



March 26, 2001

Mr. Thomas F. Keever
Assistant District Attorney
Denton County
P. O. Box 2850
Denton, Texas 76202

OR2001-1170

Dear Mr. Keever:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your requests were assigned ID#s 145271 and 145336. We have combined these files and will consider the issues presented in this single ruling assigned ID# 145271.

Denton County (the "county") received requests for (1) a June 26, 2000 report commissioned by the county discussing problems with the Denton County Courts Building (the "courts building"); (2) correspondence between the county, its departments or agents, and any potential party to a lawsuit regarding the courts building; and (3) correspondence between the county, its departments or agents, and KONE, Inc. regarding problems with the elevators at the courts building. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first note that the requested report is a completed report for purposes of section 552.022(a)(1) of the Government Code. Section 552.022(a) enumerates categories of information that are public information and not excepted from required disclosure under chapter 552 of the Government Code unless they are expressly confidential under other law. One such category of expressly public information under section 552.022 is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108..." Gov't Code § 552.022(a)(1). The report must therefore be released under section 552.022 unless the information is expressly made confidential

under other law or is excepted from disclosure under section 552.108 of the Government Code. Section 552.103 of the Government Code is a discretionary exception and is not "other law" for purposes of section 552.022.¹ Likewise, section 552.107 of the Government Code, which excepts information within the attorney-client privilege, and section 552.111 of the Government Code, which excepts information within the attorney work product privilege, do not constitute "other law" for purposes of section 552.022. Open Records Decision No. 630 at 4 (1994) (governmental body may waive section 552.107(1)); Open Records Decision No. 473 (1987) (governmental body may waive section 552.111).

However, the attorney-client privilege and work product privilege are also found in Rule 503 of the Texas Rules of Evidence and Rule 192.5 of the Texas Rules of Civil Procedure, respectively. Recently, the Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, No. 00-0453, 2001 WL 123933, at *8 (Tex. Feb. 15, 2001). Thus, we will determine whether the information is confidential under Rule 503 of the Texas Rules of Evidence or Rule 192.5 of the Texas Rules of Civil Procedure.

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

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

¹Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 549 at 6 (1990) (governmental body may waive informer's privilege), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

(E) among lawyers and their representatives representing the same client.

A communication is “confidential” if 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. TEX. R. EVID. 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. Upon a demonstration of all three factors, the document containing privileged information is 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). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.–Houston [14th Dist.] 1993, no writ).

Furthermore, an attorney’s core work product is confidential under Rule 192.5. Core work product is defined as the work product of an attorney or an attorney’s representative developed in anticipation of litigation or for trial that contains the attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. 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 that the material was (1) created for trial or in anticipation of litigation 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 that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that (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 that the documents at issue contains the attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test is confidential under Rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege

enumerated in Rule 192.5(c). *Pittsburg Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.--Houston [14th Dist.] 1993, no writ).

However, the attorney-client and attorney work product privileges can be waived if the information to which the privileges attach is voluntarily disclosed in a non-privileged context. TEX. R. EVID. 511; *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 554 (Tex. 1990); *Carmona v. State*, 947 S.W.2d 661, 663 (Tex. App.--Austin 1997, no writ); *Arkla, Inc. v. Harris*, 846 S.W.2d 623, 630 (Tex. App.--Houston [14th Dist.] 1993, no writ); *State v. Peca*, 799 S.W.2d 426, 431 (Tex. App.--El Paso 1990, no writ). Here, you state that the assistant district attorney, in an effort to settle the county's claims against certain parties, sent copies of the requested report to the parties against whom the county might bring litigation. You state that these parties agreed to keep the report confidential and not disclose it to any other third party. However, while the parties may have agreed not to subsequently disclose the report, the county's disclosure of the report to those parties was not "privileged." See TEX. R. EVID. 503-510; TEX. R. CIV. P. 192.5. Therefore, the county waived its claim that the report is protected under the attorney-client and work product privileges. See TEX. R. EVID. 511; see also *In re Chrysler Motors Corp. Overnight Evaluation Program Litigation*, 860 F.2d 844, 846-47 (8th Cir. 1988); *Bowne of New York City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 480 (S.D.N.Y. 1993); *Khandji v. Keystone Resorts Mgmt., Inc.*, 140 F.R.D. 697, 700 (D. Colo. 1992); *Axelson, Inc.*, 798 S.W.2d at 554; *Freeman v. Bianchi*, 820 S.W.2d 853, 859-60 (Tex. App.--Houston [1st Dist.] 1991, orig. proceeding). The county must release the requested report contained in Exhibit C.

