



ATTORNEY GENERAL OF TEXAS
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June 27, 2013

Ms. Jordan Hale
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P.O. Box 12548
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OR2013-11016

Dear Ms. Hale:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 490076 (PIR No. 13-35811).

The Office of the Attorney General (the "OAG") received a request for "the pleadings, correspondence, orders, discovery responses, document production, depositions (if any), expert designations and settlement agreements with British Petroleum that relate to or involve the Benzene release at the Texas City refinery in April-May 2010." The OAG asserts Exhibit B is excepted from disclosure under section 552.107 of the Government Code. As for Exhibit C, the OAG takes no position as to disclosure of this information and has notified attorneys for BP Products North America Inc. ("BP") of the request in order for BP to submit arguments to this office as to why its information should not be released. Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information). We have reviewed the submitted information and considered the OAG's claimed exception and BP's arguments.

First, we must provide background information on some of the information at issue. As a result of litigation with the State of Texas, BP produced documents in response to discovery requests. In producing the information, BP inadvertently produced privileged information. Upon discovery of this fact, BP alerted the State within ten days of the discovery and

requested return of the documents. *See* Tex. R. Civ. P. 193.3(d) (“snap-back” provision regarding inadvertent disclosure of privileged information and return of said documents). The OAG informed BP such information had been removed from its electronic database but did not return the source disks, which also contain copies of the privileged information. The OAG possesses this information when it received the instant request for information. Although the OAG states it “takes no position with regard to the BP documents,” it further opines that the documents “should not be considered information available to the public under section 552.002(a)” of the Government Code because “[i]f it had been returned to BP, the OAG would not have collected, assembled or maintained it or otherwise owned it or have any right of access to it.” Section 552.002 defines “public information” as “information that is collected, assembled, or maintained . . . in connection with the transaction of official business . . . by a governmental body.” Gov’t Code § 552.002(a)(1). As stated above, the OAG possesses the information as a result of litigation with BP, which constitutes the transaction of official OAG business. The OAG’s suggestion that the information is not “public information” is predicated on the OAG’s return of the information to BP, which unfortunately, has not occurred. Because the OAG has not returned the information to BP, still possesses the information, and maintains it in connection with the transaction of its official business, the information subject to the snap-back provision is public information subject to the Act.

Pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving an open records request a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e). The OAG received the request for information on March 26, 2013. Thus, its deadline for submitting the requested information is April 16, 2013. However, it did not submit a portion of the information until May 24, 2013. Thus, the OAG failed to comply with section 552.301(e) for this information.

Pursuant to section 552.302 of the Government Code, a governmental body’s failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. *Id.* § 552.302. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *Id.*; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). This office has held that a compelling reason exists to withhold information when the information is confidential by another source of law or affects third party interests. *See* Open Records Decision No. 150 (1977). Because BP’s interests are affected in this instance, we find BP’s assertions of discovery privileges are compelling in this instance. *See* Open Records Decision Nos. 677 (2002) (compelling reason under section 552.302 may be demonstrated for work product if shown that release of information would harm third party), 676 (2002)

(compelling reason under section 552.302 may be demonstrated for attorney-client privileged communications if shown that release of information would harm third party); V.T.C.S. art. 4447cc, §§ 2-3, 5-6 (to encourage voluntary compliance with environmental and health and safety laws, Texas Environmental, Health, and Safety Audit Privilege Act (the "TEHSAP"), as encompassed by Gov't Code § 552.125, provides for confidentiality of environmental or health and safety audits voluntarily performed by or for owner or operator of facility regulated under environmental or health and safety law).

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. Tex. R. Evid. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. Tex. R. Evid. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "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). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

The OAG states the Texas Commission on Environmental Quality transmitted the documents in Exhibit B to its attorney in the OAG's Environmental Protection Division for legal representation. Furthermore, the OAG states the communicated documents were intended

to be confidential, and the confidentiality of the transmission has been maintained. Because the transmission was made in furtherance of the OAG's rendition of legal services to its client, we find the OAG may withhold Exhibit B under section 552.107 of the Government Code.

Having considered all of the OAG's arguments, we next address BP's arguments for the remaining submitted information. BP claims some of the remaining submitted information is protected by the attorney-client privilege pursuant to Texas Rule of Evidence 503, the core work product privilege pursuant to Texas Rule of Civil Procedure 192.5, and section 552.125 of the Government Code.

Section 552.125 of the Government Code exempts from disclosure "[a]ny documents or information privileged under the Texas Environmental, Health, and Safety Audit Privilege Act." Gov't Code § 552.125. Section 5 of article 4447cc of the Texas Civil Statutes, the TEHSAP, provides in part:

(a) An audit report is privileged as provided in this section.

