



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 23, 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

OR2013-12658

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# 493949.

The City of Kemah (the "city"), which you represent, received a request for specified billing records for a specified time period and all related payment records for a different time period. You state you will release certain information, including the payment records with redactions under section 552.136 of the Government Code pursuant to Open Records Decision No. 684 (2009).<sup>1</sup> See Gov't Code § 552.232 (prescribing procedures for response to repetitive or redundant requests for information). You claim some of the requested information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code and

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<sup>1</sup>Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including routing and bank account numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision. However, on September 1, 2011, the Texas legislature amended section 552.136 to allow a governmental body to redact the information described in subsection 552.136(b) without the necessity of seeking a decision from the attorney general. See Gov't Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). See *id.* § 552.136(e). Thus, the statutory amendments to section 552.136 of the Government Code supercede Open Records Decision No. 684 on September 1, 2011. Therefore, a governmental body may only redact information subject to subsection 552.136(b) in accordance with section 552.136, not Open Records Decision No. 684.

privileged pursuant to rule 503 of the Texas Rules of Evidence.<sup>2</sup> We have considered your arguments and reviewed the submitted information.

Initially, you state some of the requested information was the subject of previous requests for information in response to which this office issued Open Records Letter Nos. 2012-02459 (2012), 2012-14017 (2012), and 2013-10908 (2013). With regard to the requested information that is identical to the information previously requested and ruled upon by this office in the prior rulings, we conclude, as we have no indication the law, facts, and circumstances on which the prior rulings were based have changed, the city must continue to rely on Open Records Letter Nos. 2012-02459, 2012-14017, and 2013-10908 as previous determinations and withhold or release the requested information in accordance with those rulings. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances, on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). You explain the submitted information is not encompassed by the previous rulings. Therefore, we will address the submitted arguments for this information.

Next, we note, and you acknowledge, 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:

...

(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 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 portions of the submitted information under sections 552.107 and 552.111 of the Government Code. However, section 552.107 and section 552.111 are discretionary exceptions and do not make information confidential under the Act. *See* Open Records Decision Nos. 676 (2002) at 10-11 (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 677 at 10 (2002) (attorney work product privilege under section 552.111

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<sup>2</sup>Although you do not cite to section 552.111 in your brief, we understand you to raise this section based on your arguments.

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 552.107 or section 552.111 of the Government Code. You also seek to withhold portions of the submitted information under Texas Rule of Evidence 503. Further, we note the Texas Supreme Court has held the Texas Rules of Evidence and the Texas Rules of Civil Procedure are “other law” within the meaning 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 and the attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure for the information at issue.

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 information you have highlighted in the fee bills contain confidential communications between the city's attorney and the city's staff. You state these communications were made for the purpose of facilitating the rendition of professional legal services to the city and have remained confidential. Based on your representations and our review, we find the city has established portions of the information at issue, which we have marked, constitute attorney-client communications under rule 503. Thus, the city may withhold the information we have marked pursuant to Texas Rule of Evidence 503. However, we find the remaining information you highlighted 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 failed to demonstrate the remaining information you highlighted documents confidential communications between privileged parties. Accordingly, the remaining information may not be withheld under Texas Rule of Evidence 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 some of 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 portions of the remaining information that document settlement negotiations with opposing counsel are confidential under rule 192.5. Upon review, we find 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 must continue to rely on Open Records Letter Nos. 2012-02459, 2012-14017, and 2013-10908 as previous determinations and withhold or release the requested information in accordance with those rulings. The city may withhold the information we marked under Texas Rule of Evidence 503. 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](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,



Kathleen J. Santos  
Assistant Attorney General  
Open Records Division

KJS/som

Ref: ID# 493949

Enc. Submitted documents

c: Requestor  
(w/o enclosures)