



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

May 14, 2003

Mr. Brad Norton
Assistant City Attorney
City of Austin - Law Department
P.O. Box 15468
Austin, Texas 78767-1546

OR2003-3241

Dear Mr. Norton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 181005.

The City of Austin (the "city") received a request for information relating to certain attorney fee bills.¹ You state that some of the requested information has been released but claim that other information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the city's obligations under section 552.301 of the Government Code. When a governmental body receives a request for information that it wishes to withhold from disclosure but for which it does not have a previous determination, the governmental body must request a ruling from this office and state the exceptions that apply not later than the 10th business day after the date of receiving the written request. Gov't Code § 552.301(a), (b). Within fifteen business days of receiving the open records request, the governmental body must submit (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply

¹As you have not submitted a copy of the request, we take our description from your brief.

to which parts of the documents. *Id.* § 552.301(e). In this instance, you did not provide a copy of the written request for information and have thus failed to comply with the procedural requirements of section 552.301.

Section 552.302 provides that a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released. *See* Gov't Code § 552.302. In order to overcome this presumption, a governmental body must provide compelling reasons why the information should not be disclosed. *Id.*; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see* Open Records Decision No. 150 (1977) (presumption of openness overcome by showing that information is made confidential by another source of law or affects third party interests); *see also* Open Records Decision No. 630 (1994). You claim that some of the submitted information is excepted from disclosure under sections 552.107 and 552.111. However, these sections are discretionary exceptions that protect the governmental body's interests and may be waived. As such, they do not provide compelling reasons to overcome the presumption of openness. *See* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege), 522 at 4 (1989) (discretionary exceptions in general), 473 (1987) (failure to meet 10-day deadline waived protection of predecessor to section 552.111).

We note, however, that the submitted information constitutes attorney fee bills that are subject to section 552.022 of the Government Code. This section provides that "information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege" is public and may not be withheld unless it is expressly confidential under other law. Gov't Code § 552.022(a)(16). 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). Open Records Decision Nos. 676 at 5-6 (2002), 677 at 8-9. We will therefore consider whether any of the submitted information is excepted under the rules.

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. 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). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

Having considered your representations as well as the submitted information, the only privileged parties we are able to identify are city attorneys David Smith and Andy Martin and outside attorneys Casey Dobson, Chris Sileo, Jennifer Knauth, Gail Schilly, and Stacey Petersen. Accordingly, only communications among these individuals may be withheld pursuant to Rule 503. We have marked the information you may withhold pursuant to this rule. However, we have no basis for concluding that any other individual mentioned in the fee bills is a privileged party; thus, entries that reflect communications with individuals other than those listed above may not be withheld pursuant to Rule 503. *See* Open Records Decision No. 676 at 7 (2002) ("Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Absent such information, this office cannot necessarily assume that the communication was made only among the categories of individuals identified in rule 503, and the governmental body will thereby have failed to demonstrate the privilege."); *see*

generally Gov't Code § 552.301(e)(1)(A); Open Records Decision No. 150 (1977) (stating that Public Information Act places burden on governmental body to establish why and how exception applies to requested information); *see also 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 attorney fee bills are protected by the attorney work product privilege. An attorney's work product is confidential under Rule 192.5, which 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). 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).

Having considered your arguments and reviewed the remaining marked entries, we agree that portions of the remaining information constitute privileged work product that may be withheld under Rule 192.5. We have marked the information that may be withheld on this basis. We find, however, that you have not demonstrated the applicability of Rule 192.5 to the remaining information. *See generally* Gov't Code § 552.301(e)(1)(A); ORD 150; *see also Strong v. State*, 773 S.W.2d at 552. Thus, none of the remaining information may be withheld pursuant to Rule 192.5.

In summary, we have marked the information that the city may withhold pursuant to Rules 503 and 192.5. The remaining submitted information must be released.

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 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,

A handwritten signature in black ink, appearing to read "Denis C. McElroy". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 181005

Enc. Submitted documents

c: Ms. Amy Smith
The Austin Chronicle
P. O. Box 49066
Austin, Texas 78765
(w/o enclosures)