



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 8, 2013

Ms. Julie Y. Fort  
For the City of Duncanville  
McKamie Krueger, L.L.P.  
2007 North Collins Blvd, Suite 501  
Richardson, Texas 75080

OR2013-00421

Dear Ms. Fort:

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# 475454.

The City of Duncanville (the "city"), which you represent, received a request for information relating to attorney and legal fees and any other expenses or fees incurred by the city regarding two named lawsuits since a specified period of time. You state you have released some information to the requestor. You claim portions of the submitted information are excepted from disclosure under section 552.103 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the submitted information.

We note the submitted information is subject to section 552.022 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 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 city 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 552.103, this section is discretionary and does 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 section 552.103); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the city may not withhold any portion of the submitted information under section 552.103. We note the Texas Supreme Court has held "[t]he Texas Rules of Civil Procedure and the Texas Rules of Evidence are 'other law'

within the meaning of section 552.022.” *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). You contend portions of the submitted information are protected by Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. Thus, we will address the applicability of the attorney-client privilege under rule 503 of the Texas Rules of Evidence and the attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure for the submitted attorney fee bills subject to section 552.022(a)(16).

Rule 503 of the Texas Rules of Evidence 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 Open Records Decision No. 676 at 6-7 (2002).*

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

You contend portions of the submitted fee bills are protected by the attorney-client privilege. You indicate the submitted information contains confidential attorney-client communications between city officials and employees, attorneys for the city, and the city's insurance carrier, Texas Municipal League Intergovernmental Risk Pool ("TMLIRP"). You explain TMLIRP is the city's agent. You indicate the communications were made for the purpose of the rendition of legal services to the city in a pending lawsuit, and the confidentiality of these communications have been maintained. Based on your representations and our review of the submitted information, we find portions of the submitted information, which we have marked, constitute confidential attorney-client communications under rule 503. Accordingly, the city may withhold the information we have marked within the submitted attorney fee bills pursuant to rule 503 of the Texas Rules of Evidence. However, we find the remaining information at issue either documents communications with individuals you have not demonstrated are privileged parties or you have not demonstrated the information consists of a communication. Thus, we find you have failed to demonstrate how any of the remaining information at issue documents privileged attorney-client communications. Accordingly, none of the remaining information at issue may be withheld under rule 503.

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 it 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.*

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 the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney’s 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 Caldwell*, 861 S.W.2d at 427.

You contend the portions of the remaining information you have marked in the submitted fee bills contain attorney work product protected by rule 192.5 of the Texas Rules of Civil Procedure. You state, and provide documentation showing, the lawsuit at issue was pending when the request for information was received. You further state the remaining information you have marked contains the mental impressions and opinions of attorneys for the city and reveal the legal strategy of the attorneys in defending the lawsuit at issue. However, we conclude you have not demonstrated any of the remaining information at issue consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney’s representative that were created for trial or anticipation of litigation. Accordingly, none of the remaining information at issue may be withheld under Texas Rule of Civil Procedure 192.5.

In summary, the city may withhold the information we have marked under rule 503 of the Texas Rules of Evidence. 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](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,



Kathleen J. Santos  
Assistant Attorney General  
Open Records Division

KJS/dls

Ref: ID# 475454

Enc. Submitted documents

c: Requestor  
(w/o enclosures)