



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 3, 2011

Mr. Quentin D. Price
First Assistant City Attorney
City of Beaumont
P.O. Box 3827
Beaumont, Texas 77704-3827

OR2011-06037

Dear Mr. Price:

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# 416130.

The City of Beaumont (the "city") received a request for (1) the total amount of all money spent, (2) invoices and financial documents related to money spent, and (3) invoices or financial documents related to money paid to a named individual or a specified law firm, for any city legal action involving a named firefighter during a specified time period. You state the city has no information responsive to the first and third portions of the request.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code, as well as privileged under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure. We have considered the submitted arguments and reviewed the submitted information. We have also received and considered comments from the requestor. *See Gov't Code* § 552.304 (interested party may submit comments stating why information should or should not be released).

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), 452 at 3 (1986), 362 at 2 (1983).

Initially, you inform us some of the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2011-01703 (2011). In that ruling, we determined the city must withhold the information you marked under section 552.101 of the Government Code in conjunction with article 55.03 of the Code of Criminal Procedure, the city may withhold the information we marked under rule 503 of the Texas Rules of Evidence, and the city must release the remaining information. We have no indication there has been any change in the law, facts, and circumstances on which the prior ruling was based. Accordingly, with regard to the information responsive to the instant request for information that is identical to the information previously requested and ruled upon by this office, we conclude the city must continue to rely on Open Records Letter No. 2011-01703 as a previous determination and withhold or release the identical information in accordance with that ruling. *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 the same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure).

Next, we note the remaining information is subject to section 552.022 of the Government Code. This section provides, in pertinent part:

(a) [T]he following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...
(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code. § 552.022(a)(16). In this instance, the information at issue consists of attorney fee bills. Therefore, the information must be released under section 552.022 unless it is confidential under other law. Sections 552.103 and 552.107 of the Government Code are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *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 Gov't Code § 552.103); Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103 and 552.107 are not other laws that make information confidential for the purposes of section 552.022(a)(16). Therefore, the city may not withhold any of the remaining information under section 552.103 or section 552.107 of the Government Code. You also seek to withhold the remaining information under rule 503 of the Texas Rules of Evidence. Further, we understand you to claim portions of the

remaining information are protected by the attorney work product privilege. 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. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your assertions of the attorney-client privilege under rule 503 of the Texas Rules of Evidence and the attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure. We will also consider section 552.101 of the Government Code for the information at issue because section 552.101 is other law for purposes of section 552.022.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information protected by other statutes. Gov't Code § 552.101. Section 552.101 encompasses chapter 55 of the Code of Criminal Procedure. Articles 55.01 through 55.05 of the Code of Criminal Procedure provide for the expunction of criminal records in certain limited circumstances. Article 55.03 prescribes the effect of an expunction order and provides:

When the order of expunction is final:

- (1) the release, maintenance, dissemination, or use of the expunged records and files for any purpose is prohibited;
- (2) except as provided in Subdivision (3) of this article, the person arrested may deny the occurrence of the arrest and the existence of the expunction order; and
- (3) the person arrested or any other person, when questioned under oath in a criminal proceeding about an arrest for which the records have been expunged, may state only that the matter in question has been expunged.

Crim. Proc. Code art. 55.03. Article 55.04 imposes sanctions for violations of an expunction order and provides in relevant part:

Sec. 1. A person who acquires knowledge of an arrest while an officer or employee of the state or of any agency or other entity of the state . . . and who knows of an order expunging the records and files relating to that arrest commits an offense if he knowingly releases, disseminates, or otherwise uses the records or files.

Id. art. 55.04, § 1. This office has previously determined the expunction statute prevails over the Act. *See Open Records Decision No. 457 at 2 (1987)* (governmental body prohibited from releasing or disseminating arrest records subject to expunction order, as "those records

are not subject to public disclosure under the [Act]”). You inform us the information you have highlighted is subject to an expunction order. Based upon your representation, the city must withhold the highlighted information, and the additional information we have marked, under section 552.101 of the Government Code in conjunction with article 55.03 of the Code of Criminal Procedure.

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(b)(1). A communication is “confidential” if it is 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

We understand you to claim the submitted fee bills are confidential in their entirety under rule 503. However, section 552.022(a)(16) of the Government Code provides information contained 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)*. This office has found only information 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 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) (predecessor to 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). Thus, the city may withhold under rule 503 only the parts of the submitted attorney fee bills you specifically demonstrate consist of privileged communications.

You state the attorney fee bills contain confidential communications between the city's attorneys and certain named city employees. You state these communications were made for the purpose of facilitating the rendition of professional legal services to the city. Further, you indicate the fee bills were intended to be, and have remained, confidential. Accordingly, the city may withhold the information we have marked on the basis of the attorney-client privilege under Texas Rule of Evidence 503. We note, however, you have failed to identify some of the parties to the communications in the 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). We find you have failed to demonstrate the remaining information documents confidential communications between privileged parties. Therefore, we conclude Texas Rule of Evidence 503 is not applicable to the remaining information, and it may not be withheld on this basis.

We next address the Texas Rule of Civil Procedure 192.5 for the remaining information 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 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 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 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 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 part of the work product test requires the governmental body to show the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney 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 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.

You assert the submitted attorney fee bills contain attorney core work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. Upon review, we find you have not demonstrated 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 the city may not withhold any of the remaining information under Texas Rule of Civil Procedure 192.5.

In summary, with regard to the information responsive to the instant request for information that is identical to the information previously requested and ruled upon by this office, we conclude the city must continue to rely on Open Records Letter No. 2011-01703 as a previous determination and withhold or release the identical information in accordance with that ruling. The city must withhold the information you have highlighted, and the additional information we have marked, under section 552.101 of the Government Code in conjunction with article 55.03 of the Code of Criminal Procedure. The city may withhold the information we have marked under rule 503 of the Texas Rules of Evidence. 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, 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,

A handwritten signature in black ink, appearing to read "Claire Morris Sloan", with a long horizontal flourish extending to the right.

Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/tf

Ref: ID# 416130

Enc. Submitted documents

c: Requestor
(w/o enclosures)