ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 17, 2007

Mr. Ricardo J. Navarro
Denton, Navarro, Rocha & Bernal
701 East Harrison, Suite 100
Harlingen, Texas 78550-9151

OR2007-09014

Dear Mr. Navarro:

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#284052.

The City of McAllen (the "city"), which you represent, received a request for "all documents showing all expenses paid by the [city] or any entity of the [city] receiving public funds, relating to cause [number] C-1959-06-I." You claim that the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.136 of the Government Code, and protected under rules 192.3 and 192.5 of the Texas Rules of Civil Procedure and rule 503 of the Texas Rules of Evidence.[1] We have considered your arguments and reviewed the submitted information.

Initially, we note that Exhibit I is not responsive to the present request. You have submitted information which does not document expenses paid or received by the city. This ruling does not address the public availability of any information that is not responsive to the request, and the city is not required to release Exhibit I in response to the request.

[1]Although you raise section 552.101 of the Government Code in conjunction with rules 192.3, 192.5, and 503, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Thus, we will not address your claim that the submitted information is confidential under section 552.101 in conjunction with rules 192.3, 192.5, and 503.

Next, we note that a portion of the requested information was the subject of a prior ruling by this office, issued as Open Records Letter No. 2007-07728 (2007). In this letter ruling, we ruled that the city may withhold certain information under Texas Rule of Evidence 503 and 192.3(e) of the Texas Rules of Civil Procedure. We also ruled that the city must withhold certain information under section 552.136 of the Government Code. We presume that the pertinent facts and circumstances have not changed since the issuance of Open Records Letter No. 2007-07728. Thus, the city must continue to rely on Open Records Letter No. 2007-07728 for the information that was at issue in that prior ruling. *See* Open Records Decision No. 673 (2001) (governmental body may rely on prior ruling as previous determination when: 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D); 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior ruling was based have not changed since the issuance of the ruling). For the information not previously ruled upon, we will address the submitted arguments.

Next, we note that the responsive information is subject to section 552.022 of the Government Code, which provides in pertinent part as follows:

> (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:
>
> > (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;
> >
> > . . .
> >
> > (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 information in Exhibits C, E, and F includes invoices and payment vouchers, which are made public under section 552.022(a)(3). The information in Exhibits D, G, and H consists of attorney fee bills, which are made public under section 552.022(a)(16). Although you seek to withhold the submitted information under sections 552.103 and 552.107 of the Government Code, those sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See id.* § 552.007; *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.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 552.103 and 552.107 are not other law that makes information confidential for the purposes of section 552.022. Therefore, the city may not withhold any of the information under either section 552.103 or section 552.107.

The Texas Supreme Court has held, however, 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). Accordingly, we will consider your assertion of rule 503, rule 192.3, and rule 192.5 with respect to the submitted information. We will also consider your assertion of section 552.136 of the Government Code, which is other law for purposes of section 552.022 of the Government Code.

Texas Rule of Evidence 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 the city's attorneys and their clients and consultants that were made in connection with the rendition of professional legal services to the city. You also state that the communications were intended to be confidential. Based on your representations and our review of the information at issue, we have marked the information in Exhibits D, G, and H that the city may withhold on the basis of the attorney-client privilege under Texas Rule of Evidence 503. However, the city has failed to demonstrate how any of the remaining information constitutes confidential communications between privileged parties made for the purpose of facilitating the rendition of professional legal services. Accordingly, none of the remaining information may be withheld on that basis.

Texas Rule of Civil Procedure 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 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 claim that the submitted fee bills contain core attorney work product that is protected by rule 192.5. You argue that the submitted information reveals the mental impressions, opinions, conclusions, or legal theories of the city's attorneys regarding anticipated litigation. Upon review, we determine that the city may withhold the information we have marked in Exhibits D, G, and H under Texas Rule of Civil Procedure 192.5. However, you have not established that any of the remaining information is protected by the attorney work product privilege and it may not be withheld under Texas Rule of Civil Procedure 192.5.

We next consider your claim that the consulting expert privilege protects portions of the remaining information. The consulting expert privilege is 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 indicate that the city contracted for advice and consulting services from an expert consultant regarding pending litigation. You state that the services provided by the city's consultant were provided in anticipation of and in preparation for this litigation. You indicate that this expert "has no personal knowledge of the facts leading to the lawsuit, other than the information provided," and thus, will not be called as a witness at trial. Based on your representations and our review, we find that portions of the responsive information reveal the identity and opinions of the city's consulting expert. Accordingly, the city may withhold the information we have marked pursuant to rule192.3(e) of the Texas Rules of Civil Procedure. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). You have not established that any of the remaining information, however, reveals the identity and opinions of the city's consulting expert. Therefore, none of the remaining information may be withheld under Texas Rule of Civil Procedure 192.3.

You also state that some of the remaining documents include information subject to section 552.136 of the Government Code. Section 552.136(b) states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. Thus, the city must withhold the information that you have marked in green, in addition to the information we have marked, under section 552.136 of the Government Code.

In summary, the city must continue to rely on our ruling in Open Records Letter No. 2007-07728, with regard to information in the current request that is identical to the information previously requested and ruled upon by this office. The city may withhold the information we have marked under Texas Rule of Evidence 503, Texas Rule of Civil Procedure 192.5, and Texas Rule of Civil Procedure 192.3(e). The city must withhold the information marked under section 552.136 of the Government Code. The remaining 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).

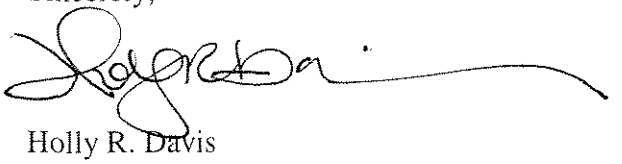
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



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Assistant Attorney General
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Ref: ID# 284052

Enc. Submitted documents

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(w/o enclosures)