



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

February 8, 2016

Mr. Don W. Minton  
Assistant City Attorney  
Office of the City Attorney  
City of El Paso  
P.O. Box 1890  
El Paso, Texas 79950-1890

OR2016-02951

Dear Mr. Minton:

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# 597317 (El Paso No. 15-1004-670).

The City of El Paso (the "city") received a request for information pertaining to a specified renovation project and any communications between the city and the contractor pertaining to the specified renovation project. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.111 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the submitted information.

Initially, we note portions of the submitted information are 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:

...

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

Gov't Code § 552.022(a)(3). The submitted information contains invoices relating to the receipt or expenditure of funds by the city which are subject to section 552.022. The city must release the invoices pursuant to section 552.022(a)(3) unless the information is made confidential under the Act or other law. Although you raise sections 552.103, 552.107, and 552.111 of the Government Code for the invoices subject to section 552.022, these sections are discretionary exceptions to disclosure and do not make information confidential under the Act. *See Dallas Area Rapid Transit*, 4 S.W.3d at 475-76 (Tex. App. – Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); *see also* Open Records Decision Nos. 677 at 8 (2002) (attorney work product privilege under section 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2005) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the information subject to section 552.022, which we have marked, may not be withheld under section 552.103, section 552.107, or section 552.111 of the Government Code. The Texas Supreme Court has held, however, 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). Accordingly, we will address your attorney-client privilege claim under rule 503 of the Texas Rules of Evidence and attorney work product privilege claim under rule 192.5 of the Texas Rules of Civil Procedure. We will also consider your arguments under sections 552.103, 552.107, and 552.111 for the information not subject to section 552.022.

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 to facilitate the rendition of professional legal services to the client:

- (A) between the client or the client's representative and the client's lawyer or the lawyer's representative;
- (B) between the client's lawyer and the lawyer's representative;
- (C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;
- (D) between the client's representatives or between the client and the client's representative; 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; 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, orig. proceeding).

You explain the information that is subject to section 552.022 consists of attachments to privileged e-mail communications between city attorneys and city staff in their capacity as clients that were made for the purpose of providing legal services to the city. You state the communications were intended to be confidential and have remained confidential. However, if the attachments are removed from the e-mails and stand alone, they are responsive to the request for information. Therefore, if these non-privileged attachments, which we have indicated, are maintained by the city separate and apart from the otherwise privileged e-mails to which they are attached, then the city may not withhold the attachments under Texas Rule of Evidence 503. If the indicated attachments subject to section 552.022 do not exist separate and apart from the e-mails to which they are attached, the city may withhold them under rule 503.

To the extent the non-privileged attachments are maintained separate and apart from the other privileged e-mails, the city also argues Texas Rule of Civil Procedure 192.5, which 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 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 Co. 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 that 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.*, 861 S.W.2d at 427.

You contend the information subject to section 552.022 of the Government Code contains attorney core work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. Upon review, we find you have not demonstrated any of the 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 litigation. Accordingly, the city may not withhold any of the information subject to section 552.022 under rule 192.5.

Section 552.103 of the Government Code provides as follows:

(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.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). See ORD 551.

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). To establish litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); see Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You claim the information not subject to section 552.022 is excepted under section 552.103 of the Government Code. You assert that you received a communication from the contractor which specifically referenced litigation and the information at issue pertains to whether or not the contractor breached the contract at issue. You claim the city anticipated litigation on the date the request was received. However, you do not inform us when you received this letter from the contractor. Furthermore, you do not inform us the contractor had taken any concrete steps toward initiating litigation against the city as of the date of the request. Therefore, we find you have failed to demonstrate the city reasonably anticipated litigation on the date the request for information was received. Accordingly, the city may not withhold any of the information at issue under section 552.103 of the Government Code.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. The elements of the privilege under section 552.107(1) are the same as those discussed above for rule 503. 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. ORD 676 at 6-7. Section 552.107(1) generally excepts an entire communication that is demonstrated to be

protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie*, 922 S.W.2d at 923.

You state the remaining information at issue constitutes e-mail communications between city attorneys and city staff in their capacity as clients that were made for the purpose of providing legal services to the city. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the city may generally withhold the remaining information that is not subject to section 552.022 under section 552.107(1). We note, however, some of the e-mails and attachments at issue were received from non-privileged parties. Furthermore, if the e-mails and attachments received from the non-privileged parties are removed from their e-mail strings and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails and attachments, which we have indicated, are maintained by the city separate and apart from the otherwise privileged e-mail strings, then the city may not withhold these non-privileged e-mails and attachments under section 552.107(1).

To the extent the non-privileged e-mails exist separate and apart, we will address your attorney work product claim under section 552.111 of the Government Code. Section 552.111 excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov’t Code § 552.111. This exception encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); ORD 677 at 4-8. Rule 192.5 defines work product as:

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5. A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. *Id.*; ORD 677 at 6-8. The test to determine whether information was created or developed in anticipation of litigation is the same as that discussed above concerning rule 192.5.

To the extent the non-privileged e-mails and attachments exist separate and apart from the otherwise privileged e-mail strings, you contend they consist of attorney work product. However, as previously noted, the information at issue consists of information that was

received from third parties you have not demonstrated are privileged parties. Therefore, because non-privileged parties have had access to this information, the work product privilege under section 552.111 has been waived. Accordingly, the city may not withhold any of the information at issue under the work product privilege of section 552.111 of the Government Code.

In summary, if the attachments subject to section 552.022 of the Government Code, which we have indicated, do not exist separate and apart from the otherwise privileged e-mails to which they are attached, the city may withhold them under Texas Rule of Evidence 503. The city may generally withhold the remaining information that is not subject to section 552.022 of the Government Code under section 552.107(1) of the Government Code. However, to the extent the non-privileged e-mails and attachments, which we have indicated, are maintained by the city separate and apart from the otherwise privileged e-mail strings, then the city may not withhold these non-privileged e-mails and attachments under section 552.107(1) 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,



Thana Hussaini  
Assistant Attorney General  
Open Records Division

TH/som

Ref: ID# 597317

Enc. Submitted documents

c: Requestor  
(w/o enclosures)