



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 12, 2013

Mr. Gary B. Lawson
Strasburger
901 Main Street, Suite 4400
Dallas, Texas 75202-3794

OR2013-09882

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# 490631.

The Dallas Police and Fire Pension System (the "system"), which you represent, received a request for three specified invoices submitted by a specified law firm. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and of the Government Code, as well as privileged under rule 503 of the Texas Rules of Evidence and rules 192.3 and 192.5 of the Texas Rules of Civil Procedure.¹ We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

¹Although you also raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503 and Texas Rules of Civil Procedure 192.3 and 192.5, 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). Therefore, we do not address your argument under section 552.101.

(116) 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 submitted information consists of attorney fee bills that are subject to subsection 552.022(a)(16). This information must be released unless it is made confidential under the Act or other law. *See id.* §§ 552.022(a)(16). You seek to withhold the submitted information under sections 552.103, 552.107, and 552.111 of the Government Code. However, sections 552.103, 552.107, and 552.111 are discretionary exceptions 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. 677 (2002) (governmental body may waive attorney work product privilege under section 552.111), 676 at 10-11 (2002) (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 submitted information may not be withheld under section 552.103, section 552.107, or section 552.111 of the Government Code. You also seek to withhold the submitted information under Texas Rule of Evidence 503 and Texas Rules of Civil Procedure 192.3 and 192.5, which the Texas Supreme Court has held are "other law" within the meaning 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-client privilege under rule 503, the consulting expert privilege under rule 192.3, and the attorney work product privilege under rule 192.5 for 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 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 submitted attorney fee bills must be withheld in their entirety under rule 503. However, section 552.022(a)(16) of the Government Code provides information “that is *in* a bill for attorney’s fees” is not excepted from required disclosure unless it is confidential under other law or privileged under the attorney-client privilege. *See Gov’t Code* § 552.022(a)(16) (emphasis added). This provision, by its express language, does not permit the entirety of an attorney fee bill to be withheld. *See also* Open Records Decisions Nos. 676 (attorney fee bill cannot be withheld in entirety on basis it contains or is attorney-client communication pursuant to language in section 552.022(a)(16)), 589 (1991) (information in attorney fee bill excepted only to extent information reveals client confidences or attorney’s legal advice). Accordingly, the system may not withhold the entirety of the submitted fee bills under Texas Rule of Evidence 503.

In the alternative, you assert the portions of the submitted fee bills you have marked should be withheld under rule 503. You argue the submitted fee bills include privileged attorney-client communications between the system’s attorneys and representatives of the system in their capacities as clients. You state the communications at issue were made for the purpose of the rendition of legal services to the system and you state the communications were intended to be, and have remained, confidential. Based on your representations and our review of the information at issue, we find the system has established the information we have marked constitutes attorney-client communications under rule 503. Thus, the system 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 you marked documents communications with individuals whom you have not demonstrated are privileged parties, or does not document a communication. Thus, we find you have not demonstrated how the remaining information you have marked documents an

attorney-client communication for purposes of rule 503. Accordingly, the remaining information you have marked may not be withheld on that basis.

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, a high-rise residential condominium that is owned by the system. 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.* 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.

You argue portions of the remaining information are protected as work product because they contain the mental impressions, opinions, conclusions, and legal theories in handling litigation. Having considered your arguments regarding the remaining information, we find you have not demonstrated 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.

In summary, the system may withhold the information we have marked within the submitted attorney fee bills under rule 503 of the Texas Rules of Evidence and rule 192.3 of the Texas Rules of Civil Procedure. The system 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, 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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 490631

Enc. Submitted documents

c: Requestor
(w/o enclosures)