



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 26, 2007

Mr. Daniel L. Rentfro, Jr.
The Rentfro Faulk Law Firm, L.L.P.
185 East Ruben M. Torres Senior Boulevard
Brownsville, Texas 78520-9136

OR2007-12525

Dear Mr. Rentfro:

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# 290270.

The Brownsville Navigation District of Cameron County (the "district"), which you represent, received a request for all information regarding two specified district lessees as well as information pertaining to environmental crimes at the Port of Brownsville for the past five years. You state that you have released some of the requested information. However, you argue that the remaining information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code, and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the submitted representative sample of information.¹

Initially, you note that a portion of the requested information relating to environmental impact studies conducted on the ESCO Marine leasehold was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2005-01678 (2005). You do not indicate that there has been any change in the law, facts, and circumstances on which the previous ruling is based. We therefore conclude that the district may continue to rely on Open Records Letter No. 2005-01678 with respect to the information that relates to environmental impact studies conducted on the ESCO Marine

¹We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

leasehold. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under section 552.301(a)).

We now turn to the submitted information, which was not the subject of a previous ruling, and note that a portion of the information in Exhibit F is made expressly public under section 552.022 of the Government Code. Section 552.022 provides, in relevant 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:

(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)(16). Some of the information, which we have marked, is subject to section 552.022(a)(16) of the Government Code. Therefore, the district may only withhold this information if it is confidential under "other law." Sections 552.103, 552.107, and 552.111 of the Government Code are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived.² As such, sections 552.103, 552.107, and 552.111 are not "other law" that makes information confidential for the purposes of section 552.022. Accordingly, the district may not withhold the information that is subject to section 552.022 pursuant to sections 552.103, 552.107, and 552.111. 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). The attorney client privilege is found at Texas Rule of Evidence 503, and the attorney work product privilege is found at Texas Rule of Civil Procedure 192.5. Accordingly, we consider your assertions under these rules for the attorney fee bill.

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:

²Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *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. 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). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

(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 attorney fee bill in Exhibit F constitutes privileged attorney client communications between the district's attorney and employees of the district. You also state that these communications were made to facilitate the rendering of professional legal services to the district and that the confidentiality of this information has been maintained. Based on your representations and our review of the information at issue, we have marked the information that the district may withhold on the basis of the attorney client privilege under Texas Rule of Evidence 503. However, you have failed to demonstrate that the remaining information at issue satisfies the requirements of the attorney-client privilege for purposes of rule 503. Therefore, none of it may be withheld on that basis.

You then argue that the information at issue is privileged as attorney work product. 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 attorney fee bill contains core attorney work product that is protected by rule 192.5. Upon review we find that none of the information at issue is protected by the attorney work product privilege. Therefore, none of the remaining information at issue may be withheld under Texas Rule of Civil Procedure 192.5.

Next, we address your arguments for the information not subject to section 552.022 of the Government Code. Section 552.107 of the Government Code 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, and lawyer representatives. 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). We note that communications with third party consultants with which the district shares a privity of interest are protected. *See Open Records Decision Nos. 464 (1987), 429 (1985); see also Wu v. Nat’l Endowment of the Humanities*, 460 F.2d 1030 (5th Cir. 1972).

You state that the remaining information consists of confidential communications between the district’s attorney, employees of the district, and third party consultants. You also state that these communications were made in confidence, were intended for the sole use of the district, and have not been shared or distributed to others. Based on our review of your representations and the remaining information, we find that you have demonstrated the applicability of the attorney-client privilege to the remaining information. Accordingly, we conclude that the district may withhold the remaining information under section 552.107 of the Government Code.

In summary, the district must release the document we have marked under section 552.022 of the Government Code, but it may withhold the portion of the document we have marked under Texas Rule of Evidence 503. The district may withhold the remaining information as

confidential attorney-client communications under section 552.107 of the Government Code.³

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

³As our ruling is dispositive, we need not consider your remaining claimed exceptions to disclosure.

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 cursive script that reads "C. Chantaplin-McLelland".

Chanita Chantaplin-McLelland
Assistant Attorney General
Open Records Division

CC/jb

Ref: ID#290270

Enc. Submitted documents

c: Mr. Chris Mahon
The Brownsville Herald
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(w/o enclosures)