



ATTORNEY GENERAL OF TEXAS  
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May 16, 2014

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P.O. Box 1210  
McKinney, Texas 75070-1210

OR2014-08462

Dear Ms. Brewer:

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# 522885.

The City of Frisco (the "city"), which you represent, received a request for (1) all records relating to the city's entry into or participation in a specified program; (2) all records relating to environmental issues at a specified lead smelting facility owned by Exide Technologies ("Exide"); and (3) certain communications pertaining to these topics for a specified period of time. You state the city will release some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 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, which we have indicated, is not responsive to the instant request because it is not within the time period specified in the request or was created after the date of the request. This ruling does not address the public availability of any information that is not responsive to the request and the city is not required to release such information in response to this request.

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<sup>1</sup>Although you also raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 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).

Next, we note some of the responsive information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part, the following:

(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:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (3), (17). The responsive information includes completed reports subject to section 552.022(a)(1). The city must release the completed reports pursuant to section 552.022(a)(1), unless they are excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* § 552.022(a)(1). The responsive information also includes information in an account, voucher, or contract relating to the receipt or expenditure of funds by the city subject to section 552.022(a)(3) and court-filed documents subject to section 552.022(a)(17). The city must release this information pursuant to sections 552.022(a)(3) and 552.022(a)(17) unless the information is made confidential under the Act or other law. *See id.* § 552.022(a)(3), (17). Although you raise sections 552.103, 552.107 and 552.111 of the Government Code for the responsive information subject to section 552.022, these exceptions are discretionary in nature 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 section 552.103); Open Records Decision Nos. 677 at 8-10 (2002) (governmental body may waive attorney work product privilege under section 552.111), 676 at 10-11 (2002) (governmental body may waive attorney-client privilege under section 552.107(1)), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). Therefore, the city may not withhold any of the responsive information subject to section 552.022, which we have marked, under section 552.103, 552.107, or 552.111. However, the Texas Supreme Court has held the Texas Rules of Evidence and Texas Rules of Civil Procedure are “other law” that make information expressly confidential for purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we

will consider your assertions of the attorney-client privilege and the attorney work product privilege under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, respectively. Further, because section 552.136 of the Government Code makes information confidential under the Act, we will consider the applicability of this exception to the information at issue.<sup>2</sup> We will also address your arguments against disclosure of the responsive information not subject to section 552.022.

Texas Rule of Evidence 503(b)(1) provides the following:

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).

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 the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication;

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<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. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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. *Id.* Upon a demonstration of all three factors, the entire communication 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). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege extends to entire communication, including factual information).

You claim a portion of the responsive information subject to section 552.022, which consists of attachments to communications involving the city's staff, representatives, legal counsel, outside counsel, counsel representatives, and consultants for the city, are protected from disclosure by rule 503. You state these communications were made for the purpose of facilitating the rendition of professional legal services to the city and these communications have remained confidential. Based on these representations and our review, we find you have established the information at issue, which we have marked, constitutes attorney-client communications under rule 503. Therefore, the city may generally withhold the information we have marked under Texas Rule of Evidence 503.<sup>3</sup> We note, however, one of these attachments consists of a document filed with a court. This document has been seen by non-privileged parties and is separately responsive to the request. Accordingly, to the extent this document exists separate and apart from the privileged communication to which it is attached, the city may not withhold this document under rule 503 of the Texas Rules of Evidence. If the document at issue does not exist separate and apart from the privileged communication, the city may withhold it under rule 503 of the Texas Rules of Evidence.

To the extent the non-privileged court-filed document exists separate and apart from the privileged communication to which it is attached, we will address your argument against its disclosure under Texas Rule of Civil Procedure 192.5. We will also address your argument under rule 192.5 for the remaining responsive information subject to section 552.022 of the Government Code. Rule 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 the information implicates the core work product aspect of the work product privilege. *See* ORD 677 at 9-10. Rule 192.5 defines 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.*

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

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 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 Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 426 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

You claim the remaining responsive information subject to section 552.022 consists of attorney core work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. However, upon review, we find you have not demonstrated any of the information at issue consists of mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative that were created for trial or in anticipation of litigation. Therefore, we conclude the city may not withhold any of the remaining responsive information subject to section 552.022 under Texas Rule of Civil Procedure 192.5.

Section 552.136 of the Government Code states "[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); *see id.* § 552.136(a) (defining "access device"). Upon review, we find the city must withhold the routing and bank account numbers we have marked under section 552.136 of the Government Code.

We now address your argument under section 552.103 of the Government Code for the responsive information not subject to section 552.022. Section 552.103 provides, in relevant part, the following:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

*Id.* § 552.103(a), (c). A governmental body claiming section 552.103 has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect that litigation is “realistically contemplated.” *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld from disclosure if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is “reasonably likely to result”). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* ORD 452 at 4.

You claim the information at issue relates to anticipated litigation by the city. You state, and provide documentation showing that prior to the city’s receipt of the instant request, the city placed Exide on notice of its intent to pursue any and all remedies in connection with Exide’s alleged breach of the Master Settlement Agreement (the “agreement”) entered into by the city and Exide. Further, you inform us that, prior to the city’s receipt of the request, the agreement was incorporated into Exide’s bankruptcy proceedings and state the city has been contemplating seeking relief from the automatic stay. Based on these representations and our review, we find the city reasonably anticipated litigation when it received the request for information, and the information at issue relates to the anticipated litigation. Therefore, we conclude the city may withhold the responsive information not subject to section 552.022 under section 552.103 of the Government Code.<sup>4</sup>

We note, however, once information has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect

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<sup>4</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends when the litigation has concluded or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

In summary, the city may withhold the information we have marked under Texas Rule of Evidence 503, including the non-privileged court-filed document, if this document does not exist separate and apart from the otherwise privileged communication to which it is attached. The city must withhold the bank account and routing numbers we have marked under section 552.136 of the Government Code. With the exception of the remaining responsive information subject to section 552.022, which we have marked for release, the city may withhold the remaining responsive information under section 552.103 of the Government Code.

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,



Miriam A. Khalifa  
Assistant Attorney General  
Open Records Division

MAK/akg

Ref: ID# 522885

Enc. Submitted documents

c: Requestor  
(w/o enclosures)