



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 14, 2009

Mr. Read Cook
Attorney for Mountain Peak Special Utility District
Miller Mentzer, P.C.
P. O. Box 130
Palmer, Texas 75152

OR2009-12944

Dear Mr. Cook:

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# 355128.

The Mountain Peak Special Utility District (the "district"), which you represent, received a request for all of the district's legal bills for the period of January 1, 2007 through June 30, 2009. You claim that portions of the submitted legal bills are excepted from disclosure under sections 552.103 and 552.107 of the Government Code, and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5.¹ We have considered your arguments and reviewed the submitted information. We have also considered comments submitted by the requestor.² *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

¹Although you also raise section 552.022 of the Government Code for your attorney-client privilege claim, that provision is not an exception to disclosure. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are expressly confidential under other law. *See* Gov't Code § 552.022.

²The requestor informs the office that he has made several other requests for information to the district for which the district has not sought a decision from this office. We note that the scope of this open records ruling is limited to the instant request for the district's legal bills, and for which the district has requested a ruling. *See* Gov't Code § 552.301(a) (division's authority is limited to determining, upon a governmental body's request, whether requested information falls within an exception to disclosure). Thus, this ruling does not address any other open records request that the requestor submitted to the district.

Initially, we address the requestor's contention that the district should have submitted the copies of the attorney fee bills from the district's offices and not copies printed off of the district's law firm's system. We note that the Act does not require a governmental body to produce the responsive information in a certain format. *AT&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 676 (Tex.1995); *Fish v. Dallas Indep. Sch. Dist.*, 31 S.W.3d 678, 681 (Tex. App.—Eastland 2000, pet. denied); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975). A governmental body must make a good-faith effort to relate a request to any responsive information that is within its possession or control. See Open Records Decision No. 561 at 8-9 (1990). In this case, the district has determined that the submitted documents are responsive to the request. Upon review, we find the submitted attorney fee bills are responsive to the request. As the district has identified this information as responsive and has submitted it to our office for review, we will consider the district's arguments against the release of this information.

Next, as you acknowledge, the submitted information consists of attorney fee bills subject to section 552.022(a)(16) of the Government Code. Section 552.022(a)(16) provides for required public disclosure of "information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege," unless the information is expressly confidential under other law. Gov't Code § 552.022(a)(16). Although the district asserts that information contained in the submitted fee bills is excepted from disclosure by sections 552.103 and 552.107 of the Government Code, those 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 district may not withhold information contained in the submitted fee bills under sections 552.103 and 552.107. However, the Texas Supreme Court has held that the Texas Rules of Evidence and 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). Therefore, we will address the district's arguments that portions of the submitted attorney fee bills are privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5.

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 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). We note that the details in the submitted attorney fee bills may only be withheld if they are protected under the attorney-client privilege. *See* Open Records Decisions No. 589 (1991) (information in attorney fee bill excepted only to extent information reveals client confidences or attorney's legal advice).

You contend that the information you have marked in the submitted attorney fee bills document confidential communications between the district's attorneys, members of the district's board of directors, representatives of the district, and attorneys for district representatives and board members that were made in furtherance of the rendition of professional legal services to the district. You indicate that these communications have remained confidential and have not been revealed to any third party. Upon review of the submitted attorney fee bills, we agree that some of the information at issue is protected by the attorney-client privilege. We note, however, that you have not specifically identified some of the individuals who you claim are privileged parties. We are also unable to discern from the submitted information whether the individuals who were not identified are privileged parties. Additionally, some of the information you have marked documents communications with non-privileged parties. Furthermore, while other marked entries indicate that certain documents were prepared, there is no indication that the information was

actually communicated to a privileged party. Therefore, we find that the district has failed to demonstrate how the remaining information you have marked documents privileged attorney-client communications. Accordingly, the district may only withhold the information we have marked in the submitted attorney fee bills pursuant to Texas Rule of Evidence 503.

We next address your arguments under Texas Rule of Civil Procedure 192.5 for the remaining information you marked in the submitted attorney fee bills. Rule 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 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's 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.*, 861 S.W.2d at 427.

In this instance, you have not demonstrated that any of the remaining information in the submitted fee bills consists of mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative that were created for trial or in anticipation of litigation. We therefore conclude that the district may not withhold any of the remaining information under Texas Rule of Civil Procedure 192.5.

In summary, the district may withhold the information we have marked in the submitted attorney fee bills under Texas Rule of Evidence 503. As no further exceptions are raised against its disclosure, 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, 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 (888) 672-6787.

Sincerely,



Laura Ream Lemus
Assistant Attorney General
Open Records Division

LRL/eb

Ref: ID# 355128

Enc. Submitted documents

c: Requestor
(w/o enclosures)