



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 24, 2009

Mr. James R. Evans, Jr.  
Attorney for the Rockwall Appraisal District  
Hargrove & Evans, L.L.P.  
4425 Mopac South, Building 3, Suite 400  
Austin, Texas 78735

OR2009-13489

Dear Mr. Evans:

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# 356231.

The Rockwall Central Appraisal District (the "district"), which you represent, received a request for (1) copies of all district contracts for legal services currently in effect, and (2) if no such contracts exist, a copy of the district's most recent bill for legal services. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.<sup>2</sup>

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<sup>1</sup>We note in your letter of July 24, 2009, the district withdrew its claim under section 552.103.

<sup>2</sup>Although we understand you to raise section 552.101 in conjunction with Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). You also raise section 552.022 of the Government Code; we note, however, that section 552.022 is not an exception to disclosure. Rather, section 552.022 lists categories of information that are not excepted from disclosure unless they are expressly confidential under other law. *See* Gov't Code § 552.022.

Initially, we note that you have only submitted information responsive to category two; thus, we understand this to indicate that information responsive to category one does not exist. We note that the Act does not require a governmental body to release information that did not exist when it received a request, create responsive information, or obtain information that is not held by the governmental body or on its behalf. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W. 2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed). However, to the extent such information exists, the district must release it at this time. See Gov't Code §§ 552.301, .302.

Next, as you acknowledge, the submitted information consists of attorney fee bills that are subject to section 552.022 of the Government Code. Section 552.022(a)(16) provides that information in a bill for attorney fees that is not privileged under the attorney-client privilege is not excepted from required disclosure unless it is expressly confidential under other law; therefore, information within these fee bills may only be withheld if it is confidential under other law. Section 552.107 is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. See Open Records Decision Nos. 676 at 6 (2002) (section 552.107 is not other law for purposes of section 552.022), 522 (1989) (discretionary exceptions in general). As such, section 552.107 does not make information confidential for the purposes of section 552.022; therefore, the district may not withhold the fee bills under this section. However, the Texas Supreme Court has held that the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your arguments 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).

You claim that the submitted fee bills are confidential in their entirety under Texas Rule of Evidence 503. 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). This provision, by its express language, does not permit the entirety of an attorney fee bill to be withheld. *See* ORD Nos. 676 (attorney fee bill cannot be withheld in entirety on basis it contains or is attorney-client communication pursuant to language in section 552.022(a)(16)), 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 676.

You have also marked information in the submitted fee bills that you claim consists of confidential attorney-client communications that were made in furtherance of the rendition of professional legal services to the district. You have identified the parties to the communications. You indicate that these communications have remained confidential and have not been revealed to any third party. Based on your representations and our review of the submitted information, we agree that the information we have marked reveals confidential communications made between privileged parties. Accordingly, this information is protected by the attorney-client privilege and thus may be withheld pursuant to rule 503 of the Texas Rules of Evidence. However, we find that you have failed to

establish how the remaining information you wish to withhold under rule 503 constitutes privileged attorney-client communications. Therefore, none of the remaining information may be withheld under rule 503 of the Texas Rules of Evidence.

You also have marked information in the submitted fee bills that you contend is privileged attorney work product pursuant to Texas Rule of Civil Procedure 192.5. 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.

You state, and the submitted information reflects, the entries you have marked pertain to pending litigation in which the district is a party. You further state that this information consists of "mental impressions, conclusions, opinions, and legal theories developed in anticipation of litigation or for trial by counsel for the [d]istrict." Upon review, we agree the information we have marked is privileged core work product under rule 192.5. However, you have not sufficiently demonstrated that the remaining information you have marked consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or

an attorney's representative that qualify as core work product under rule 192.5. Therefore, the district may not withhold any of the remaining information on this basis.

In summary, the district may withhold the portions of the submitted fee bills we have marked under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure. The remaining information must be released.

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, toll free, at (888) 672-6787.

Sincerely,



Pamela Wissemann  
Assistant Attorney General  
Open Records Division

PFW/jb

Ref: ID# 356231

Enc. Submitted documents

c: Requestor  
(w/o enclosures)