



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 12, 2013

Mr. Brian S. Nelson  
General Counsel  
Lone Star College System  
5000 Research Forest Drive  
The Woodlands, Texas 77381-4356

OR2013-09873

Dear Mr. Nelson:

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# 489995 (LSCS File No. PR13-0320-00093).

The Lone Star College System (the "system") received a request for all invoices for outside legal services and billings for a specified time period. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107 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 representative sample of information.<sup>1</sup>

We note, and you acknowledge, 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 system must release this information pursuant to section 552.022(a)(16)

---

<sup>1</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 that those records contain substantially different types of information than that submitted to this office.

unless the information is confidential under the Act or other law. *Id.* Although you assert this information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code, these sections are discretionary and do 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 Gov't Code § 552.103); *see also* Open Records Decision Nos. 676 at 10-11 (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the system may not withhold any portion of the submitted information under section 552.103 or section 552.107. 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). Thus, we will address the applicability of the attorney-client privilege under rule 503 of the Texas Rules of Evidence and your assertion of the attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure for the submitted information. Additionally, we note a portion of the submitted information is subject to section 552.136 of the Government Code. As section 552.136 of the Government Code makes information confidential under the Act, we will consider the applicability of this exception to the submitted information.<sup>2</sup>

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

---

<sup>2</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(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 state the information at issue contains privileged attorney-client communications between the system’s general counsel and attorneys, and representatives of the system’s outside counsel. You state the communications at issue were made for the purpose of the rendition of legal services to the system. You further state the communications 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 information at issue, which we have marked, constitute confidential attorney-client communications under rule 503. Accordingly, the system may withhold the information we have marked 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, you have not shown how the remaining information at issue documents privileged attorney-client communications, and none of the remaining information at issue may be withheld under Texas Rule of Evidencen 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 remaining information in the submitted fee bills contain attorney work product protected by rule 192.5 of the Texas Rules of Civil Procedure. You state the remaining information implicates the mental impressions, opinions, conclusions, or legal theories of the system's outside counsel developed in anticipation of litigation. 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.

Section 552.136(b) of the Government Code states that "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b). Upon review, we find the system must withhold the partial credit card numbers we have marked under section 552.136 of the Government Code.

In summary, the system may withhold the information we have marked pursuant to Texas Rule of Evidence 503. The system must withhold the information we have marked under section 552.136. 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,

A handwritten signature in cursive script that reads "Kathleen J. Santos". The signature is written in black ink and is positioned above the typed name.

Kathleen J. Santos  
Assistant Attorney General  
Open Records Division

KJS/som

Ref: ID# 489995

Enc. Submitted documents

c: Requestor  
(w/o enclosures)