



**ATTORNEY GENERAL OF TEXAS**  
**GREG ABBOTT**

August 2, 2012

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

OR2012-12132

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# 460779 (ORR# 2012-0318).

The City of Frisco (the "city"), which you represent, received a request for certain e-mails, documents, reports, and legal fee bills that include references to certain subjects related to the development of a piece of property by Exide Technologies ("Exide").<sup>1</sup> You state the city will release some of the information upon payment of charges. You claim the submitted information is excepted from disclosure under sections 552.103, 552.105, 552.107, and 552.111 of the Government Code, and privileged under rules 408 and 503 of the Texas

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<sup>1</sup>We note the city sought and received clarification of the request. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). See also *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

Rules of Evidence and rules 192.3 and 192.5 of the Texas Rules of Civil Procedure.<sup>2</sup> We have considered your arguments and reviewed the submitted information.

Initially, we note the submitted information contains copies of city ordinances. As 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 city must release the submitted ordinances.

We also note the submitted information contains agendas and minutes of public meetings of the city. The agendas and minutes of a governmental body’s public meetings are specifically made public under provisions of the Open Meetings Act, chapter 551 of the Government Code. *See* Gov’t Code §§ 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying on request to governmental body’s chief administrative officer or officer’s designee), .041 (governmental body shall give written notice of date, hour, place, and subject of each meeting), .043 (notice of meeting of governmental body must be posted in place readily accessible to general public for at least 72 hours before scheduled time of meeting). Although you seek to withhold this information under sections 552.103, 552.107, and 552.111, as a general rule, the exceptions to disclosure found in the Act do not apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Accordingly, the submitted agendas and minutes of the public meetings must be released pursuant to section 551.022 of the Government Code.

Next, we note the submitted information contains attorney fee bills, which are subject to section 552.022(a)(16) of the Government Code. Section 552.022(a)(16) provides for the 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 expressly confidential under the Act or other law. Gov’t Code § 552.022(a)(16). Although you raise sections 552.103, 552.105, and 552.111 of the Government Code for this information, we note these are discretionary exceptions that protect a governmental body’s interest and may be waived. *See* Gov’t Code § 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 (2000) (discretionary exceptions generally), 663 at 5 (1999) (governmental body may waive section 552.111), 564

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<sup>2</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 that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 (2002), 677 (2002). We note 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* Open Records Decision Nos. 676, 677. You also raise Texas Rule of Civil Procedure 193.3. We note this rule instructs a party on how to preserve a privilege from written discovery. As this provision does not make any information privileged or confidential, we do not address it in our ruling.

(1990) (statutory predecessor to section 552.105 subject to waiver), 470 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). As such, sections 552.103, 552.105, and 552.111 do not make information confidential under the Act. Accordingly, the city may not withhold the attorney fee bills under section 552.103, 552.105, or 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 address your arguments under rules 408 and 503 of the Texas Rules of Evidence and rules 192.3 and 192.5 of the Texas Rules of Civil Procedure for the submitted fee bills. We will also consider your assertion of sections 552.103, 552.105, 552.107, and 552.111 for the remaining information that is not subject to section 552.022.

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 assert portions of the submitted attorney fee bills must be withheld under rule 503. You indicate the information at issue contains privileged attorney-client communications between the city's attorneys and the city's employees and officials in their capacities as clients. You indicate the communications at issue were made to facilitate the rendition of legal services to the city. You further indicate the communications at issue have not been, and were not intended to be, disclosed to third parties. Thus, based on your representations and our review of the information at issue, we find portions of the attorney fee bills, which we have marked, constitute confidential attorney-client communications under rule 503. Accordingly, the city may withhold the information we have marked within the attorney fee bills pursuant to rule 503 of the Texas Rules of Evidence. However, the remaining information at issue documents communications with individuals who are not identified, and thus 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 information may be withheld under Texas Rule of Evidence 503.

Rule 192.5 of the Texas Rules of Civil Procedure 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 there was a substantial chance litigation would ensue, and (2) the party resisting discovery believed in good faith there was a substantial chance 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 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 assert the submitted attorney fee bills contain attorney core work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. Upon review, we find you have not demonstrated any of the remaining information in the submitted 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 city may not withhold any of the remaining fee-bill information under Texas Rule of Civil Procedure 192.5.

Rule 408 of the Texas Rules of Evidence governs the admissibility of information developed through compromise negotiations. *See* TEX. R. EVID. 408. However, rule 408 does not expressly make information confidential. *See generally* Open Records Decision Nos. 658 at 4 (1998) (stating that statutory confidentiality provision must be express and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (stating that, as general rule, statutory confidentiality requires express language making information confidential), 465 at 4-5 (1987). Accordingly, the city may not withhold any of the remaining information at issue under rule 408 of the Texas Rules of Evidence.

