



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 3, 2009

Mr. Michael B. Gary  
Assistant General Counsel  
Harris County Appraisal District  
P.O. Box 920975  
Houston, Texas 77292-0975

OR2009-10730

Dear Mr. Gary:

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# 350901 (HCAD ref. # 09-0067 and 09-0068).

The Harris County Appraisal District (the "district") received two requests from the same requestor for (1) any information provided to the Office of the Attorney General of Texas (the "OAG") and the Texas Department of Licensing and Regulation (the "department") since January 1, 2008, and (2) any information pertaining to the requestor's company provided to the OAG and the department since January 1, 2008.<sup>1</sup> You claim the submitted e-mails, letters, and attachments are excepted from disclosure under sections 552.103, 552.107, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

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<sup>1</sup>You state the district sought and received clarification from the requestor regarding the requests. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

<sup>2</sup>We assume 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 those records contain substantially different types of information than that submitted to this office.

Initially, we note the submitted information contains litigation petitions filed with a court. Court-filed documents are expressly public under section 552.022(a)(17) of the Government Code. Gov't Code § 552.022(a)(17). Such information must be released unless it is expressly confidential under other law. You claim the court-filed documents are excepted from disclosure under sections 552.103, 552.107, 552.108, and 552.111 of the Government Code. However, these sections are discretionary exceptions that protect a governmental body's interests and are, therefore, not "other law" for purposes of section 552.022(a)(17). *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. 677 at 8 (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 (2000) (discretionary exceptions generally), 586 (1991) (governmental body may waive section 552.108). Therefore, the district may not withhold the court-filed documents, which we have marked, under section 552.103, section 552.107, section 552.108, or section 552.111 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege is also found under rule 503 of the Texas Rules of Evidence, and the attorney work product privilege is also found at rule 192.5 of the Texas Rules of Civil Procedure. Accordingly, we will consider your assertion of these privileges under rule 503 and rule 192.5 for the submitted court-filed documents. We will also consider your arguments under sections 552.103, 552.107, 552.108, and 552.111 for the remaining information not subject to section 552.022.

Rule 503 of the Texas Rules of Evidence 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 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 the communication is confidential by explaining it was not intended to be disclosed to third persons and 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 the submitted court-filed litigation petitions were communicated between the district’s in-house counsel and OAG attorneys at the request of the OAG. Although you also state the communications were made for the purpose of facilitating the rendition of professional legal services to the “respective public entities as clients,” you have not explained how the communications between the attorneys for the district and the attorneys for the OAG constitute communications between privileged parties. Thus, we find you have failed to establish the applicability of the attorney-client privilege to the court-filed documents. Consequently, these documents may not be withheld under Texas Rule of Evidence 503.

For purposes of section 552.022, information is confidential under rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. Open Records Decision No. 677 at 9-10 (2002). Core work product is defined as the work product of an attorney or an attorney’s representative developed in anticipation of litigation or for trial that contains the attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. 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 the material was (1) created for trial or in anticipation of litigation 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 the information at issue was created in anticipation of litigation, has two parts. A governmental

body must demonstrate (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation there was a substantial chance that litigation would ensue, and (2) the party resisting discovery believed in good faith there was a substantial chance 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 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*, 861 S.W.2d 423, 427.

Although you indicate the court-filed litigation petitions are subject to the attorney work product privilege, we note the petitions were not created by attorneys or attorney representatives of the district. Thus, because the district did not create the petitions, they do not contain the mental impressions, opinions, conclusions, or legal theories of attorneys or attorney representatives of the district. Consequently, you have failed to establish the applicability of Rule 192.5 of Texas Rules of Civil Procedure to the court-filed petitions; thus, the petitions may not be withheld on this basis. As you have claimed no further exceptions to disclosure for the petitions, they must be released.

We now address your arguments for the remaining information not subject to section 552.022. You contend the remaining information is excepted under section 552.103, which provides:

(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 state or a political subdivision, as a consequence 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). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular

situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). Furthermore, the purpose of section 552.103 is to protect the litigation interests of governmental bodies that are parties to the litigation at issue. See Gov't Code § 552.103(a); Open Records Decision No. 638 at 2 (1996) (section 552.103 only protects the litigation interests of the governmental body claiming the exception). To secure the protection of section 552.103 of the Government Code, a governmental body must demonstrate the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 at 1 (1991).

You claim the remaining information is excepted under section 552.103 because the information relates to pending litigation between the OAG and the requestor's company. You acknowledge, however, that the district is not a party to that litigation. Although you state the district anticipates intervening in that litigation, you have not provided any arguments explaining how the district reasonably anticipated intervening in the litigation prior to receiving the request for information. Consequently, you have not shown that, at the time the request was received, the district reasonably anticipated becoming a party to litigation. Therefore, you have not established the applicability of section 552.103 of the Government Code to the remaining information, and it may not be withheld on this basis.

