



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 16, 2013

Mr. Dick H. Gregg, III  
Counsel for the City of Kemah  
Gregg & Gregg, P.C.  
16055 Space Center Boulevard, Suite 150  
Houston, Texas 77062

OR2013-12168

Dear Mr. Gregg:

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# 493159.

The City of Kemah (the "city"), which you represent, received a request for current contracts or special agreements between the city and attorneys for legal services or advice, including the most recent bills and billing information. You claim portions of the submitted information are excepted from disclosure under section 552.107 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5.<sup>1</sup> We have considered your arguments and reviewed the submitted information.

Initially, we note some of the submitted information is not responsive to the present request for information because it was created after the present request for information was received.<sup>2</sup> This ruling does not address the public availability of any information that is not

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<sup>1</sup>We understand you to raise Texas Rule of Civil Procedure 192.5 based upon your assertion the information at issue is subject to the attorney work-product privilege.

<sup>2</sup>The Act does not require a governmental body to release information that did not exist when it received a request, create responsive information, or obtain information that is not held by the governmental body or on its behalf. See *Economic 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), 452 at 3 (1986), 362 at 2 (1983).

responsive to the request, and the city need not release such information in response to this request.

Next, as 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 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 552.107 of the Government Code, this section is discretionary and does not make information confidential under the Act. *See* Open Records Decision No. 676 at 6 (2002) (attorney-client privilege under section 552.107(1) may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the city may not withhold the submitted information under section 552.107. However, the Texas Supreme Court has held the Texas Rules of Civil Procedure and the Texas Rules of Evidence are “other law” that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will address your arguments under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5 for the information you have highlighted.

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 information 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 the information you have highlighted documents privileged attorney-client communications made between city attorneys and staff for the purpose of facilitating the rendition of professional legal services to the city. You have identified some of the parties to the communications and state the communications were intended to be and have remained confidential. Based on your representations and our review, we conclude the information we have marked may be withheld under Texas Rule of Evidence 503.<sup>3</sup> However, the remaining information at issue either reveals communications with individuals you have not demonstrated are privileged parties or the information does not reveal the content of a communication. Accordingly, this information is not privileged under rule 503 and may not be withheld on this basis.

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

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<sup>3</sup>As our ruling is dispositive of this information, we need not address the applicability of your remaining argument against its disclosure.

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 425.

You generally state the remaining information at issue is protected by the attorney work product privilege. Upon review, we find you have failed to demonstrate how any of the remaining information at issue 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 city may not withhold this information under Texas Rule of Civil Procedure 192.5.

In summary, the city may withhold the information we have marked under Texas Rule of Evidence 503. The city must release the remaining responsive 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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](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 cursive script that reads "Lindsay E. Hale".

Lindsay E. Hale  
Assistant Attorney General  
Open Records Division

LEH/tch

Ref: ID# 493159

Enc. Submitted documents

c: Requestor  
(w/o enclosures)