee bills on the basis of the attorney-client privilege under Texas Rule of Evidence 503. We note, however, the remaining information you have highlighted in the attorney fee bills, which we have marked, does not document a communication or consists

of communications with parties who you have not established are privileged parties for purposes of Texas Rule of Evidence 503. As a result, we find you have failed to demonstrate that any of the remaining highlighted information in the attorney fee bills documents confidential communications that were made between privileged parties. Therefore, we conclude rule 503 is not applicable to the information we have marked and it may not be withheld on this basis.

Next, we address your argument under the attorney work product privilege for the remaining information you have highlighted in the 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 the information implicates the core work product aspect of the work product privilege. *See* ORD 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.

Having considered your arguments regarding the information at issue, we conclude you have not demonstrated that any of this information consists of core work product for purposes of rule 192.5. Therefore, the city may not withhold any of the remaining highlighted information under Texas Rule of Civil Procedure 192.5.

Section 552.130 of the Government Code excepts information related to a motor vehicle title or registration issued by an agency of this state, another state or country. *See Gov't Code* § 552.130(a)(2). We have marked motor vehicle record information in the documents subject to section 552.022(a)(3) of the Government Code. The city must withhold this marked information under section 552.130.

Section 552.136 of the Government Code provides “[n]otwithstanding any other provision of [the Act], 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.” *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Upon review, we find the city must withhold the partial credit card numbers, the frequent flyer account numbers, and the club membership account numbers we have marked in the documents subject to section 552.022(a)(3) of the Government Code under section 552.136.

Section 552.137 of the Government Code provides “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its public disclosure or the e-mail address falls within the scope of section 552.137(c). *Id.* § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked an e-mail address in the documents subject to section 552.022(a)(3) of the Government Code that is not subject to section 552.137(c). The city must withhold the e-mail address we have marked under section 552.137, unless the owner of the e-mail address affirmatively consents to its public disclosure.

Lastly, we note some of the submitted information appears to be protected by copyright law. A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See Open Records Decision No. 180 at 3 (1977); see also Open Records Decision No. 109 (1975).* A custodian of public records also must comply with copyright law, however, and is not required to furnish copies of records that are copyrighted. *See ORD 180 at 3.* A member of the public who wishes to make copies of copyrighted materials must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, except for the information we have marked for release, the city may withhold the information you have highlighted under Texas Rule of Evidence 503. The city must withhold the information we have marked under sections 552.130 and 552.136 of the Government Code. The city must also withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the e-mail address consents to its public disclosure. The city 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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/ag

Ref: ID# 456599

Enc. Submitted documents

c: Requestor
(w/o enclosures)