Rule 192.3 of the Texas Rules of Civil Procedure provides the consulting expert privilege. A party to litigation is not required to disclose the identity, mental impressions, and opinions of consulting experts whose mental impressions or opinions have not been reviewed by a testifying expert. *See* TEX. R. CIV. P. 192.3(e). A "consulting expert" is defined as "an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert." TEX. R. CIV. P. 192.7. Although you generally claim this privilege, we find you have not demonstrated its applicability to the submitted information. Accordingly, the city may not withhold any of the remaining information at issue under rule 192.3 of the Texas Rules of Civil Procedure. As you make no other arguments against disclosure, the remaining fee-bill information must be released.

We turn next to the remaining information that does not consist of attorney fee bills. Section 552.103 provides in relevant part as follows:

- (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 has the burden of providing relevant facts and documents to show section 552.103(a) is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *Open Records Decision No. 551 at 4* (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551.

To establish 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 section 552.103 and 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 that 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 at issue is related to the anticipated litigation. Based on your representations and documentation, our review of the submitted information, and the totality of the circumstances, we find the information at issue is related to litigation the city reasonably anticipated on the date it received the request for information. Accordingly, we find section 552.103 is generally applicable to the information at issue.

However, once information has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* *Open Records Decision Nos. 349* (1982), *320* (1982). Thus, any information obtained from or provided to all other parties in the anticipated litigation is not

excepted from disclosure under section 552.103(a) and must be disclosed. In this instance, the opposing party in the anticipated litigation has seen or had access to some of the information at issue. Accordingly, this information may not be withheld under section 552.103 of the Government Code. Nonetheless, the city may withhold the information the opposing party has not seen or had access to under section 552.103 of the Government Code. We note the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982). Therefore, with the exception of any information the opposing party to the anticipated litigation has seen or had access to, the city may withhold the information not subject to section 552.022(a)(16) under section 552.103 of the Government Code. We will address your remaining arguments under sections 552.105, 552.107, and 552.111, as well as the applicability of section 552.137 of the Government Code, for the information the opposing party has seen or had access to.

Section 552.105 of the Government Code excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Gov't Code § 552.105. We note this provision is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. *See* Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). Information that is excepted from disclosure under section 552.105 that pertains to such negotiations may be excepted from disclosure so long as the transaction relating to that information is not complete. *See* ORD 310. A governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" Open Records Decision Nos. 357 at 3, 222 (1979). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiating position with regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body's good-faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* ORD 564. Upon review, we find you have not demonstrated any of the remaining information pertains to the location, appraisal, or purchase price of real or personal property for a public purpose. Accordingly, the city may not withhold any of this information under section 552.105 of the Government Code.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). 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. Open Records Decision No. 676 at 6-7. First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of

professional legal services” to the client governmental body. 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. *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 a 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. See TEX. R. EVID. 503(b)(1). 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.*, 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. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). 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). As previously noted, the opposing party to the anticipated litigation has seen or had access to the information at issue. Thus, we find you have failed to demonstrate the applicability of the attorney-client privilege to the remaining information, and the city may not withhold that information under section 552.107(1) of the Government Code.

Section 552.111 of the Government Code excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. Section 552.111 of the Government Code encompasses the attorney work-product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); ORD 677 at 4–8. Rule 192.5 defines work product 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 governmental body seeking to withhold information under this exception bears the burden of demonstrating that 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. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

a) 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 b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

*Brotherton*, 851 S.W.2d at 207. 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; ORD 677 at 7.

You claim the information at issue discloses attorney work product. However, the opposing party to the anticipated litigation has seen or had access to this information. Thus, we find the city has failed to demonstrate the applicability of the attorney work-product privilege to this information. Accordingly, the city may not withhold any of this information under the work-product privilege of section 552.111 of the Government Code.

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 release or the e-mail address is specifically excluded by subsection (c). Gov’t Code § 552.137(a)–(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 release.<sup>3</sup>

In summary, the city must release the submitted attorney fee bills, but it may withhold the information we have marked within the fee bills under rule 503 of the Texas Rules of Evidence. With the exception of the information we have marked for release, the city may withhold the remaining 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. The remaining information must be released.

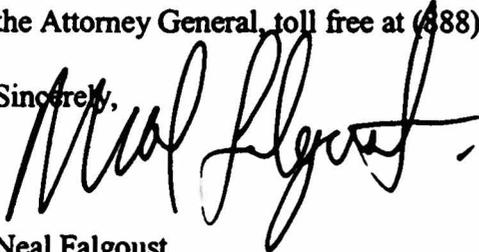
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<sup>3</sup>Open Records Decision No. 684 (2009) serves as a previous determination to all governmental bodies permitting them to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting a decision from this office.

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,



Neal Falgoust  
Assistant Attorney General  
Open Records Division

NF/ag

Ref: ID# 460779

Enc. Submitted documents

c: Requestor  
(w/o enclosures)