



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 6, 2007

Mr. Joshua S. Haley  
Staff Attorney  
Texas Municipal League Intergovernmental Risk Pool  
1821 Rutherford Lane, First Floor  
Austin, Texas 78754

OR2007-07063

Dear Mr. Haley:

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 #280397.

The Texas Municipal League Intergovernmental Risk Pool ("TML") received a request for all reports submitted by "GAB Robins" pertaining to a claim filed against the City of Euless (the "city") by the requestor, as well as copies of all communications pertaining to the same claim. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received correspondence from 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, we note that a portion of the submitted information is subject to section 552.022(a)(1) of the Government Code, which provides that:

(a) . . . 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). The information sought in request number one consists of two completed reports made by GAB Robins for the TML. These reports must be released under section 552.022(a)(1) unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. Sections 552.103 and 552.111 of the Government Code are discretionary exceptions to public disclosure that protect a governmental body's interests and may be waived. *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); *see also* Open Records Decision No. 677 at 8-10 (2002) (attorney work product privilege under section 552.111 may be waived; where section 552.022 is applicable to the information at issue the governmental body should raise rule 192.5 of the Texas Rules of Civil Procedure, not section 552.111 of the Government Code). As such, sections 552.103 and 552.111 of the Government Code are not "other law" that make information confidential for the purposes of section 552.022. Therefore, the TML may not withhold any of the submitted information under section 552.103 or section 552.111. However, the Texas Supreme Court held that "[t]he 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, 337 (Tex. 2001). Thus, we will address your work product claims under Texas Rule of Civil Procedure 192.5.

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 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 have not provided any arguments to this office explaining how any portion of the reports you wish to withhold under rule 192.5 consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative created for trial or in anticipation of litigation. Therefore, the reports sought in the first part of the request must be released under section 552.022(a)(1).

You claim that the information sought in the second part of the request is excepted from disclosure under section 552.107(1) of the Government Code. Section 552.107(1) protects information coming within the attorney-client privilege. 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. Tex. R. Evid. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some 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 capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and lawyers representing another party in a pending action concerning a matter of common interest therein. Tex. R. Evid. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it 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 this definition 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) 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 sought in the second part of this request contains confidential communications between city attorneys, representatives of the TML, an insurance adjuster, and other city employees. We understand that the TML administers the city's self-insurance coverage, and that the TML has a privity of interest with the city regarding the requestor's claim. You explain that these communications were made in furtherance of the rendition of legal services in the defense of the requestor's claim and subsequent lawsuit against the city. Finally, you state that these communications were made in confidence, intended for the sole use of the city, city attorneys, and TML, and have not been shared or distributed to others. Based on our review of your representations and the submitted information, we find that you have demonstrated the applicability of the attorney-client privilege to the requested communications. Accordingly, we conclude that the TML may withhold the information sought in the second part of this request pursuant to section 552.107(1) of the Government Code. As our ruling on this issue is dispositive, we need not address your remaining argument against disclosure.

In summary, the TML must release the reports sought in the first part of the request under section 552.022(a)(1) of the Government Code. The TML may withhold the remaining information under section 552.107(1) of the Government Code.

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 that reads "Reg Hargrove". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Reg Hargrove  
Assistant Attorney General  
Open Records Division

RJH/jb

Ref: ID# 280397

Enc. Submitted documents

c: Mr. George R. Moore  
1104 Aransas Drive  
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(w/o enclosures)