



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 30, 2012

Mr. Robert Schell
Assistant Director General Counsel
North Texas Tollway Authority
5900 West Plano Parkway, Suite 100
Plano, Texas 75093

OR2012-11875

Dear Mr. Schell:

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# 460351.

The North Texas Tollway Authority (the "authority") received three requests for (1) all correspondence between the authority and a named individual or specified law firm, all contracts between the authority and a named individual or two specified law firms, invoices from the named individual or two specified law firms, and information related to amounts paid by the authority to those entities; (2) information on a specified request for proposals process and scoring involving two specified law firms, and all requests for proposals and staff recommendations related to certain condemnation proceedings; and (3) information related to amounts paid by the authority to a named individual or two specified law firms during a specified time period and information related to two request for proposal processes. You state you have no information responsive to a portion of the request.¹ You also state you have released some information to the requestor. You claim some of the submitted information is excepted from disclosure pursuant to sections 552.103, 552.107, and 552.111

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

of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

We first note some of 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 [the Act] or other law:

...

(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). Some of the submitted information consists of fee bills subject to section 552.022(a)(16). The submitted information also contains a check and invoice subject to section 552.022(a)(3). Thus, the fee bills, check, and invoice must be released unless this information is made confidential under the Act or other law. *See id.* §§ 552.022(a)(3), (16). You seek to withhold some of this 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), 470 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). Therefore, the information subject to section 552.022 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

²We assume the "representative sample" of information 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 that those records contain substantially different types of information than that submitted to this office.

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 your attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure for the information you have highlighted in the submitted fee bills. We will also address your claims for the information not subject to section 552.022.

Texas Rule of Evidence 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 state the attorney fee bills contain confidential communications among the authority, its consultants, and the authority's legal counsel. You state these communications were made for the purpose of facilitating the rendition of professional legal services to the authority. Accordingly, the authority may withhold the information we have marked in the attorney fee bills on the basis of the attorney-client privilege under Texas Rule of Evidence 503.³ We note, however, the remaining information you have highlighted in the attorney fee bills does not document communications. As a result, we find you have failed to demonstrate any of the remaining highlighted information in the attorney fee bills documents confidential communications made between privileged parties. Therefore, we conclude rule 503 is not applicable to the remaining information you have highlighted, 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. Texas Rule of Civil Procedure 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

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

exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp.*, 861 S.W.2d at 427.

You state the remaining information you have highlighted in the attorney fee bills consists of communications related to reasonably anticipated condemnation litigation to which the authority is a party. However, we conclude you have not demonstrated any of the remaining information at issue consists of core work product for purposes of rule 192.5. Therefore, the authority may not withhold any of the remaining highlighted information under Texas Rule of Civil Procedure 192.5. The authority must release the remaining information subject to section 552.022 of the Government Code.

Next, we address your arguments against disclosure of the information not subject to section 552.022 of the Government Code. Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107(1) are the same as those discussed for rule 503. 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 ORD 676* at 6-7. 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 state the information you have highlighted in the submitted e-mails consists of confidential communications among the authority, its consultants, and the authority's legal counsel. You state these communications were made for the purpose of facilitating the rendition of professional legal services to the authority. Based on these representations and our review, we agree section 552.107(1) is applicable to the information at issue, and the authority may withhold the information you have highlighted in the submitted e-mails under section 552.107(1) of the Government Code.⁴

We note portions of the remaining e-mails may be subject to section 552.117(a)(1) of the Government Code.⁵ Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, emergency contact information, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code* § 552.117(a)(1). Section 552.117 is also applicable to cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See Open Records Decision No. 506* at 5-6 (1988) (statutory predecessor to section 552.117 of

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure of 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).

the Government Code not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. See Open Records Decision No. 530 at 5(1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Therefore, if the individual whose cellular telephone number we have marked timely requested confidentiality under section 552.024 and pays for the cellular telephone service with his own funds, the authority must withhold the marked information under section 552.117(a)(1) of the Government Code. If the individual whose information is at issue did not make a timely election under section 552.024 or does not pay for the cellular telephone service with his own funds, the authority may not withhold the information at issue under section 552.117(a)(1) of the Government Code.

In summary, the authority may withhold the information we have marked under rule 503 of the Texas Rules of Evidence. The authority may withhold the information you have highlighted in the submitted e-mails under section 552.107(1) of the Government Code. If the individual whose cellular telephone number we have marked in the remaining e-mails timely requested confidentiality under section 552.024 and pays for the cellular telephone service with his own funds, the authority must withhold the marked information under section 552.117(a)(1) of the Government Code. The remaining 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,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/dls

Ref: ID# 460351

Enc. Submitted documents

c: Requestor
(w/o enclosures)