



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 9, 2014

Ms. Natalia Luna Ashley
Executive Director
Texas Ethics Commission
P.O. Box 12070
Austin, Texas 78711-2070

OR2014-15839

Dear Ms. Ashley:

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# 535591.

The Texas Ethics Commission (the "commission") received a request for invoices from the commission's outside legal counsel regarding the commission's handling of complaints against a named individual and a specified entity and records of payments made in the same matters. You state you have provided some information to the requestor. You claim some of the submitted information is privileged under Rule 503 of the Texas Rules of Evidence and Rule 192.5 of the Texas Rules of Civil Procedure.¹ We have considered your arguments and reviewed the submitted information.

Initially, we note the submitted information consists of attorney fee bills that are subject to section 552.022(a)(16) of the Government Code. Section 552.022(a)(16) provides for 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 the information is expressly confidential under the Act or other law. Gov't Code § 552.022(a)(16). The Texas Supreme Court has held the Texas Rules of Evidence and the Texas Rules of Civil Procedure are

¹We note, in initial its correspondence to this office, the commission raised sections 571.139 and 571.140 of the Government Code. However, the commission has provided no arguments in support of those sections. Accordingly, we assume the commission no longer asserts those sections. *See* Gov't Code §§ 552.301, .302.

“other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will address your claims of the attorney-client and attorney work product privileges under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure, respectively.

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 portions of the fee bills you have marked under rule 503 consist of confidential communications involving the commission, the commission's representatives, and the commission's outside counsel. You state these communications were made for the purpose of facilitating the rendition of professional legal services to the commission and were intended to be and have remained confidential. Based on your representations and our review, we find the information we have marked may be withheld under Texas Rule of Evidence 503.² However, we find the remaining information at issue either does not reveal communications for purposes of rule 503 or documents communications with individuals that you have not established are privileged parties. Accordingly, we find you have failed to demonstrate the applicability of the attorney-client privilege to the remaining information at issue, and the commission may not withhold it under rule 503 of the Texas Rules of Evidence.

Texas Rule of Civil Procedure 192.5 encompasses the attorney work product privilege. For purposes of section 552.022 of the Government Code, information may be withheld 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 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 when the governmental body received the request for information, and (2) consists of an attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *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 prong of the work product test requires the governmental body to show the documents at issue contain the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test may be withheld under rule 192.5, provided the information does not fall within

²As our ruling for this information is dispositive, we need not address your remaining argument against its disclosure.

the purview of the exceptions to the privilege enumerated in rule 192.5(c). *See Caldwell*, 861 S.W.2d at 427.

The commission contends portions of the remaining information constitute attorney work product protected by rule 192.5 of the Texas Rules of Civil Procedure. Upon review, we find you have not demonstrated any of the remaining information at issue consists of mental impressions, opinions, conclusion, or legal theories of an attorney or an attorney's representative that were created for trial or in anticipation of trial. Therefore, the commission may not withhold any of the remaining information at issue under rule 192.5 of the Texas Rules of Civil Procedure.

In summary, the commission may withhold the information we have marked under rule 503 of the Texas Rules of Evidence. The commission 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.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,



Kristi L. Godden
Assistant Attorney General
Open Records Division

KLK/cz

Ref: ID# 535591

Enc. Submitted documents

c: Requestor
(w/o enclosures)