



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 19, 2004

Ms. Jo-Christy Brown  
Brown & Carls  
106 East Sixth Street, Suite 550  
Austin, Texas 78701

OR2004-3144

Dear Ms. Brown:

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# 199653.

The City of Bastrop (the "city"), which you represent, received a request for all information related to the "investigation, evaluation and appeal" conducted during the summer of 2003, concerning the requestor's employment with the Bastrop Public Library. You state that you have released some responsive information. You claim that the remainder of the requested information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code, Texas Rule of Evidence 503, and Texas Rule of Civil Procedure 192.5. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that you claim that some of the submitted information is not responsive to the instant request. Information that is not responsive to the request for information need not be released. We do not address such information in this ruling. You also claim that the exclusion of "incomplete drafts or incomplete reports, audits, evaluations, or investigation[s]" from the types of information listed as expressly public in section 552.022(a) of the Government Code implies that these types of information are not public information. We note, for your information, that the Act applies to information that is "collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by a governmental body." Gov't Code § 552.002(a)(1). This encompasses information prepared by attorneys or consultants for the governmental body. See Open Records Decision Nos. 462 at 4 (1987); 445 (1986). Section 552.022(a) is not intended to be an exhaustive list of the types of information that are subject to the Act. See *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 359 (Tex. 2000). Rather, the

section provides a list of the types of information that generally may only be withheld if they are expressly confidential under "other law." Gov't Code § 552.022(a). Thus, the submitted information is not excepted from public disclosure under section 552.022(a) and may not be withheld on this basis. *See also* Open Records Decision Nos. 551 (1990) (construing predecessor statute, held that information listed is illustrative, though not exhaustively so, of "public information," and does not limit the applicability of enumerated exceptions), 460 (1987) (predecessor statute does not limit the meaning of other sections of the Act, therefore information may not be withheld solely because it is in incomplete form), 407 (1984) (although predecessor statute "specifically [makes] public" certain categories of information, including "investigations . . . upon completion," information in possession of governmental body which has not yet become part of finalized investigative report may not be withheld simply because report not yet completed). To the extent you have raised exceptions to disclosure for the submitted information, we address them accordingly.

We now turn to your claimed exceptions and first note that the submitted information is subject to section 552.022. Section 552.022 provides that 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). In this instance, the submitted information is contained in a completed investigation made of, for, or by the city. Therefore, the city must release the information at issue under section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law.<sup>1</sup> The city raises sections 552.107 and 552.111 of the Government Code with regard to the submitted information. We note, however, that these sections are discretionary exceptions to public disclosure that protect the governmental body's interests and may be waived.<sup>2</sup> As such, sections 552.107 and 552.111 are not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the city may not withhold any of the submitted information under sections 552.107 or 552.111.

The Texas Supreme Court has held, however, that the Texas Rules of Evidence and Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The city asserts the attorney-client and attorney work product privileges with regard to the submitted information. The attorney-client privilege is found at Texas Rule of Evidence 503, and the attorney work product

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<sup>1</sup> The city does not seek to withhold any of the submitted information under section 552.108 of the Government Code.

<sup>2</sup> *See* Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege may be waived), 676 at 10-11 (2002) (attorney-client privilege may be waived), 665 at 2 n.5 (discretionary exceptions generally), 630 at 4 (1994) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 470 at 7 (1987) (statutory predecessor to Gov't Code § 552.111 may be waived).

privilege is found at Texas Rule of Civil Procedure 192.5.<sup>3</sup> Therefore, we will consider whether the city may withhold the submitted information under rules 503 and 192.5. However, as the Texas Disciplinary Rules of Professional Conduct are not considered “other law” for purposes of section 552.022, we do not address your argument under Rule 1.05. See Open Records Decision 676 at 3-4 (2002).

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

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<sup>3</sup> We also understand you to assert these provisions in conjunction with section 552.101 of the Government Code, which excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This office has found that discovery and evidentiary rules are not confidentiality provisions for the purposes of section 552.101. See Open Records Decision Nos. 677, 676, 575 (1990), 416 (1984). However, we address these provisions as they are “other law” for purposes of section 552.022.

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).

You inform us that some of the submitted information consists of communications between attorneys for and client representatives of the city. You state that these communications were not intended to be disclosed to third persons other than those to whom disclosure was made in furtherance of the rendition of professional legal services to the city or those reasonably necessary for the transmission of the communications. Based on your representations, we conclude that the information that you have marked as attorney-client communications is confidential under Texas Rule of Evidence 503 and may be withheld.

We now turn to the information for which you have not claimed attorney-client privilege. Texas Rule of Civil Procedure 192.5 enacts the attorney work product privilege. For the purpose of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent that the information implicates the core work product aspect of the work product privilege. *See* Open Records Decision No. 677 at 9-10 (2002). 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 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 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 the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *Id.*

The first element of the 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 (1) that 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) that 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 element of the test requires the governmental body to show that the documents 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 elements of the work product test is confidential under rule 192.5, provided that the information does not fall within the purview 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, no writ).

You indicate that some of the remaining submitted information is attorney work product. You state that the requestor filed a complaint with the Equal Employment Opportunity commission and that a reasonable person would have concluded that there was a substantial chance of litigation. You further indicate that the information you have marked was created for the purpose of “advising the [c]ity on legal matters related to the complaints.” You contend that the marked information reveals the mental processes, conclusions, and legal theories of an attorney because it consists of “drafts of material prepared or communications made by the [c]ity’s attorney or [c]ity representatives at the [c]ity attorney’s direction in anticipation of litigation.” Based on your representations, we conclude that a portion of the remaining information qualifies as core attorney work product and is confidential under Texas Rule of Civil Procedure 192.5. We have marked this information for your convenience. However, upon careful review of the remaining information at issue, we conclude that it did not meet both prongs of the work-product test and may not be withheld. Therefore, the city may withhold the information we have marked under rule 192.5.

In summary, you may withhold the information you have marked under Texas Rule of Evidence 503. You may withhold the information we have marked under Texas Rule of Civil Procedure 192.5. You must release the remaining responsive information to the requestor.

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,



Jennifer E. Berry  
Assistant Attorney General  
Open Records Division

JEB/sdk

Ref: ID# 199653

Enc: Submitted documents

c: Mr. William H. Drummond  
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(w/o enclosures)