



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 4, 2008

Mr. John Danner  
Assistant City Attorney  
City of San Antonio  
P.O. Box 839966  
San Antonio, Texas 78283

OR2008-07633

Dear Mr. Danner:

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# 311749.

The City of San Antonio (the "city") received two requests from the same requestor for information related to a specified property. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.106, 552.107, 552.111, and 552.137 of the Government Code, and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5.<sup>1</sup> We have considered your arguments and the submitted information.

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

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<sup>1</sup>Although you also raise sections 552.102, 552.104, 552.105, 552.108, 552.109, 552.110, 552.114, 552.115, 552.116, 552.117, 552.1175, 552.119, 552.122, 552.128, 552.129, 552.130, 552.131, 552.136, 552.139, and 552.140 of the Government Code, you have provided no arguments explaining how these exceptions are applicable to the submitted information. Therefore, we presume you no longer assert these exceptions to disclosure. Gov't Code §§ 552.301, .302.

(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;

...

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

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (3), (17). The submitted information contains a completed report made for or by the city, which is expressly public under section 552.022(a)(1). The submitted information also includes account information relating to the expenditure of public or other funds by the city, which is expressly public under section 552.022(a)(3), and court-filed documents that are made public under section 552.022(a)(17). We have marked the documents that are subject to section 552.022. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.106, 552.107, and 552.111 of the Government Code. However, these sections are discretionary exceptions under the Act and do not constitute "other law" for purposes of section 552.022. 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. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, the city may not withhold the information subject to section 552.022 under sections 552.103, 552.106, 552.107, and 552.111 of the Government Code. 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 whether the city may withhold the information subject to section 552.022 under Texas Rule of Evidence 503 or Texas Rule of Civil Procedure 192.5. Furthermore, because sections 552.101 and 552.137 are "other law" for purposes of section 552.022, we will address your arguments under these exceptions for both the information subject to section 552.022 and the remaining submitted information.

Next, we address your argument under section 552.103 of the Government Code for the information not subject to section 552.022. Section 552.103 provides in relevant part 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 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 city 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 city must meet both prongs of this test for information to be excepted under section 552.103(a).

You assert that the information at issue relates to pending litigation involving the specified property. You state that the city is a party to this litigation. You further explain that this litigation began on December 21, 2007, which was before the date of the city's receipt of these requests for information. Based on your representations and our review, we conclude that the city was a party to pending litigation when it received these requests for information. We also conclude that the information at issue is related to the pending litigation. Therefore, section 552.103 is generally applicable to the information not subject to section 552.022 and it may be withheld on that basis.<sup>2</sup>

We note, however, that the opposing party in the anticipated litigation appears to have already seen or had access to some of the submitted information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that is related to litigation through discovery procedures. *See* ORD 551 at 4-5. If the opposing party has seen or had access to information that is

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure under section 552.101 or section 552.137 of the Government Code.

related to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a). Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982). Accordingly, the city may withhold the information that the opposing party has not seen or had access to under section 552.103. The city may not, however, withhold any of the remaining information that the opposing party has seen or had access to under section 552.103 of the Government Code.

We now address your arguments under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5 for the information subject to section 552.022. Rule 503 encompasses the attorney-client privilege and provides:

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).

Upon review, we find that the city has failed to demonstrate how any of the remaining information at issue constitutes confidential communications between privileged parties made for the purpose of facilitating the rendition of professional legal services. Therefore, none of the information subject to section 552.022 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 when the governmental body received the request for information 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 contain 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).

Having considered your arguments and reviewed the information at issue, we conclude you have not demonstrated that any of the remaining information at issue consists of core work product for purposes of Texas Rule of Civil Procedure 192.5. Thus, the city may not withhold any of the information subject to section 552.022 under rule 192.5.

In summary, the city may withhold the information that the opposing party has not seen or had access to under section 552.103 of the Government Code. As you raise no other arguments against the disclosure of the information subject to section 552.022, which we have marked, it 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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).

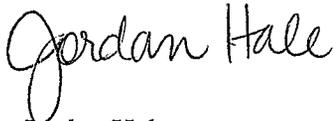
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



Jordan Hale  
Assistant Attorney General  
Open Records Division

JH/jb

Ref: ID# 311749

Enc. Submitted documents

c: Mr. Greg Harman  
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(w/o enclosures)