



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 5, 2007

Mr. James A. Farren
Criminal District Attorney
Randall County
501 16th Street
Canyon, Texas 79015

OR2007-00207

Dear Mr. Farren:

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# 268533.

Randall County (the "county") received a request for copies of (1) all invoices regarding civil legal services provided to the county by private lawyers and/or private law firms during a specified time period ; and (2) all records of all amounts paid by the county to such private lawyers and/or private law firms for civil legal work performed for the county during this time period. You state that the county has released a portion of the information responsive to the request, but you claim that the remaining requested information is excepted from disclosure based on sections 552.101, 552.107, 552.111, and 552.147 of the Government Code, as well as Rule 503 of the Texas Rules of Evidence and Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct.¹ We have considered the exceptions you claim and reviewed the submitted information.

First, we note that the submitted documents consist of information subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

- (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are

¹ Although you also raise section 552.022 of the Government Code, that provision is not an exception to disclosure. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are expressly confidential under other law. See Gov't Code § 552.022.

public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

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

.....

(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)(3), (16). The submitted documents include checks and attorney fee bills. Pursuant to section 552.022, this information is required to be disclosed unless it is expressly confidential under other law. Although you seek to withhold the submitted information under sections 552.107 and 552.111 of the Government Code, these sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See id.* § 552.007; Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (discretionary exceptions generally). 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 county may not withhold any of the submitted information under section 552.107 or section 552.111. In addition, 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; and thus, none of the submitted information may be withheld on this basis. *See Open Records Decision No. 676 at 3-4 (2002).*

However, the Texas Supreme Court has held that the Texas Rules of Evidence and the 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 attorney-client privilege also is found at Texas Rule of Evidence 503, and the attorney work product privilege also is found at Texas Rule of Civil Procedure 192.5. Accordingly, we will address your assertion of these privileges under rule 503 and rule 192.5, respectively.²

² You also raise section 552.101 of the Government Code, which excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. We note, however, that section 552.101 does not encompass the attorney-client and attorney work product privileges. *See Open Records Decision No. 676 at 1-3 (2002)* (Gov't Code § 552.101 does not encompass discovery privileges). We also note that section 552.101 does not encompass Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct. Accordingly, we do not address your claim that information contained in the submitted attorney fee bills is confidential under section 552.101 in conjunction with rules 1.05, 503, and 192.5. We do not understand you to argue that the submitted information is confidential on any other basis under section 552.101.

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 indicate that the submitted attorney fee bills contain communications between the county's attorneys and their clients that were made in connection with the rendition of professional legal services to the county. We also understand you to state that the communications were intended to be and remain confidential. Based on your representations

and our review of the information that you claim is privileged, we find that you have demonstrated that some of the information at issue is confidential under rule 503. We therefore conclude that the county may withhold that information, which we have marked. We also find, however, that you have not identified each of the parties to the remaining communications at issue as being privileged parties under rule 503(b)(1). *See* Open Records Decision No. 676 at 8 (2002). Only communications between the county and its attorneys, and their representatives, may be protected by the attorney-client privilege. *See* Tex. R. Evid. 503. Likewise, you have not shown that other information that you seek to withhold under rule 503 constitutes or documents an attorney-client communication. *See id.* at 7. *See* Open Records Decision Nos. 542 (1990) (stating that governmental body has burden of establishing that exception applies to requested information), 532 (1989), 515 (1988), 252 (1980). We therefore conclude that the county may not withhold any of the remaining information that you claim is privileged under rule 503.

We next address your claim under rule 192.5 of the Texas Rules of Civil Procedure with respect to the remaining submitted information. Rule 192.5 encompasses the attorney work product privilege. For purposes 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 Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state that the documents contain information that was developed in connection with pending or anticipated litigation and that reveals the mental processes of the county's attorneys. Based on your representations and our review of the remaining information in question, we have marked the information that the county may withhold on the basis of the attorney work product privilege under Texas Rule of Civil Procedure 192.5. However, we find that you have failed to establish the applicability of rule 192.5 to any of the remaining information at issue. Thus, none of the remaining information may be withheld on this basis.

You claim that the tax identification numbers in the submitted information should be excepted from disclosure under section 552.147 of the Government Code. This section provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. Section 552.147 does not except from disclosure tax identification numbers. We therefore conclude that the county may not withhold the tax identification numbers on this ground.

In summary: (1) the county may withhold the marked information that is protected by Texas Rule of Evidence 503; (2) the county may also withhold the marked information that is protected by Texas Rule of Civil Procedure 192.5. The rest of the 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, 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,



Gilbert N. Saenz
Assistant Attorney General
Open Records Division

GNS/sdk

Ref: ID# 268533

Enc. Submitted documents

c: Mr. John P. Niland
Texas Defender Service
510 South Congress, Suite 304
Austin, Texas 78704
(w/o enclosures)