



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 20, 2012

Mr. Warren M.S. Ernst  
Chief, General Counsel Division  
City of Dallas  
1500 Marilla Street, Room 7BN  
Dallas, Texas 75201

OR2012-15003

Dear Mr. Ernst:

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# 466283.

The City of Dallas (the "city") received a request for twenty-three categories of information ~~pertaining to the requestor, specified investigations and grievances, certain city employees, and specified contracts.~~<sup>1</sup> You state the city does not possess information responsive to part two of the request.<sup>2</sup> You state some information will be released to the requestor upon payment of reproduction costs. You claim some of the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code and

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<sup>1</sup>You state, and provide documentation showing, the city sought and received clarification of the request. See Gov't Code § 552.222(b) (stating if information requested is unclear or large amount has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); 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).

<sup>2</sup>The Act does not require a governmental body to release information that did not exist when it received a request or to create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1(1990).

privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the submitted representative sample of information.<sup>3</sup>

We first note, and you acknowledge, Exhibit I consists of attorney fee bills subject to section 552.022 of the Government Code. In addition, Exhibit E consists of a completed report subject to section 552.022. Section 552.022 provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

...

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

Gov't Code § 552.022(a)(1), (16). You seek to withhold the completed report in Exhibit E under sections 552.103 and 552.111 of the Government Code. However, these are discretionary exceptions to disclosure that may be waived and do not make information confidential under the Act. *See id.* § 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. 677 at 10-11 (work-product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 473 (1987) (section 552.103 may be waived). As such, sections 552.103 and 552.111 do not make information confidential for the purposes of section 552.022(a)(1), and Exhibit E may not be withheld on those bases. However, the Texas Supreme Court has held the Texas Rules of Evidence and Texas Rules of Civil Procedure are “other law” that make information confidential for purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your assertion of the attorney work product privilege for Exhibit E under Texas Rule of Civil Procedure 192.5, along with your arguments under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5 for Exhibit I. In addition, we will

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<sup>3</sup>We assume the “representative sample” of records 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 those records contain substantially different types of information than that submitted to this office.

consider your arguments under sections 552.103, 552.107, and 552.111 for the information not subject to section 552.022.

Texas Rule of Evidence 503(b)(1) provides:

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.

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~~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 the portions of the fee bills you have marked in Exhibit I should be withheld under rule 503. You assert the marked information reveals privileged attorney-client communications between the city and its outside legal counsel. You state the communications at issue were made in furtherance of the rendition of legal services and were intended to be, and have remained, confidential. Based on your representations and our review of the information at issue, we find the city may withhold the information we have marked under rule 503. We note the remaining information you have marked concerns communications with non-privileged parties or individuals you have not demonstrated are privileged parties, does not reveal the content of a communication, or reveals the creation of a document but does not reflect whether the document was communicated. Thus, you have failed to provide this office with the necessary facts to demonstrate the elements of the attorney-client privilege with respect to the remaining information you seek to withhold. Consequently, the remaining information in Exhibit I may not be withheld under rule 503.

You raise Texas Rule of Civil Procedure 192.5 for the completed report in Exhibit E and the remaining information you have marked in the fee bills in Exhibit I. 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* 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 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.*

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

You assert the report in Exhibit E was created for the city attorney's office in anticipation of litigation with the requestor. However, upon review, we find you have not explained how the report, which consists of a factual description of events, consists of "the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative," or established that the report was created in anticipation of litigation. Therefore, we find Exhibit E is not core attorney work product for purposes of rule 192.5 and may not be withheld on that basis. You state the remaining information you have marked in Exhibit I is related to pending litigation involving the city, and was developed to prepare the city for trial. However, upon review, we find you have failed to demonstrate that any of the remaining information consists of mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. Consequently, none of the remaining information in Exhibit I may be withheld pursuant to rule 192.5. As you raise no additional exceptions to disclosure for Exhibit E and the remaining information in Exhibit I, it must be released to the requestor.

We next address your arguments for Exhibits B through D, which are not subject to section 552.022. Section 552.103 of the Government Code provides, in relevant part:

(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 that the section 552.103(a) exception applies 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 requested information 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). The governmental body must

meet both parts of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* This office has stated that a pending Equal Employment Opportunity Commission ("EEOC") complaint indicates that litigation is reasonably anticipated. *See* Open Records Decision Nos. 386 at 2 (1983), 336 at 1(1982).

You have submitted information to this office showing that, prior to the city's receipt of the instant request, the requestor filed an EEOC complaint against the city. You state the information at issue is directly related to the substance of the EEOC complaint. Based on your representations and our review, we find you have demonstrated the information at issue is related to litigation that was reasonably anticipated at the time the city received the request for information. Accordingly, the city may withhold Exhibits B, C, and D under section 552.103 of the Government Code.<sup>4</sup>

We note the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Therefore, once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, a section 552.103(a) interest no longer exists as to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the city may withhold the information we have marked in Exhibit I under Texas Rule of Evidence 503. The city may withhold Exhibits B, C, and D under section 552.103 of the Government Code. Exhibit E and the remaining information in Exhibit I must be released pursuant to section 552.022 of the Government Code.

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),

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<sup>4</sup>Because our ruling as to this information is dispositive, we do not address your remaining argument against its disclosure.

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,

A handwritten signature in cursive script that reads "Misty Haberer Barham".

Misty Haberer Barham  
Assistant Attorney General  
Open Records Division

MHB/som

Ref: ID# 466283

Enc. Submitted documents

c: Requestor  
(w/o enclosures)