



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 28, 2009

Mr. Peter S. Vogel  
Mr. Peter L. Loh  
Gardere Wynne Sewell L.L.P.  
3000 Thanksgiving Tower  
1601 Elm Street  
Dallas, Texas 75201-4761

OR2009-07315

Dear Mr. Vogel and Mr. Loh:

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# 344387.

Collin County (the "county"), which you represent, received three requests from the same requestor. One request was for specified communications regarding a court case involving the county, the second request was for specified communications regarding certain software and its access, and the third request was for all invoices for legal fees regarding a court case involving the county. You state that you have provided the requestor with a redacted copy of the invoices for legal fees. You claim that the submitted information is excepted from disclosure under section 552.103 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 reviewed the submitted information.

Initially, we note that a portion of the submitted information is subject to section 552.022(a)(16) of the Government Code, which provides that information in a bill for attorney's fees must be released unless it is privileged under the attorney-client privilege

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<sup>1</sup>Based on your argument to withhold portions of the information under the attorney work product privilege, we understand you to raise Texas Rule of Civil Procedure 192.5, as this is the proper rule for the substance of your argument.

or is expressly confidential under other law. *See* Gov't Code § 552.022(a)(16). You contend that the highlighted portions of the submitted attorney fee bills are protected under the attorney-client privilege found in rule 503 of the Texas Rules of Evidence and the attorney work product privilege under Texas Rule of Civil Procedure 192.5. Because the Texas Supreme Court has held that the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022, we will consider whether the submitted attorney fee bills may be withheld under rule 503 of the Texas Rules of Evidence and under rule 192.5 of the Texas Rules of Civil Procedure. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001).

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 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. 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 claim that all of the information you have highlighted in the attorney fee bills is confidential because the fee bills themselves are attorney-client communications between the county's outside counsel and the county's administrator. However, section 552.022(a)(16) of the Government Code provides that information "that is *in* a bill for attorney's fees" is not excepted from required disclosure unless it is confidential under other law or privileged under the attorney-client privilege. *See* Gov't Code § 552.022(a)(16) (emphasis added); *see also* Open Records Decision No. 589 (1991) (information in attorney fee bill excepted only to extent information reveals client confidences or attorney's legal advice). This office has found that only information that is specifically demonstrated to be protected by the attorney-client privilege or made confidential by other law may be withheld from fee bills. *See* ORD No. 676. In this instance, you indicate that the submitted attorney fee bills contain confidential communications between the county's outside counsel and county administrator that were made for the purpose of facilitating the rendition of professional legal services to the county. We note that beyond the county administrator, you have failed to identify the other parties to the communications within the submitted attorney fee bills. *See* ORD 676 at 8 (governmental body must inform this office of identities and capacities of individuals to whom each communication at issue has been made; this office cannot necessarily assume that communication was made only among categories of individuals identified in rule 503); *see generally* Open Records Decision No. 150 (1977) (stating that predecessor to the Act places burden on governmental body to establish why and how exception applies to requested information); *Strong v. State*, 773 S.W.2d 543, 552 (Tex. Crim. App. 1989) (burden of establishing attorney-client privilege is on party asserting it). However, upon review, we have been able to discern from the face of the documents that certain individuals are privileged parties. Further, you state that the communications at issue were intended to be and remain confidential. Accordingly, the county may withhold the information we have marked on the basis of the attorney-client privilege under Texas Rule of Evidence 503.

With respect to the remaining information you have highlighted, we note that many of the entries document communications with non-privileged parties, such as opposing parties, third parties you have not identified, or parties representing other governmental bodies. Thus, we find that you have failed to demonstrate that this information constitutes confidential communications that were made between privileged parties. Furthermore, while other entries indicate that certain documents were prepared or that certain work was done, you have failed to establish that these entries constitute or document communications actually made to a privileged party. Therefore, we conclude that Texas Rule of Evidence 503 is not applicable to any of the remaining highlighted information, and it may not be withheld on this basis.

Next, we address Texas Rule of Civil Procedure 192.5, which encompasses the attorney work product privilege, for the remaining information you have highlighted. 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). *See Pittsburgh Corning Corp.*, 861 S.W.2d at 427. Having reviewed the information at issue, we agree that a portion of the attorney fee bills reflects the mental processes, conclusions, strategies, or legal theories of the county's attorneys regarding current litigation. Thus, the information we have marked is protected as attorney core work product and may be withheld under rule 192.5 of the Texas Rules of Civil Procedure. However, we find that you have failed to explain how any portion of the remaining information at issue 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. Thus, the county may not withhold any of the remaining information you have highlighted under rule 192.5 of the Texas Rules of Civil Procedure. Therefore, the remaining attorney fee bills subject to section 552.022(a)(16) must be released.

We will now address your claim 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 governmental body 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 governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform us that the information at issue relates to a pending lawsuit styled *Collin County, Texas v. Collin County Auditor*, Cause No. 219-01215-2008. You state, and provide supporting documentation showing, that the county filed a notice of appeal in this lawsuit prior to the county's receipt of the instant request. Further, you assert that the remaining information relates to the specified software program and its access, which is at issue in the pending lawsuit. Based on your representations and our review of the information, we find that the remaining information relates to pending litigation for purposes of section 552.103. We therefore conclude that the county may withhold the remaining information, which we have marked, under section 552.103 of the Government Code.

However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has been obtained from or provided to all other parties in the pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends when the litigation has concluded or is no longer anticipated.

Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

In summary, the county may withhold the information we have marked in the submitted fee bills under Texas Rule of Evidence 503 and under rule 192.5 of the Texas Rules of Civil Procedure. The county may also withhold the information we have marked under section 552.103 of the Government Code. The remaining information must be released to the requestor.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Sarah Casterline  
Assistant Attorney General  
Open Records Division

SEC/jb

Ref: ID# 344387

Enc. Submitted documents

c: Requestor  
(w/o enclosures)