



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 31, 2009

Ms. Jakki A. Hansen
Assistant General Counsel
Metropolitan Transit Authority of Harris County
P.O. Box 61429
Houston, Texas 77208-1429

OR2009-12221

Dear Ms. Hansen:

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# 353980 (MTA No. 2009-0198).

The Metropolitan Transit Authority of Harris County ("METRO") received a request for a list of accidents, Q-card revenue statements, fixed-route bus fare box revenue, TVM sales/revenue, fixed-route bus boardings, METRORail boardings, information related to "stray current," information related to corrosion committee meetings, information regarding the requestor's Title VI Civil Rights complaint, and communications concerning urban rail. You state you have released the information responsive to categories one through six of the request. You state you do not possess any information responsive to categories eight and nine of the request.¹ You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code, and privileged under Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the submitted information.

Initially, we note that a portion of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

No. 2009-10510 (2009). In that ruling, we found that METRO may withhold the information we marked in the information submitted as responsive to category ten regarding US 90A Commuter Rail under section 552.111 of the Government Code. With regard to the requested information that is identical to the information previously submitted and ruled upon by this office in the prior ruling, we conclude that, as we have no indication that the law, facts, or circumstances on which the prior ruling was based have changed, METRO may continue to rely upon Open Records Letter No. 2009-10510 as a previous determination and withhold or release the identical information in accordance with that ruling.² See Open Records Decision No. 673 (2001) (so long as law, facts, circumstances, on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). We will address your arguments regarding the remaining information, which has not been previously ruled upon.

We note that the remaining information, submitted as responsive to item seven of the request, is subject to section 552.022 of the Government Code, which provides in relevant part:

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[.]

Gov't Code § 552.022(a)(1). The information at issue consists of a completed report made for METRO and is, therefore, subject to section 552.022(a)(1). Accordingly, METRO may withhold this information only if it is confidential under "other law" or excepted from disclosure under section 552.108 of the Government Code. You do not raise section 552.108 for the information at issue. Sections 552.103 and 552.111 are discretionary exceptions to public disclosure that protect the governmental body's interests and may be waived. See Gov't Code § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 470 at 7 (1987) (statutory predecessor to section 552.111 may be waived), 663 (1999) (governmental body may waive section 552.103); see also Open Records Decision No. 665 at 2 n.5 (discretionary exceptions generally). As such, sections 552.103 and 552.111 are not "other law" that makes information confidential for the purposes of section 552.022. Therefore, METRO may not withhold any of the remaining

²As our ruling is dispositive, we need not address your arguments against disclosure of this information.

information subject to section 552.022 under section 552.103 or section 552.111 of the Government Code. However, the Texas Supreme Court held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Therefore, we will consider your argument that the information subject to section 552.022 is privileged under Rule 192.5 of the Texas Rules of Civil Procedure.

Information subject to section 552.022 is “expressly confidential” for purposes of that section under Rule 192.5 only to the extent the information implicates the core work product aspect of the privilege. *See* 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).

In order to withhold attorney 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 an attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. ORD 677 at 6-7. 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 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).

You state the remaining information was prepared and developed by METRO’s expert consultant in cooperation with METRO’s attorneys in anticipation of trial. Upon review, we find that the information at issue is attorney work product that is protected by rule 192.5. Accordingly, METRO may withhold this information, which we have marked, under 192.5 of the Texas Rules of Civil Procedure.

In summary, METRO may continue to rely upon Open Records Letter No. 2009-10510 as a previous determination and withhold or release the identical information at issue in

accordance with that ruling. METRO may also withhold the information we have marked under Texas Rule of Civil Procedure 192.5.

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, 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,

A handwritten signature in black ink, appearing to read 'Chris Schulz', with a long horizontal flourish extending to the right.

Chris Schulz
Assistant Attorney General
Open Records Division

CS/eb

Ref: ID# 353980

Enc. Submitted documents

c: Requestor
(w/o enclosures)