



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 16, 2016

Mr. Ryan D. Pittman
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P.O. Box 1210
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OR2016-18517

Dear Mr. Pittman:

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# 623346.

The City of Frisco (the "city"), which you represent, received a request for 1) specified water or sewer service contracts or agreements, 2) specified maps pertaining to the city's water and sewer service lines, and 3) specified categories of communications pertaining to a specified address. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code and privileged under Texas Rule of Evidence 503 and rules 192.3 and 192.5 of the Texas Rules of Civil Procedure.¹ We have considered the submitted arguments and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See Gov't Code* § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released).

Initially, we note the city seeks to withdraw its request for an open records decision because it asserts the request for information was withdrawn by operation of law when the requestor

¹Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503 and Texas Rules of Civil Procedure 192.3 and 192.5, this office has concluded that section 552.101 does not encompass discovery privileges. *See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).*

failed to timely respond to a cost estimate for providing the requested records. Upon review of a copy of the cost estimate, we find it does not comply with the requirements of section 552.2615(a) of the Government Code. *Id.* § 552.2615(a). Accordingly, we conclude the request for information was not withdrawn by operation of law. *See id.* § 552.2615(b).

Next, we address the requestor's claim the city failed to comply with the section 552.301(b) of the Government Code in requesting a ruling from this office. Section 552.301 prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See id.* § 552.301(b). The city received the request for information on April 6, 2016. We note the city sought clarification of the request on April 19, 2016, and received clarification of the request on April 22, 2016. *See id.* § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). You state the city provided the requestor with a cost estimate pursuant to section 552.2615 of the Government Code and required a deposit. *See Gov't Code* §§ 552.2615(a), .263(a). You state the city received payment of the deposit on May 27, 2016. Thus, May 27, 2016, is the date on which the city is deemed to have received the request. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date that the governmental body receives deposit or bond). We understand the city was closed on May 30, 2016, in observance of the Memorial Day holiday. This office does not count the date the request was received or holidays a governmental body is closed for the purpose of calculating a governmental body's deadlines under the Act. Accordingly, the ten-business-day deadline for requesting a ruling from this office was June 13, 2016. The city submitted the information required by section 552.301(b) on June 13, 2016. *See id.* § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Therefore, we find the city complied with the procedural requirements of section 552.301(b) of the Government Code in requesting this decision.

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[.]

Id. § 552.022(a)(3). The submitted information contains information that is subject to section 552.022(a)(3). 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 this information under sections 552.103, 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). 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. 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 consider your arguments under rule 503 of the Texas Rules of Evidence and rules 192.3 and 192.5 of the Texas Rules of Civil Procedure. Further, because section 552.101 of the Government Code can make information confidential for purposes of section 552.022, we will consider the applicability of this exception to the information subject to section 552.022. Further, we will address the city’s arguments against disclosure of the remaining information.

Section 552.103 of the Government Code provides:

(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 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 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, no pet.); *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). We note contested cases conducted under the Administrative Procedure Act (the “APA”), chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. See Open Records Decision No. 588 at 7 (1991).

You state the requestor has filed a formal complaint against the city, styled *Formal Complaint of Ker-Seva, Ltd., against the City of Frisco, Texas*, PUC Docket No. 45870, before the Public Utility Commission. You state the complaint was pending prior to the city's receipt of the instant information request. We understand the pending case is being conducted according to the APA. You state the submitted information not subject to section 552.022 of the Government Code is related to the pending litigation. Based on your representations and our review, we find litigation was pending when the city received the request for information, and the information at issue is related to the pending litigation for the purposes of section 552.103. Therefore, the district may withhold the submitted information not subject to section 552.022 of the Government Code under section 552.103 of the Government Code.²

Texas Rule of Evidence 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;

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

(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).

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 assert the submitted information subject to section 552.022 of the Government Code should be withheld under rule 503. You state the information at issue consists of communications between city attorneys, city employees, and city consultants 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 information we have marked consists of privileged attorney-client communications. Therefore, the city may generally withhold the information we have marked under rule 503 of the Texas Rules of Evidence.³ We note, however, the information at issue consists of attachments shared with non-privileged parties that are attached to otherwise privileged e-mail strings. Furthermore, if the attachments at issue are removed from the otherwise privileged e-mail strings in which they appear and stand alone, they are responsive to the request for information. Therefore, if these non-privileged attachments, which we have marked, are maintained by the city separate and apart from the otherwise privileged e-mail strings in which they appear, then the city may not withhold these non-privileged attachments under rule 503. Further, we find you have failed to demonstrate the remaining information consists of privileged attorney-client communications. Thus, the city may not withhold any of the remaining information under rule 503.

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

Rule 192.3 of the Texas Rules of Civil Procedure provides the consulting expert privilege. A party to litigation is not required to disclose the identity, mental impressions, and opinions of consulting experts whose mental impressions or opinions have not been reviewed by a testifying expert. *See* TEX. R. CIV. P. 192.3(e). A “consulting expert” is defined as “an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert.” TEX. R. CIV. P. 192.7. Although you generally claim this privilege, we find you have not demonstrated its applicability to the information at issue. Accordingly, the city may not withhold any portion of the remaining information under rule 192.3 of the Texas Rules of Civil Procedure.

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 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.*, 861 S.W.2d at 427.

Upon review, we find you have not demonstrated the remaining information contains the mental impressions, opinions, conclusions, or legal theories of an attorney or the attorney’s representative that was developed in anticipation of litigation or for trial. Therefore, we find

the city may not withhold the remaining information under Texas Rule of Civil Procedure 192.5.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 of the Government Code encompasses information protected by other statutes. As part of the Texas Homeland Security Act, sections 418.176 through 418.182 were added to chapter 418 of the Government Code. These provisions make confidential certain information related to terrorism. You assert the remaining information is made confidential by sections 418.181 and 418.182 of the Government Code.

Section 418.181 provides,

Those documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

Id. § 418.181. Section 418.182 provides, in relevant part,

(a) Except as provided by Subsections (b) and (c), information, including access codes and passwords, in the possession of a governmental entity that relates to the specifications, operating procedures, or location of a security system used to protect public or private property from an act of terrorism or related criminal activity is confidential.

Id. § 418.182(a). The fact that information may relate to a governmental body’s security concerns does not make the information *per se* confidential under the Texas Homeland Security Act. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute’s key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the Texas Homeland Security Act must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov’t Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You assert the release of the remaining information would reveal information relating to specifications and locations of critical city security infrastructure and systems. However, you do not explain how the remaining information identifies the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Moreover, you have not demonstrated how the information at issue consists of access codes and passwords or reveals the location of a security system used to protect public or private property from an act of terrorism or related criminal activity. Consequently, we find the city may not withhold any

of the remaining information under section 552.101 of the Government Code in conjunction with section 418.181 or section 418.182 of the Government Code.

In summary, the city may withhold the submitted information not subject to section 552.022 of the Government Code under section 552.103 of the Government Code. The city may generally withhold the information we have marked under rule 503 of the Texas Rules of Evidence; however, the city may not withhold this information if it is maintained separate and apart from the otherwise privileged e-mail strings in which it appears. 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,

A handwritten signature in black ink, appearing to read 'Meredith L. Coffman', followed by a long horizontal line extending to the right.

Meredith L. Coffman
Assistant Attorney General
Open Records Division

MLC/bw

Ref: ID# 623346

Enc. Submitted documents

c: Requestor
(w/o enclosures)