



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

February 5, 2003

Ms. Patricia E. Carls
Brown & Carls, L.L.P.
106 East Sixth Street, Suite 550
Austin, Texas 78701

OR2003-0782

Dear Ms. Carls:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 176058.

The City of Georgetown (the "city"), which you represent, received a request for all e-mail correspondence from the city manager to the members of the city council during a specified period. You state that the requestor subsequently narrowed his request to seek only the "weekly e-mail report" from the city manager to the city council during the specified period. You state that you have provided most of the requested information but claim that portions of the submitted "weekly reports" are excepted from disclosure under sections 552.103, 552.104, 552.107, 552.111, and 552.131 of the Government Code and Rules 192.5 and 192.3 of the Texas Rules of Civil Procedure. We have considered the exceptions you claim and reviewed the submitted information.

Initially we note that the submitted information consists entirely of completed reports made of, for, or by the city. Section 552.022 of the Government Code provides in part:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). Thus, the submitted reports must be released under section 552.022(a)(1) unless they are expressly confidential under other law or excepted from disclosure under section 552.108.

You assert that portions of the submitted information are protected by sections 552.103, 552.107, and 552.111. In addition, we understand you to assert that portions of the information are excepted under section 552.131(b).¹ These sections are all discretionary exceptions that protect a governmental body's interests and may be waived. As such, they are not other law that makes information confidential for the purposes of section 552.022. *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 section 552.103); Open Records Decision Nos. 677 at 4 (2002) (section 552.107 is not "other law" for purposes of section 552.022), 676 at 6 (2002) (section 552.111 is not "other law" for purposes of section 552.022); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Therefore none of the submitted information may be withheld on the basis of section 552.103, 552.107, 552.111, or 552.131.

However, the Texas Supreme Court has held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). This office has determined that when the attorney-client privilege or work-product privilege is claimed for information that is subject to release under section 552.022, the proper analysis is whether the information at issue is excepted under Texas Rule of Evidence 503 (attorney-client communications) or Texas Rule of Civil Procedure 192.5 (work product). ORD 676 at 5-6, 677 at 8-9. We will therefore consider whether any of the submitted information is excepted under the rules or section 552.104 of the Government Code. *See* Gov't Code § 552.104(b) (section 552.022 does not apply to information that is excepted from disclosure under section 552.104).

Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." This exception protects a governmental body's interests in connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). You explain that some of the noted entries refer to a contract that is currently being negotiated between the city and a third party and indicate that you believe release of this information would interfere with these negotiations. However, you do not inform us that the release of this information would give advantage to a competitor or bidder. Indeed, the submitted information indicates that at this point there are no competitors because the city is

¹You do not specify which subsection of section 552.131 you are claiming. However, you give no indication, nor do the submitted documents reflect, that the portions you have marked as being excepted under section 552.131 constitute trade secret or commercial information of the proposed business prospects. *See* Gov't Code § 552.131(a). We therefore understand you to argue that the information concerns financial incentives offered to a business prospect that are excepted under section 552.131(b).

negotiating the renewal of an existing agreement. We therefore conclude that you have failed to demonstrate how release of the marked information would undermine the city's interests with respect to a competitive bidding situation. Therefore no information may be withheld pursuant to this aspect of section 552.104.

This office has also held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the "competitive advantage" aspect of this exception if it can satisfy two criteria. First, the governmental body must demonstrate that it has specific marketplace interests. *Id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *Id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body's legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body's demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *Id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988). Having considered your arguments and reviewed the marked information, we find that you have failed to demonstrate that the city has any specific marketplace interests at issue or that release of any of the submitted information would harm the city in a specific competitive situation. We therefore conclude that none of the submitted information may be withheld under this aspect of section 552.104.

You also assert that a portion of the information is excepted under Rule 192.3 of the Texas Rules of Civil Procedure. This rule protects from discovery "[t]he identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert." Tex. R. Civ. P. 192.3(e). You do not advise whether the author of the referenced report is a testifying expert or whether the report has been reviewed by a testifying expert. We therefore conclude that you have failed to show that the requirements of Rule 192.3(e) have been met and no information may be withheld pursuant to this rule.

We turn now to your arguments regarding the attorney-client privilege. 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 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. 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. *Id.* 503(a)(5).

Thus, 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. On 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). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). Having reviewed your arguments and the information at issue, we conclude that you have failed to establish that any of the submitted information is protected by Rule 503, and none of it may be withheld on that basis. *See Strong v. State*, 773 S.W.2d 543, 552 (Tex. Crim. App. 1989) (burden of establishing attorney-client privilege is on party asserting it).

You also contend that portions of the marked information are protected by the attorney work product privilege. An attorney's work product is confidential under Rule 192.5. Work product is defined 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). Accordingly, in order to withhold attorney work product from disclosure under Rule 192.5, a governmental body must demonstrate that the material, communication, or mental impression was created for trial or in anticipation of litigation. *Id.* To show that the information at issue was created in anticipation of litigation, 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 National 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. Information that meets 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). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.–Houston [14th Dist.] 1993, no writ). Based on your arguments and our review of the marked information, we find that you have failed to establish that any of the submitted information is protected by the attorney work product privilege under Rule 192.5, and none of it may be withheld on that basis.

In summary, the submitted information must be released in its entirety.

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.

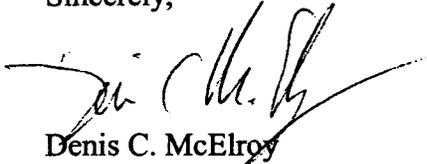
The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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 Department of Public 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 176058

Enc. Submitted documents

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(w/o enclosures)