



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 6, 2012

Ms. Brandy N. Davis  
Abernathy, Roeder, Boyd & Joplin, P.C.  
P.O. Box 1210  
McKinney, Texas 75070-1210

OR2012-12293

Dear Ms. Davis:

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# 461119.

North Central Texas College (the "college"), which you represent, received a request for the unredacted legal fees, bills, and invoices for January 1, 2011 through March 20, 2012, which were previously requested by the requestor on a specified date. You claim that portions of the submitted information are excepted from disclosure under section 552.107 of the Government Code and Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released).

Initially, you state the college will release responsive information for the time period January 1, 2011 through December 1, 2011 to the requestor with redactions made pursuant to our ruling in Open Records Letter No. 2012-02839 (2012). In Open Records Letter No. 2012-02839, we ruled, in pertinent part, that the college may withhold the information we marked in the responsive attorney fee bills for January 1, 2011 through November 30, 2011 under Texas Rule of Evidence 503. We have no indication that the law, facts, or circumstances on which the prior ruling were based have changed. Accordingly, the college may continue to rely on that ruling as a previous determination and withhold or release the previously ruled upon information for January 1, 2011 through

November 30, 2011 in accordance with Open Records Letter No. 2012-02839. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, in Open Records Letter No. 2012-02839, we noted information created after November 30, 2011 was not responsive to that request, thus, the previous ruling did not rule on any information submitted for December 1, 2011. As such, the college may not withhold any information for December 1, 2011 that is responsive to the present request on the basis of Open Records Letter No. 2012-02839.

Next, we address the requestor's argument that the college was late in requesting a ruling from this office because the requestor previously requested the information on March 20, 2012. *See* Gov't Code § 552.301(b), (d) (prescribing procedural obligations governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure). Based on the information submitted by the requestor, the requestor's March 20 request sought the same information as the current request, but only for that information "not protected by attorney-client privilege." The college explains it reasonably interpreted the March 20 request to exclude information the college believed to be privileged. The college states it released the information to the requestor, redacting information the college believed was privileged as non-responsive to the March 20 request. The college states it interprets the current request as a new request to include the information the college previously believed to be not responsive. Accordingly, we find the present request for information is for new information, and we conclude the college did not violate section 552.301 in seeking a ruling from this office for the newly requested information.

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 it is "made confidential under [the Act] or other law[.]" Gov't Code § 552.022(a)(16). In this instance, the submitted information consists of attorney fee bills. Thus, the college must release this information pursuant to section 552.022(a)(16) unless the information is confidential under the Act or other law. *Id.* Although you assert this information is excepted from disclosure under section 552.107, this section is discretionary and does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 6 (2002) (section 552.107 is not other law for purposes of section 552.022), 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the college may not withhold the submitted information under section 552.107. However, the Texas Supreme Court has held the Texas Rules of Civil Procedure and the Texas Rules of Evidence are "other law" that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will address your assertion of the attorney-client privilege under Texas Rule of Evidence 503 and your attorney work product argument under Texas Rule of Civil Procedure 192.5.

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 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).

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. Thus, in order to withhold attorney-client privileged 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. *Id.* Upon a demonstration of all three factors, the information is 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 the information you have marked documents privileged attorney-client communications made between outside legal counsel and the college for the purpose of facilitating the rendition of professional legal services to the college. You have identified some of the parties to the communications and state the communications were intended to be and have remained confidential. Based on your representations and our review, we conclude the information we have marked may be withheld under Texas Rule of Evidence 503. However, the remaining information either reveals communications with individuals you have not demonstrated are privileged parties or does not reveal the content of a communication. Accordingly, this information is not privileged under rule 503 and may not be withheld on this basis.

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* 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. 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 privileged 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. v. Caldwell*, 861 S.W.2d 423, 425 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You generally state portions of the information at issue are protected by the attorney-client privilege because the college communicated with its legal counsel regarding matters of a

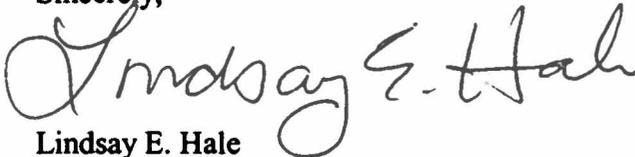
specified civil action. Upon review, we find you have failed to demonstrate how any of the remaining information consists of mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative created for trial or in anticipation of litigation. Accordingly, the college may not withhold any of the remaining information under Texas Rule of Civil Procedure 192.5.

In summary, the college may continue to rely on Open Records Letter No. 2012-02839 as a previous determination and withhold or release the previously ruled upon information for January 1, 2011 through November 30, 2011 in accordance with that ruling. The college may withhold the information we have marked under Texas Rule of Evidence 503. The college 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](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,



Lindsay E. Hale  
Assistant Attorney General  
Open Records Division

LEH/ag

Ref: ID# 461119

Enc. Submitted documents

c: Requestor  
(w/o enclosures)