



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

August 9, 2006

Ms. Ann Greenberg
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
P.O. Box 2156
Austin, Texas 78768-2156

OR2006-08998

Dear Ms. Greenberg:

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# 256146.

The City of Chireno (the "city"), which you represent, received a request for attorney fee bills submitted by a named attorney since December 14, 2005 and correspondence from a named insurance company regarding the discontinuation of maternity coverage for city employees. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.117 of the Government Code, Texas Rule of Evidence 503, and Rule 192.5 of the Texas Rules of Civil Procedure. We have considered your arguments and reviewed the submitted information.

Initially, we note that Exhibit 2 contains attorney fee bills subject to section 552.022 of the Government Code. Section 552.022(a) provides for the required public disclosure of "information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege," unless the information is expressly confidential under other law. Gov't Code § 552.022(a)(16). Although you claim portions of the submitted attorney fee bills are excepted under section 552.103 of the Government Code, this section is a discretionary exception that a governmental body may waive. *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 Gov't Code § 552.103). As such, section 552.103 is not other law that makes information expressly confidential for purposes of section 552.022. Therefore, the city may not withhold any of Exhibit 2 under section 552.103. 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." *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Therefore, we will consider your arguments under these provisions for Exhibit 2.

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 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 state that the submitted attorney fee bills document communications between attorneys for the city and the city's staff and representatives. You state that these communications were made for the purpose of facilitating the rendition of professional legal services to the city, and that such communications were not intended for disclosure to third persons. Based

on your representations and our review of the submitted information, we have marked the information that the city may withhold under Texas Rule of Evidence 503.¹

You also claim that Exhibit 2 contains information that may be withheld under Rule 192.5 of the Texas Rules of Civil Procedure. Information generally deemed public under section 552.022 may be 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 contains 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 inform us that the requestor has filed a charge of discrimination with the Texas Workforce Commission Civil Rights Division and the United States Equal Opportunity Commission (the "EEOC").² Upon review, we find that a portion of Exhibit 2 consists of the mental impressions, opinions, conclusions, or legal theories of the city's attorneys regarding the anticipated litigation. Accordingly, the city may withhold this information, which we have marked, under rule 192.5. However, you have not demonstrated that any of

¹As our ruling under the attorney-client privilege is dispositive, we need not address your arguments under section 901.457 of the Occupations Code.

²This office has concluded that litigation was reasonably anticipated when the potential opposing party has filed a complaint with the Equal Employment Opportunity Commission. *See* Open Records Decision No. 336 (1982).

the remaining information was created for trial or in anticipation of litigation. Thus, none of the remaining information is protected by rule 192.5.

You claim that Exhibit 3 may be withheld under section 552.103 of the Government Code, which 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 is pending or reasonably anticipated, 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 [1st 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).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.³ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit

³In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

You inform us that the requestor has a pending EEOC claim and argue that the city “has a good faith belief that [the requestor] will file an amended or an entirely new charge against the City alleging some sort of retaliation, gender discrimination, or other misdeed by the City related to the health insurance coverage.” After reviewing your arguments, we find that you have not demonstrated that the city reasonably anticipated litigation regarding Exhibit 3 on the date it received the request. Accordingly, we conclude the city may not withhold Exhibit 3 under section 552.103 of the Government Code.

However, Exhibit 3 contains information subject to section 552.117 of the Government Code, which excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). You state, and provide documentation showing, that the employees at issue have made a request for confidentiality under section 552.024 prior to the date on which the request for this information was received. Therefore, the city must withhold the personal information we have marked in Exhibit 3 under section 552.117.

In summary, we have marked the information in Exhibit 2 that the city may withhold under Texas Rule of Evidence 503 and Rule 192.5 of the Texas Rules of Civil Procedure. The city must withhold the personal information we have marked in Exhibit 3 under section 552.117. The remaining 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, 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,



José Vela III
Assistant Attorney General
Open Records Division

JV/krl

Ref: ID# 256146

Enc. Submitted documents

c: Ms. Kim Johnson
354 Depot Street
Chireno, Texas 75937
(w/o enclosures)