



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 28, 2016

Ms. Monica L. Perez
Counsel for the City of Socorro
Mounce, Green, Myers, Safi, Paxson, & Galatzan
P.O. Box 1977
El Paso, Texas 79999-1977

OR2016-06833

Dear Ms. Perez:

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# 603032.

The City of Socorro (the "city"), which you represent, received a request for information from a specified time period, to include: (1) certain attorney fee bills; (2) information relating to individual acquisitions of land in a specified area; (3) compensation to purchase fee simple interest, easements, or other right-of-way interests in the specified area; (4) certain invoices from and compensation paid to a named appraiser relating to a specified appraisal; and (5) the names and compensation paid to all other appraisers contracted by the city. You state the city will release some of the requested information to the requestor. You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.103, 552.105, 552.107, 552.111, and 552.136 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. We have considered the submitted arguments and reviewed the submitted representative sample of information.¹

¹We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

Initially, we note the submitted information contains information 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;

...

(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)(3), (16). Exhibits 1 and 2 contain invoices and checks relating to the receipt or expenditure of funds by the city that are subject to section 552.022(a)(3), and Exhibit 3 consists of attorney fee bills that are subject to section 552.022(a)(16). The city must release the information subject to section 552.022 unless it is made confidential under the Act or other law. Although you seek to withhold some of the information subject to section 552.022 under sections 552.103, 552.105, 552.107, and 552.111 of the Government Code, these exceptions are discretionary 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 Gov't Code § 552.103); *see also* Open Records Decision Nos. 676 at 10-11 (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (governmental body may waive section 552.111), 564 (1990) (statutory predecessor to section 552.105 subject to waiver). Therefore, the information subject to section 552.022 may not be withheld under section 552.103, section 552.105, section 552.107, or section 552.111 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence and Texas Rules of Civil Procedure are "other law" that makes information expressly confidential for purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will address the city's claims 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. Further, because information subject to section 552.022 may be withheld under sections 552.101 and 552.136 of the Government Code, we will consider your claims under these exceptions for the information at issue. We will also consider your arguments for the submitted information not subject to section 552.022.

Section 552.105 of the Government Code excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Gov't Code § 552.105. We note this provision is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. *See* Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). Information that is excepted from disclosure under section 552.105 that pertains to such negotiations may be excepted from disclosure so long as the transaction relating to that information is not complete. *See* ORD 310. Under section 552.105, a governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" ORD 357 at 3 (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiating position with regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body's good-faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* ORD 564.

You state the information in Exhibit 1 that is not subject to section 552.022 "relates to the 'taking' of several tracts of real property . . . as part of a project involving the Texas Department of Transportation." You explain at the time of the request, there were potential condemnation proceedings between the requestor and the city relating to the specified project, and the transaction regarding such negotiations is not yet completed. Accordingly, you state the city has made a good-faith determination that release of this information would impair the city's planning and negotiating position in regard to the transaction in question. Based on your representations, with the exception of the information subject to section 552.022, we conclude the city may withhold Exhibit 1 under section 552.105 of the Government Code.²

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information other statutes make confidential. In addition, a federal regulation enacted pursuant to statutory authority can provide statutory confidentiality for purposes of section 552.101 of the Act. *See* Open Records Decision No. 599 at 4 (1992). You raise section 552.101 in conjunction with part 24 of title 49 of the Code of Federal Regulations, which implements the Uniform Relocation Assistance and Real

²As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Property Acquisition Policies Act of 1970, and pertains to relocation assistance and real property acquisition for federal and federally-assisted programs. Section 4633 of title 42 of the United States Code authorizes the Secretary of Transportation to prescribe regulations necessary to carry out the Uniform Act. *See* 42 U.S.C. § 4633. Section 24.9 of title 49 of the Code of Federal Regulations states, in part:

(a) Records. The Agency shall maintain adequate records of its acquisition and displacement activities in sufficient detail to demonstrate compliance with this part. These records shall be retained for at least 3 years after each owner of a property and each person displaced from the property receives the final payment to which he or she is entitled under this part, or in accordance with the applicable regulations of the Federal funding Agency, whichever is later.

(b) Confidentiality of records. Records maintained by an Agency in accordance with this part are confidential regarding their use as public information, unless applicable law provides otherwise.

49 C.F.R. § 24.9(a)-(b). You assert the city is an “agency” as understood by this section. “Agency” means a federal agency, state, state agency, or a person that acquires real property or displaces a person from property. *See id.* § 24.2(a)(1). “State Agency” means any department, agency or instrumentality of a state or of a political subdivision of a state, and any person who has the authority to acquire property by eminent domain under state law. *See id.* § 24.2(a)(1)(iv). You assert the remaining information at issue in Exhibit 1 is confidential under section 24.9(b) of title 49 of the Code of Federal Regulations. You indicate this information consists of acquisition and displacement records maintained by the city as part of the acquisition and relocation policy for the properties located in the specified area. Further, we understand the information at issue is maintained by the city in accordance with part 24 of title 49 of the Code of Federal Regulations. Based upon your representations and our review, we agree the remaining information at issue in Exhibit 1 is confidential under section 4633 of title 42 of the United States Code and section 24.9(b) of title 49 of the Code of Federal Regulations and must be withheld under section 552.101 of the Government Code.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides:

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 not intended to be disclosed to third persons other than those to whom disclosure is made to further the rendition of professional legal services to the client or reasonably necessary to transmit the communication. *Id.* 503(a)(5).

Accordingly, 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. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under Rule 503 provided the client has not waived the privilege or the communication 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 attaches to complete communication, including factual information).

You state the submitted fee bills contain communications between city employees, city representatives, and city attorneys and their representatives that were intended to facilitate the rendition of legal services to the city. You further state these communications were intended to be, and have remained, confidential. Based on your representations and our review, we conclude the city may withhold the information we marked under rule 503 of the Texas Rules of Evidence.³ However, you have not demonstrated the remaining information at issue consists of privileged attorney-client communications. Further, we note an entry stating a memorandum or an e-mail was prepared or drafted does not demonstrate the

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

document was communicated to the client. Accordingly, the city may not withhold any of the remaining information at issue under rule 503 of the Texas Rules of Evidence.

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 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 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, 427 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

You state the remaining information you have marked consists of communications and work product prepared by attorneys for the city in anticipation of litigation. Upon review, we find none of the remaining information at issue consists of an attorney’s core work product. Accordingly, the city may not withhold any of the remaining information at issue under rule 192.5 of the Texas Rules of Civil Procedure.

Section 552.136 of the Government Code states “Notwithstanding 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 account and routing numbers you have marked under section 552.136 of the Government Code. However, the remaining information you have marked, which consists of check numbers, does not constitute an access device number and may not be withheld under section 552.136 of the Government Code.

In summary, with the exception of the invoices and checks subject to section 552.022 of the Government Code, the city may withhold Exhibit 1 under section 552.105 of the Government Code. The city must withhold the remaining information in Exhibit 1 under section 552.101 of the Government Code in conjunction with section 24.9(b) of title 49 of the Code of Federal Regulations. The city may withhold the information we have marked under rule 503 of the Texas Rules of Evidence. The city must withhold the account and routing numbers you have marked under section 552.136 of the Government Code. The city 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,



Lee Seidlits
Assistant Attorney General
Open Records Division

CLS/bw

Ref: ID# 603032

Enc. Submitted documents

c: Requestor
(w/o enclosures)