Section 552.107(1) 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). The elements of the privilege under section 552.107 are the same as those for Rule 503 outlined above.

You state the remaining e-mails, letters, and attachments were communicated between the district's in-house counsel and OAG attorneys at the request of the OAG for the purpose of facilitating the rendition of professional legal services to the "respective public entities as clients." As previously noted, however, you have not explained how the communications between the attorneys for the district and the attorneys for the OAG constitute communications between privileged parties. Thus, we find you have failed to establish the applicability of the attorney-client privilege to the remaining information, and this information may not be withheld under section 552.107 of the Government Code.

Section 552.108(a)(1) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection,

investigation, or prosecution of crime.” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.*, 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by the proper custodian of information relating to a pending investigation or prosecution of criminal conduct. *See Open Records Decision No. 474 at 4-5 (1987)*. Where a non-law enforcement agency possesses information relating to a pending case of a law enforcement agency, the custodian of records may withhold the information under section 552.108 if it demonstrates the information relates to the pending case, and this office is provided with a representation from the law enforcement entity that the law enforcement entity wishes to withhold the information.

You claim the remaining information is excepted under section 552.108 because the information may lead to criminal prosecutions. You have not, however, provided this office with a representation from any law enforcement entity that release of the remaining information would interfere with any pending criminal investigation or prosecution. Consequently, you have failed to demonstrate the applicability of section 552.108 to the remaining information, and the information may not be withheld on this basis.

Section 552.111 of the Government Code excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency,” and encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); *Open Records Decision No. 677 at 4-8 (2002)*. The elements of and test for the attorney work product privilege under section 552.111 are the same as those for Rule 192.5 outlined above. You indicate the remaining information is subject to the attorney work product privilege encompassed by section 552.111. Although the remaining information was communicated by attorneys or attorney representatives of the district, you have failed to demonstrate how the information was created or developed by the district for trial or in anticipation of litigation. Consequently, you have failed to establish the applicability of the attorney work product privilege to the remaining information. Therefore, the remaining information may not be withheld under section 552.111 of the Government Code.

The remaining information includes the cellular telephone number of a district employee that may be protected under section 552.117 of the Government Code.<sup>3</sup> Section 552.117(a)(1) excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. Gov’t Code § 552.117(a)(1). Additionally,

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<sup>3</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)*.

section 552.117 encompasses personal cellular telephone numbers, provided the cellular telephone service is paid for by the employee with his or her own funds. *See* Open Records Decision No. 670 at 6 (2001) (extending section 552.117(a)(1) exception to personal cellular telephone number and personal pager number of employee who elects to withhold home telephone number in accordance with section 552.024). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The district may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made.

We have marked a district employee's cellular telephone number in the remaining information. You have not informed us whether or not the employee timely chose to not allow public access to her personal information. Furthermore, you have not informed us whether or not she paid for her cellular telephone service. Therefore, if the cellular telephone number we have marked is the employee's personal cellular telephone number and the employee timely requested confidentiality for her personal information, the district must withhold the marked cellular telephone number pursuant to section 552.117(a)(1) of the Government Code. Otherwise, the marked cellular telephone number must be released.

We note the remaining information includes e-mail addresses subject to section 552.137 of the Government Code, which excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses in the remaining information are not specifically excluded by section 552.137(c). As such, these e-mail addresses, which we have marked, must be withheld under section 552.137, unless the owners of the addresses have affirmatively consented to their release. *See id.* § 552.137(b).

We note portions of the remaining information appear to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990). Accordingly, the remaining information must be released to the requestor in accordance with copyright law.

In summary, if the marked cellular telephone number is an employee's personal cellular telephone number and the employee timely requested confidentiality for her personal information, the district must withhold the marked cellular telephone number pursuant to

section 552.117(a)(1) of the Government Code. The district must withhold the marked e-mail addresses under section 552.137 of the Government Code, unless the owners of the addresses have affirmatively consented to their release. The remaining information must be released in accordance with copyright law.<sup>4</sup>

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,



Leah B. Wingerson  
Assistant Attorney General  
Open Records Division

LBW/cc

Ref: ID# 350901

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>4</sup>We note the remaining information contains private information to which the requestor has a right of access in this instance. See Gov't Code § 552.023(a) (person or person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person's privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual asks governmental body to provide her with information concerning herself). Because this information is generally confidential with respect to the general public, if the district receives another request for this particular information from a different requestor, then the district should again seek a decision from this office.