



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 27, 2006

Ms. Lydia L. Perry  
Law Offices of Robert E. Luna, P.C.  
4411 North Central Expressway  
Dallas, Texas 75205

OR2006-06793

Dear Ms. Perry:

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# 252664.

The Coppel Independent School District (the "district") received a request for twelve categories of information related to property being acquired by the district in eminent domain proceedings. You state that some of the requested information has been released, but claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.136 of the Government Code, Texas Rule of Evidence 503, and rules 192.3 and 192.5 of the Texas Rules of Civil Procedure. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, you state that this office has previously addressed the public availability of some of the requested information. In Open Records Letter No. 2006-3939 (2006), we ruled that certain information could be withheld under sections 552.103 and 552.136 of the Government Code, Texas Rule of Evidence 503, and rules 192.3 and 192.5 of the Texas Rules of Civil Procedure. As we have no indication that the law, facts, and circumstances surrounding this prior ruling have changed, you may continue to withhold any information responsive to the present request that was ruled upon in Open Records Letter No. 2006-3939 in accordance with that prior ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of

previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we note that the requestor, in his request for information, states that he does not seek "correspondence or documents of Dr. Robert Freilich" or "documents protected by the attorney client privilege." Thus, any such information is not responsive to the present request and need not be released.

We also note that the requestor, in his comments to this office, claims that the district did not meet its obligations under section 552.301(c) of the Government Code, which requires a governmental body to submit the requested information along with written comments explaining why the stated exceptions apply within fifteen business days after receiving the request. *See* Gov't Code § 552.301(c). The requestor correctly notes that the district did not submit comments explaining why their claimed exceptions apply to the submitted information in their April 17, 2006 letter. However, the district has fifteen business days to submit the required comments. *Id.* The district received the request for information on April 3, 2006 and informs us that they were closed on April 14, 2006. Accordingly, the district had until April 25, 2006 to submit the required written comments to us. *See* Gov't Code § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). The district submitted the requested information and written comments on April 25, 2006. Thus, the district met the statutory requirements of section 552.301(c) of the Government Code.

Next, we note that Exhibit C contains information that is subject to section 552.022 of the Government Code, which provides in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, 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;

...

(3) information in an account, voucher; or contract relating to the receipt or expenditure of public or other funds by a governmental body;

Gov't Code § 552.022(a)(1), (3). The submitted information contains documents subject to section 552.022(a)(1) and (a)(3), which we have marked. Under section 552.022, this information must be released unless it is expressly confidential under other law. Sections 552.103, 552.107, and 552.111 of the Government Code are discretionary exceptions under the Act and do not constitute "other law" for 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. 630 at 4 (1994) (governmental body may waive section 552.107); 473 (1987) (governmental body may waive predecessor to section 552.111); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Thus, none of the information subject to section 552.022 may be withheld under sections 552.103, 552.107, or 552.111 of the Government Code. However, the Texas Supreme Court has held that the Texas Rules of Civil Procedure are 'other law' within the meaning of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your arguments under the Texas Rules of Civil Procedure for the information in Exhibit C that is subject to 552.022.

You claim that a portion of the information in Exhibit C that is subject to section 552.022 is excepted from disclosure under the consulting expert privilege found in Rule 192.3(e) of the Texas Rules of Civil Procedure. A party to litigation is not required to disclose the identity, mental impressions, and opinions of consulting experts. *See* TEX. R. CIV. P. 192.3(e). A "consulting expert" is defined as "an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert." TEX. R. CIV. P. 192.7. You state, and the submitted documents reflect, that the district is the plaintiff in an eminent domain case "seeking to condemn property owned by private development entities and located within the jurisdictional limits of the City of Dallas." You inform us that the district contracted for services from several expert consultants in connection with the project at issue in the eminent domain proceedings. You further contend that the services provided by the district's consultants were provided in anticipation of litigation relating to the eminent domain proceedings. You also state that "none of these experts have been designated as testifying experts." Based on your representations and our review, we find that some of the information at issue is confidential under Rule 192.3(e). We therefore find the district may withhold the information we have indicated in the documents subject to section 552.022 pursuant to Rule 192.3(e) of the Texas Rules of Civil Procedure. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). We next consider your arguments under rule 192.5 of the Texas Rules of Civil Procedure for the remaining information subject to section 552.022 in Exhibit C.

For the purpose of section 552.022, information is confidential under Rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. 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 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 contain 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). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You explain that the "documents in Exhibit C contain the identities and work product of consultants retained to provide services to the District relating to" the eminent domain proceedings. You further explain that "since these experts were hired at the direction of the attorneys in this case, their mental impressions, conclusions, strategies, and research in this matter constitute work product protected under" rule 192.5 of the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 192.5(a)(1) (work product includes material prepared by consultants). Upon review of your arguments and the information at issue, we agree that the information in Exhibit C contains protected attorney work product. Accordingly, we find that the district may withhold the information we have marked in the documents subject to section 552.022 under Rule 192.5 of the Texas Rules of Civil Procedure. As you raise no other exceptions for the remaining information in the documents subject to section 552.022, that information must be released.

We now address your arguments for the submitted information that is not subject to section 552.022. You contend that the remaining submitted information is excepted from disclosure under section 552.103. 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 on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body 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 was pending or reasonably anticipated when the governmental body received the request, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. 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 [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

In this instance, you inform us, and provide evidence showing, that "the District is currently involved in litigation regarding the subject matter of all documents in this request." Furthermore, based on your representations and our review of the information at issue, we find that the submitted information relates to the pending litigation for purposes of section 552.103(a). We therefore conclude that the remaining submitted information may be withheld from disclosure pursuant to section 552.103.

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 or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the district may withhold the information we have indicated in the documents subject to section 552.022 pursuant to Rules 192.3(e) and 192.5 of the Texas Rules of Civil Procedure. The remaining information in the documents subject to section 552.022 must be

released. The information not subject to section 552.022 may be withheld from disclosure pursuant to section 552.103. As our ruling on this issue is dispositive, we need not address your remaining arguments.

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,

A handwritten signature in black ink, appearing to read "J. Vela III", with a horizontal flourish underneath.

José Vela III  
Assistant Attorney General  
Open Records Division

JV/krl

Ref: ID# 252664

Enc. Submitted documents

c: Mr. Christopher J. Caso  
City of Dallas  
Office of the City Attorney  
City Hall  
Dallas, Texas 75201  
(w/o enclosures)