



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 8, 2005

Ms. Amy L. Sims
Assistant City Attorney
City of Lubbock
P.O. Box 2000
Lubbock, Texas 79457

OR2005-11015

Dear Ms. Sims:

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# 237479.

The City of Lubbock (the "city") received a request for specified correspondence between the city and the Texas Commission for Environment Quality, the Environmental Protection Agency, and the Brazos River Authority regarding Lake Alan Henry, as well as invoices from third party law firms received by the city regarding the same. You claim that portions of the submitted information are excepted from disclosure under sections 552.107 and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that you have not submitted all of the requested information for our review. Therefore, to the extent any additional information existed on the date the city received this request, we assume it has been released. If you have not released any such records, you must release them to the requestor at this time. *See* Gov't Code §§ 552.301(a), .302.; *see also*

¹ We note you also assert the attorney-client privilege under section 552.101 of the Government Code. Section 552.107 is the proper exception for your attorney-client privilege claim in this instance. *See* Open Records Decision No. 676 (2002). You also raise section 552.101 in order to claim that the requested fee bills are privileged attorney work product. However, section 552.101 does not incorporate the attorney work product privilege. *See* Open Records Decision No. 575 at 2 (1990) (stating that statutory predecessor to section 552.101 does not encompass discovery privileges). The proper exception to raise when claiming attorney work product is section 552.111 of the Government Code. *Id.*; Gov't Code § 552.111. Accordingly, we interpret your claim of the attorney work product privilege as an assertion of that privilege as it is encompassed by section 552.111.

Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances).

The submitted information includes attorney fee bills which are subject to section 552.022 of the Government Code. This section provides in part 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:

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(16). Because the submitted information includes the city's attorney fee bills, the city must release this information under section 552.022(a)(16) unless it is expressly confidential under other law. The city raises sections 552.107 and 552.111 of the Government Code. These sections are discretionary exceptions to public disclosure that protect the governmental body's interests and may be waived. *See* Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege may be waived), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n. 5 (2000) (discretionary exceptions generally). As such, sections 552.107 and 552.111 do not qualify as other law that makes information confidential for the purposes of section 552.022. Therefore, the city may not withhold any portion of the submitted attorney fee bills under either section 552.107 or section 552.111 of the Government Code.

However, the Texas Supreme Court has held 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, 337 (Tex. 2001). The attorney-client privilege is also found at Texas Rule of Evidence 503, and the attorney work product privilege is also found at the Texas Rule of Civil Procedure 192.5. Accordingly, we will consider whether any of the information subject to section 552.022 may be withheld under rule 503 or rule 192.5.

Rule 503 of the Texas Rules of Evidence encompasses the attorney-client privilege and 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

(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 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).

You assert that the submitted attorney fee bills include confidential communications between representatives of the city and its attorneys that were made for the purpose of facilitating the rendering of professional legal services to the city. Based on your representations and our review of the submitted information, we agree that the attorney fee bills at issue contain information that is protected by the attorney-client privilege. We have marked the information the city may withhold pursuant to rule 503 of the Texas Rules of Evidence. We find, however, that you have not demonstrated the applicability of rule 503 for the remaining information in the fee bills, either because it does not reflect confidential communications, or because you have failed to identify the parties to the communications. *See* Open Records Decision No. 676 at 8 (governmental body must inform this office of identities and capacities of individuals to whom each communication at issue has been made; this office cannot necessarily assume that communication was made only among categories of individuals

identified in rule 503). *See also generally* Open Records Decision No. 150 (1977) (stating that predecessor to the 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). Therefore, the remaining information in the fee bills may not be withheld pursuant to the attorney-client privilege under rule 503. *See In re Grand Jury Proceedings*, 33 F.3d 342, 354 (4th Cir. 1994) (attorney-client privilege normally does not extend to payment of attorney's fees and expenses).

Next, we turn to rule 192.5 of the Texas Rules of Civil Procedure, which encompasses 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). 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 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 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 part of the work product test requires the governmental body to show that the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney's 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 that the information does not fall within the scope of the exceptions to the privilege enumerated in Rule 192.5(c). *See Pittsburgh Corning*, 861 S.W.2d at 427.

You argue that the submitted attorney fee bills also contain core work product that was prepared by the city's attorneys in anticipation of litigation. Based on your representations and our review, we agree that the submitted attorney fee bills contain information that is protected from disclosure by the attorney work product privilege. Accordingly, we have

marked the information the city may withhold pursuant to rule 192.5 of the Texas Rules of Civil Procedure.

Additionally, you raise section 552.107 of the Government Code for the remaining submitted information not subject to section 552.022. Section 552.107(1) excepts from disclosure information protected by the attorney-client privilege. Gov't Code § 552.107. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body.² TEX. R. EVID. 503(b)(1). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives.³ TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body seeking to establish that a communication is protected by the attorney-client privilege must inform this office of the identity and capacity of each individual involved in the communication. Finally, the attorney-client privilege applies only to a communication that is confidential. *Id.* 503(b)(1). A confidential communication is a communication that was “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).

Whether a communication meets the definition of a confidential communication depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) of the

² The privilege does not apply when an attorney or representative is acting in a capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Because government attorneys often act in capacities other than that of professional legal counsel, including as administrators, investigators, or managers, the mere fact that a communication involves an attorney for the government does not demonstrate this element.

³ Specifically, the privilege applies only to confidential communications between the client or a representative of the client and the client's lawyer or a representative of the lawyer; between the lawyer and the lawyer's representative; by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein; between representatives of the client or between the client and a representative of the client; or among lawyers and their representatives representing the same client. *See* Tex. R. Evid. 503(b)(1)(A), (B), (C), (D), (E); *see also id.* 503(a)(2), (a)(4) (defining “representative of the client,” “representative of the lawyer”).

Government Code generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein). You state that the information at issue reveals communications between attorney representatives for the city and city employees. You also assert that these communications were not intended to be disclosed to persons other than those to whom the communications were made in furtherance of the rendition of professional legal services. Based on your representations and our review of the information at issue, we conclude that section 552.107 is applicable to this information. Thus, the city may withhold the information we have marked under section 552.107 of the Government Code.

In summary, we have marked the portions of the submitted attorney fee bills that are protected by the attorney-client privilege and may be withheld under rule 503 of the Texas Rules of Evidence. We have also marked the portions of the fee bills that are protected by the attorney work product privilege and may be withheld pursuant to rule 192.5 of the Texas Rules of Evidence. The city may also withhold the information we have marked under section 552.107. The remainder of the submitted information must be released 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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,



Candice M. De La Garza
Assistant Attorney General
Open Records Division

CMD/segh

Ref: ID# 237479

Enc. Submitted documents

c: Mr. Jerry Corbin
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(w/o enclosures)