



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 17, 2011

Mr. Warren M.S. Ernst  
Chief, General Counsel Division  
City of Dallas  
1500 Marilla Street, Room 7BN  
Dallas, Texas 75201

OR2011-07237A

Dear Mr. Ernst:

Our office issued Open Records Letter No. 2011-07237 (2011) on May 23, 2011. In that ruling, we found you did not comply with section 552.301 of the Government Code because our office did not receive your request for a ruling until after the ten-business-day deadline. *See* Gov't Code § 552.301(b). Therefore, we ruled the requested information must be released pursuant to section 552.302. *See id.* § 552.302 (violation of section 552.301 results in legal presumption requested information is public and must be released absent a compelling reason to withhold it). In subsequent communications with our office, you provided confirmation that your request was, in fact, submitted before the statutory deadline. Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on May 23, 2011. *See id.* § 552.011 (providing Office of the Attorney General may issue a decision to maintain uniformity in application, operation, and interpretation of the Public Information Act (the "Act"))).

You ask whether certain information is subject to required public disclosure under the Act, chapter 552 of the Government Code. Your request was assigned ID# 425501.

The City of Dallas (the "city") received a request for six categories of information related to a specified water main break. You state some information will be released to the requestor upon receipt of reproduction costs. You claim the remaining requested information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government

Code and privileged under Texas Rule of Evidence 503.<sup>1</sup> We have considered the claimed exceptions and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, we note the requested information is subject to section 552.022(a)(1) of the Government Code, which provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless it is excepted by section 552.108 of the Government Code or expressly confidential under "other law." *Id.* § 552.022(a)(1). In this instance, the submitted information consists of the investigation of a claim completed by the city, which is made expressly public by section 552.022(a)(1). The city may withhold information subject to section 552.022(a)(1) only to the extent it is excepted from disclosure under section 552.108 or confidential under "other law." Although you raise sections 552.103, 552.107, and 552.111 of the Government Code, these are discretionary exceptions to disclosure that protect only 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 section 552.103); Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 663 (1999) (governmental body may waive section 552.103), 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). As such, sections 552.103, 552.107, and 552.111 are not "other law" that make information confidential for the purposes of section 552.022(a)(1), and the city may not withhold any of the information at issue under these sections. However, the Texas Supreme Court has held 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). We will therefore consider your assertions of the attorney-client and attorney work product privileges under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, respectively.

Texas Rule of Evidence 503(b)(1) 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:

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<sup>1</sup> Although you also raise section 552.101, you do not present any arguments regarding how the exception applies to the information at issue. Accordingly, we do not address that exception.

<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.

- (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).

You assert the information you have marked constitutes privileged attorney-client communications between individuals you have identified as city attorneys, staff, and insurers. You state these communications were made for the purpose of rendering legal advice and were intended to be, and have remained, confidential. Based on your representations and our review of the information at issue, we find the information you have marked is protected by the attorney-client privilege. Thus, the city may withhold the information you have marked under Texas Rule of Evidence 503.

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. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). Having considered your representations and reviewed the information at issue, we agree and have marked information consisting of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative created in anticipation of litigation. However, we find you have not established that any of the remaining information consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. Therefore, this information does not constitute privileged core attorney work product, and the city may not withhold it under Texas Rule of Civil Procedure 192.5.

In summary, the city may withhold the information you have marked under Texas Rule of Evidence 503 and the information we have marked under Texas Rule of Civil Procedure 192.5. 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](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,



Misty Haberer Barham  
Assistant Attorney General  
Open Records Division

MHB/bs

Ref: ID # 425501

Enc. Submitted documents

c: Requestor  
(w/o enclosures)