(b) Except as provided in Sections 6, 7, and 8 of this Act, any part of an audit report is privileged and is not admissible as evidence or subject to discovery in:

(1) a civil action, whether legal or equitable[.]

V.T.C.S. art. 4447cc, § 5(a)-(b). An audit report consists of, among other items, findings; recommendations; exhibits; and communications associated with an environmental or health and safety audit. *Id.* §§ 3(a)(1), (4). An "environmental or health and safety audit" is defined as a

systematic voluntary . . . assessment of compliance with environmental or health and safety law or any permit issued under those laws conducted by an owner or operator, [or] an employee of the owner or operator, . . . of:

(A) a regulated facility or operation; or

(B) an activity at a regulated facility or operation.

Id. § 3(a)(3). Section 8 of the TEHSAP provides, however, that the privilege "does not apply to . . . a document, communication, datum, or report or other information required by a regulatory agency to be collected, developed, maintained, or reported under a federal or state environmental or health and safety law[.]" *Id.* § 8(a)(1).

BP asserts some of its information is privileged under the TEHSAP and is therefore excepted from disclosure under section 552.125 of the Government Code. BP informs us it generated the information at issue as part of an environmental and health audit it performed at its Texas City refinery. Based on BP's representations and our review of the information at issue, we conclude the information is privileged under section 5 of the TEHSAP, and thus, the OAG must withhold it under section 552.125 of the Government Code.

BP asserts some of the information consists of privileged communications between its personnel and in-house counsel made in furtherance of the rendition of legal services, and they were intended to be confidential. Based on BP's representations, we find the communications are privileged attorney-client communications pursuant to Texas Rule of Evidence 503.

An attorney's core work product is confidential under Rule 192.5. 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). 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 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 National 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 contains 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). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

BP explains some of the information was prepared by its counsel or representatives of its counsel for past litigation and reflects the mental impressions and legal theories of its attorneys and their representatives. Based on these representations, we agree the information at issue is privileged core work product pursuant to Texas Rule of Civil Procedure 192.5.

However, because BP produced the information in discovery to the OAG, we must determine whether the privileges have been waived in this instance. *See* Tex. R. Evid. 511 (privilege waived if matter is voluntarily disclosed); *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 554 (Tex. 1990) (because privileged information was disclosed to Federal Bureau of Investigation, Internal Revenue Service, and *Wall Street Journal*, the attorney-client and work product privileges were waived); *In re Monsanto Co.*, 998 S.W.2d 917, 930 (Tex. App.—Waco 1999, orig. proceeding) (disclosure of information to third party waives attorney-client privilege); *Jordan v. Court of Appeals for Fourth Supreme Judicial Dist.*, 701 S.W.2d 644, 649 (Tex. 1985) (when communication is disclosed to third party, party asserting attorney-client privilege maintains burden of demonstrating that no waiver occurred); Open Records Decision No. 676 at 10-11 (where document has been voluntarily disclosed to opposing party, attorney-client privilege has generally been waived); V.T.C.S. art. 4447cc, § 6(a) (environmental or health and safety audit privilege does not apply to extent expressly waived by owner or operator who prepared or caused audit report to be prepared).

Here, BP contends it did not waive the privileges by inadvertently producing the information in response to discovery requests and relies on Texas Rule of Civil Procedure 193.3(d), which provides:

A party who produces material or information without intending to waive a claim of privilege does not waive that claim . . . if — within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made — the producing party amends the response, identifying the material or information produced and stating the privilege asserted.

Tex. R. Civ. P. 193.3(d). This provision “allows a party to assert a claim of privilege to material or information produced inadvertently without intending to waive the privilege.” *Id.* cmt. 4. Thus, an inadvertent disclosure does not automatically waive a claim of privilege. *In re Living Ctrs. of Tex., Inc.*, 175 S.W.3d 253, 260 (Tex. 2005). BP explains it took the requisite steps as provided in Rule 193.3(d) to assert its privileges for the identified information and requested the return of the inadvertently produced information. Accordingly, we conclude that, under Rule 193.3(d), BP did not waive its asserted privileges in this instance. Consequently, the remaining information BP identified under Rule 193.3(d) is protected by said privileges and the OAG must withhold the information.

In summary, the OAG may withhold Exhibit B under section 552.107 of the Government Code. The OAG must withhold the information subject to Texas Rule of Civil Procedure 193.3(d) under BP’s asserted privileges. The OAG must release the remainder.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



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Assistant Attorney General
Open Records Division

YHL/sdk

Ref: ID# 490076

Enc: Submitted documents

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(w/o enclosures)

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