ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 5, 2014

Mr. Gary B. Lawson
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OR2014-03751

Dear Mr. Lawson:

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# 514392 ("TMPC 11/19/2013 Request").

The Dallas Police & Fire Pension System (the "system"), which you represent, received a request for all documents held by the system pertaining to specified labor disputes, a specified class action lawsuit, and a specified jury trial. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.111, and 552.136 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.[1] We have considered the submitted arguments and reviewed the submitted information.

Initially, we note some of the submitted information consists of court-filed documents subject to section 552.022 of the Government Code. Section 552.022(a)(17) provides for the required public disclosure of "information that is also contained in a public court record," unless it is "made confidential under [the Act] or other law[.]" Gov't Code § 552.022(a)(17).

[1]Although you raise section 552.101 of the Government Code in conjunction with section 552.107 of the Government Code and the attorney-client privilege found in rule 503 of the Texas Rules of Evidence, this office has concluded section 552.101 does not encompass other exceptions found in the Act, nor does it encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Further, although you do not claim section 552.136 of the Government Code in your brief, we understand you to raise this section based on your markings.

Although you seek to withhold the information subject to section 552.022(a)(17) under sections 552.103, 552.107, and 552. 111 of the Government Code, these are discretionary exceptions and do not make information confidential under the Act. *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. 677 (2002) (governmental body may waive attorney work product privilege under section 552.111), 676 at 10-11 (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (governmental body may waive section 552.111). Thus, the system may not withhold the court-filed documents, which we have marked, under section 552.103, section 552.107, or section 552.111 of the Government Code. 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 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 for the information subject to section 552.022(a)(17). We will also consider your arguments against disclosure of the information not subject to section 552.022.

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:
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> > (A) between the client or a representative of the client and the cient'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 submitted court-filed documents are attachments to communications between system employees and attorneys representing the Texas Municipal Plans Consortium, L.L.C. (the "TMPC"), a private entity owned by the system for the purpose of "allowing municipal pension plans in the State of Texas to acquire an investment that itself would invest in farmland throughout the United States." We note some of the communications at issue are between system employees, counsel for the TMPC, and the Hancock Agricultural Investment Group (the "HAIG"), an entity the system contracted with to manage the TMPC. *See* TEX. R. EVID. 503(b)(1)(C) (discussing privilege among parties "concerning a matter of common interest"); *see also In re Auclair*, 961 F.2d 65, 69 (5th Cir. 1992) (citing *Hodges, Grant & Kaufmann v. United States Government*, 768 F.2d 719, 721 (5th Cir. 1985)) (attorney-client privilege not waived if privileged communication is shared with third person who has common legal interest with respect to subject matter of communication). You state the communications at issue were made for the purpose of the rendition of legal services to the system. You state the communications at issue have not been, and were not intended to be, disclosed to third parties. However, we note the court-filed documents have been seen by non-privileged parties, and these documents are separately responsive to the request. Accordingly, to the extent these non-privileged court-filed documents, which we have marked, exist separate and apart from the privileged e-mail communications to which they are attached, the system may not withhold them under rule 503 of the Texas Rules of Evidence. If the marked court-filed documents do not exist separate and apart from the privileged communications, the system may withhold them under rule 503 of the Texas Rules of Evidence.

To the extent the non-privileged court-filed documents exist separate and apart from the privileged communications, we will address your argument under Texas Rule of Civil Procedure 192.5 against their disclosure. 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).

Upon review, we find you have not demonstrated any of the information at issue reveals the 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. Further, as previously noted, the information at issue has been disclosed to non-privileged parties. We therefore conclude the system may not withhold any of the information at issue under rule 192.5 of the Texas Rules of Civil Procedure.

You claim section 552.107 of the Government Code for the information not subject to section 552.022. Section 552.107(1) protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107 are the same as those discussed for rule 503. 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. *See* ORD 676 at 6-7. 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).

As noted above, you inform us the information not subject to section 552.022 consists of privileged attorney-client communications between system employees, counsel for the TMPC, and the HAIG. *See* TEX. R. EVID. 503(b)(1)(C); *see also In re Auclair*, 961 F.2d at 69. You state the communications at issue were made for the purpose of the rendition of legal services to the system. You state the communications at issue have not been, and were not intended to be, disclosed to third parties. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the system may withhold the information not subject to section 552.022 of the Government Code under section 552.107(1) of the Government Code.[2]

In summary, the system may withhold the information subject to section 552.022(a)(17) of the Government Code we have marked pursuant to rule 503 of the Texas Rules of Evidence, if the marked information does not exist separate and apart from the otherwise privileged communications to which it is attached. If the marked information exists separate and apart from the otherwise privileged e-mail communications to which it is attached, the system must release the marked information. The system may withhold the remaining information under section 552.107(1) of the Government Code.

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,

Nicholas A. Ybarra
Assistant Attorney General
Open Records Division

NAY/ac

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[2]As our ruling is dispositive for this information, we need not consider your remaining arguments against disclosure.

Ref: ID# 514392

Enc. Submitted documents

c: Requestor
(w/o enclosures)