



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 12, 2008

Mr. Christopher S. Jackson
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Austin, Texas 78731

Mr. David B. Tabor
Shackelford, Melton, & McKinley
3333 Lee Parkway, 10th Floor
Dallas, Texas 75219

OR2008-16977

Dear Mr. Jackson and Mr. Tabor:

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# 329921.

The Grayson Central Appraisal District (the "district") and the Grayson County Appraisal Review Board (the "board"), which you represent, each received a request for any and all representation agreements between any attorneys or law firms and the district or the board from September 2006 to the present and billing information related to these attorneys and law firms. The district and the board have submitted separate briefs, as well as separate sets of documents they seek to withhold from disclosure. The district states it has released some information to the requestor, and that it does not have information responsive to some of the request.¹ The district claims the information it has submitted is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code and privileged under Texas Rule of Civil Procedure 192.5 and Texas Rule of Evidence 503. The board states the

¹We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986).

information it has submitted is excepted from disclosure under section 552.103 of the Government Code and privileged under Texas Rule of Civil Procedure 192.5 and Texas Rule of Evidence 503. We have considered the submitted arguments and reviewed the submitted information, a portion of which consists of a representative sample.² We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note the board has redacted the information it seeks to withhold from the information it submitted for our review. We are unable to discern the exact nature of the information the board has redacted. Pursuant to section 552.301 of the Government Code, information must be submitted to the attorney general in a manner that enables this office to determine whether the information falls within an exception to disclosure. *See id.* § 552.301(e)(1)(D). Pursuant to section 552.302 of the Government Code, failure to comply with section 552.301 results in a statutory presumption that information is public and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Although the board claims the redacted information is excepted from disclosure under section 552.103 of the Government Code, and privileged under Texas Rule of Civil Procedure 192.5 and Texas Rule of Evidence 503, section 552.103 and rules 192.5 and 503 are discretionary in nature. They serve only to protect a governmental body's interests and may be waived; as such, they do not constitute compelling reasons to withhold information for purposes of section 552.302. *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 Gov't Code § 552.103); Open Records Decision Nos. 677 at 10 (2002) (attorney work-product privilege under rule 192.5 is not compelling reason to withhold information under section 552.302), 676 at 12 (2002) (claim of attorney-client privilege under section 552.107 or rule 503 does not provide compelling reason to withhold information under section 552.302 if it does not implicate third-party rights), 663 at 5 (1999) (waiver of discretionary claims); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions in general). Therefore, the board must release the redacted information, to the extent that it is responsive to this request.

Next, we turn to the documents and arguments submitted by the district. We note the information submitted by the district is subject to section 552.022(a)(16) of the Government Code. This section provides in part:

²We 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.

(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:

(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). In this instance, the information submitted by the district consists solely of attorney fee bills. Thus, the district must release this information pursuant to section 552.022(a)(16) unless it is expressly confidential under other law. Sections 552.103, 552.107, and 552.111 are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived. Open Records Decision Nos. 677 at 10, 676 at 6, 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). As such, sections 552.103, 552.107, and 552.111 are not other law that make information confidential for the purposes of section 552.022; therefore, the district may not withhold the fee bills under these sections. However, the Texas Supreme Court has held that the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" that makes information expressly confidential for the purposes of section 552.022. We will therefore consider the district's arguments under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5.

Rule 503 of the Texas Rules of Evidence enacts 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).

The district states the comment fields in the submitted attorney fee bills consist of communications between district employees and attorneys for the district made for the purpose of facilitating the rendition of professional legal services and were not intended to be disclosed to third parties. Based upon the district’s representations and our review of the submitted information, we find that the district may withhold the information we have marked under rule 503 of the Texas Rules of Evidence. As the district has not demonstrated how any of the remaining information documents confidential communications between privileged parties made for the purpose of facilitating the rendition of professional legal services, the rest of the submitted information may not be withheld pursuant to rule 503.

Rule 192.5 of the Texas Rules of Civil Procedure 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* ORD 677 at 9-10. 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).

The district contends that the remaining information at issue consists of work product. Upon review, however, we find that the district has not demonstrated how this information consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative developed in anticipation of litigation or for trial. Thus, the district has failed to demonstrate that the work product privilege is applicable to this information and none of the remaining information may be withheld on that basis.

In summary, to the extent the board's redacted information is responsive, the board must release this information. The district may withhold the information we have marked in its documents under rule 503 of the Texas Rules of Evidence. The remainder of the district's 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 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). If the governmental body does not file suit over 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,



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/jb

Ref: ID# 329921

Enc. Submitted documents

cc: Requestor
(w/o enclosures)