



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 10, 2013

Mr. Gary B. Lawson
Counsel for Dallas Police and Fire Pension System
Strasburger & Price, L.L.P.
901 Main Street, Suite 4400
Dallas, Texas 75202

OR2013-09637

Dear Mr. Lawson:

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# 489748.

The Dallas Police and Fire Pension System (the "system"), which you represent, received a request for three specified invoices submitted by a named law firm. You state you have released some of the information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.111, and 552.143 of the Government Code and privileged under Texas Rules of Civil Procedure 192.3 and 192.5 and Texas Rule of Evidence 503.¹ We have considered your arguments and reviewed the submitted information.

Initially, we note the submitted information is subject to section 552.022 of the Government Code, which provides in pertinent part:

¹Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence and rules 192.3 and 192.5 of the Texas Rules of Civil Procedure, this office has concluded section 552.101 does not encompass discovery privileges. *See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990)*. Further, although you have marked a portion of the submitted information under section 552.105, you have failed to submit any arguments to this office explaining the applicability of this exception. Therefore, we presume that you have withdrawn this exception. *See Gov't Code §§ 552.301, .302.*

(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:

...

(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)(16). The information at issue consists of attorney-fee bills subject to section 552.022(a)(16). Although you seek to withhold portions of this information under sections 552.103, 552.107, and 552.111 of the Government Code, these sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *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 Nos. 677 at 10 (2002) (attorney work product privilege under Gov't Code § 552.111 may be waived), 676 at 6 (2002) (attorney-client privilege under section 552.107 may be waived), 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). Thus, the system may not withhold the information subject to section 552.022 under sections 552.103, 552.107, and 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" that make information expressly confidential for the purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence, the consulting expert privilege under rule 192.3 of the Texas Rules of Civil Procedure, and the attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure for the submitted information. Additionally, because section 552.143 makes information confidential under the Act, we will consider its applicability to the submitted information.

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 entire communication 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 portions of the fee bills contain confidential communications between the system, the system's counsel, its consultants, and an attorney for the Museum Tower, LLP ("Museum Tower"). You state the system and Museum Tower share a common legal interest in regards to the information at issue. *See* TEX. R. EVID. 503(b)(1)(c) (discussing privilege among parties "concerning a matter of common interest"); *see also In re Monsanto*, 998 S.W.2d 917, 922 (Tex. App.—Waco 1999, orig. proceeding) (discussing the "joint-defense" privilege incorporated by rule 503(b)(1)(C)). You state these communications were made for the purpose of facilitating the rendition of professional legal services to the system and have remained confidential. Based on your representations and our review, we find the

information we have marked may be withheld under Texas Rule of Evidence 503.² However, we find that you have failed to demonstrate the remaining information you have marked consists of privileged attorney-client communications for the purposes of rule 503 and none of the remaining information at issue may be withheld under Texas Rule of Evidence 503.

The consulting expert privilege is found in rule 192.3 of the Texas Rules of Civil Procedure. 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. You inform us the system contracted with multiple consulting experts for services in anticipation of and preparation for litigation involving Museum Tower. Furthermore, you state these experts have been retained solely for consultation and will not testify at trial. Based on your representations, we conclude the system may withhold the information we have marked under Texas Rule of Civil Procedure 192.3(e).

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.*

²As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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.*, 861 S.W.2d at 427.

Having considered your arguments regarding the remaining information, 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 system may not withhold any of the remaining information at issue under Texas Rule of Civil Procedure 192.5.

You argue the remaining information at issue is excepted from disclosure under section 552.143 of the Government Code, which provides, in part,

(c) All information regarding a governmental body's direct purchase, holding, or disposal of restricted securities that is not listed in Section 552.0225(b)(2)-(9), (11), (13)-(16) is confidential and excepted from the requirements of Section 552.021. This subsection does not apply to a governmental body's purchase, holding, or disposal of restricted securities for the purpose of reinvestment nor does it apply to a private investment fund's investment in restricted securities[.]

Id. § 552.143(c). Upon review, we find the system has failed to demonstrate how any of the remaining information at issue pertains to the system's direct purchase, holding, or disposal of a restricted security. Accordingly, the system may not withhold any of the remaining information under section 552.143(c) of the Government Code.

In summary, the system may withhold the information we have marked under Texas Rule of Evidence 503. The system may also withhold the information we have marked under Texas Rule of Civil Procedure 192.3(e). 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.texasattorneygeneral.gov/open_orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink that reads "Britni Fabian". The signature is written in a cursive, flowing style.

Britni Fabian
Assistant Attorney General
Open Records Division

BF/dls

Ref: ID# 489748

Enc. Submitted documents

c: Requestor
(w/o enclosures)