With respect to the requested correspondence, contained in Exhibits H through N, the county argues that the information is excepted under section 552.103, 552.107, and 552.111.² We first address the county's claim that Exhibits L, M, and N are excepted from disclosure under section 552.103 of the Government Code. Section 552.103 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

²You also assert that you submitted an Exhibit O that is excepted from disclosure under section 552.103 and 552.107. However, we did not receive this exhibit. We therefore assume you released the information contained in Exhibit O. See Gov't Code §§ 552.021, .301, .302.

on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The county 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, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas 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). The county must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that 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). You state that the county commissioned the June 26, 2000 report on the flooding and cracking of the basement floor of the courts building "to ascertain how and why the problems occurred and if any of the problems were the result of negligence in the design and/or construction of the building." Upon receiving the report, the assistant district attorney, with the consent of the County Commissioner's Court, contacted all of the parties against whom the county had claims for damage to the courts building and began settlement negotiations. You state the county is attempting "to obtain a satisfactory resolution to the problems encountered with the building by pre-litigation settlement prior to initiating expensive and protracted litigation." We understand you to state that if settlement negotiations are not successful, the county will litigate its claims to recover damages. Based on your arguments, and our review of the submitted information, we conclude that litigation concerning the problems with flooding and cracking of the courts building's basement floor was reasonably anticipated at the time the county received the requests for information. With respect to elevator problems at the courts building, you indicate that the County Commissioner's Court has authorized the district attorney "to take the necessary steps to resolve the current situation with the non-functioning elevator in the Denton County Courts Building and/or initiate suit against KONE, Inc. in order to remedy any damages the County may incur in restoring the elevator operation." Based on this order, we conclude that litigation concerning the elevator problems at the courts building was also reasonably anticipated at the time the county received the requests for information. We further find that the correspondence contained in Exhibits L, M, and N relates to the two anticipated cases. Therefore, you may withhold Exhibits L, M, and N under section 552.103 of the Government Code.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. 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 once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Next, we address your claim that Exhibits H, I, and K are excepted from disclosure under section 552.111 of the Government Code and the work product privilege. A governmental body may withhold attorney work product from disclosure if it demonstrates that the material was (1) created for trial or in anticipation of civil litigation, and (2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996). Based on your arguments and our review of the record, we agree that the information in Exhibits H, I, and K was created in anticipation of litigation concerning either the flooding and cracking problems or the elevator problems at the courts building. Furthermore, we find that these exhibits reveal the mental processes, conclusions, and legal theories of county attorneys. Therefore, you may withhold Exhibits H, I, and K under section 552.111.

Finally, we address your claim that Exhibit J is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). Section 552.107(1) does not except purely factual information from disclosure. *Id.* After reviewing the correspondence in Exhibit J, we agree that it reflects a client confidence as well as attorney advice and opinion. Therefore, you may withhold Exhibit J under section 552.107 of the Government Code.

In summary, you may withhold exhibits H through N under sections 552.103, 552.107, and 552.111. However, you must release the requested report contained in Exhibit C.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

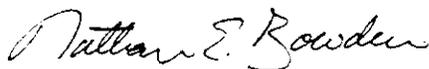
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/seg

Ref: ID# 145336

Encl: Submitted documents

cc: Mr. Tom Reedy
Denton Record-Chronicle
P.O. Box 369
Denton, Texas 76202
(w/o enclosures)

Ms. Annette Fuller
The Dallas Morning News
P.O. Box 655237
Dallas, Texas 75265
(w/o enclosures)