



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 13, 2014

Ms. Elaine Nicholson
Assistant City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-8828

OR2014-04268

Dear Ms. Nicholson:

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# 516676.

The City of Austin (the "city") received a request for all correspondence sent and received by the city related to a specified Equal Employment Opportunity Commission (the "EEOC") finding, all correspondence between the city fire department union and the city manager's office from 2013, and information related to specified law firms hired by the city. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.111 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rules of Civil Procedure 192.3 and 192.5. We have considered your arguments and reviewed the submitted representative sample information.¹

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

¹We 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) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

...

(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)(1), (16). The information submitted as Exhibit F consists of a completed report that is subject to subsection 552.022(a)(1). The city must release the completed report pursuant to subsection 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. *See id.* § 552.022(a)(1). The information submitted as Exhibit H consists of attorney fee bills, which must be released unless they are made confidential under the Act or other law. *See id.* § 552.022(a)(16). You seek to withhold the information subject to subsection 552.022(a)(1) under sections 552.103 and 552.111 of the Government Code. However, sections 552.103 and 552.111 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 Gov't Code § 552.103); *see also* Open Records Decision Nos. 677 (2002) (governmental body may waive attorney work product privilege under section 552.111), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the information subject to subsection 552.022(a)(1) may not be withheld under section 552.103 or section 552.111 of the Government Code. We note 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, the consulting expert privilege under rule 192.3, and the attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure. We will also address your remaining 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:

(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 portions of the fee bills you have marked in Exhibit H should be withheld under rule 503. You assert the fee bills include privileged attorney-client communications between the city's attorneys, outside counsel for the city, and city employees in their capacities as clients. You state the communications at issue were made for the purpose of the rendition of legal services to the city. You indicate the communications at issue have not been, and were not intended to be, disclosed to third parties. Based on your representations and our review of the information at issue, we find the city has established the information we have marked constitutes attorney-client communications under rule 503. Thus, the city may withhold the information we have marked within Exhibit H pursuant to rule 503 of the

Texas Rules of Evidence.² However, we find the remaining information you have marked in Exhibit H either reveals communications with individuals you have not demonstrated are privileged parties or does not document a communication for purposes of rule 503. Accordingly, the remaining information you have marked in Exhibit H may not be withheld on that basis.

The consulting expert privilege is found in rule 192.3 of the Texas Rules of Civil Procedure. A party to litigation is not required to disclose the identity, mental impressions, and opinions of consulting experts whose mental impressions or opinions have not been reviewed by a testifying expert. *See* TEX. R. CIV. P. 192.3(e). A “consulting expert” is defined as “an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert.” TEX. R. CIV. P. 192.7. You inform us the city contracted with a consulting expert for services in anticipation of and preparation for litigation pertaining to a hiring dispute involving the city’s fire department. Furthermore, you state this expert has been retained solely for consultation and will not testify at trial. Based on your representations, we conclude the city may withhold the information in Exhibit F in its entirety under Texas Rule of Civil Procedure 192.3(e).³

Rule 192.5 of the Texas Rules of Civil Procedure encompasses the attorney work product privilege. For purposes of section 552.022, information is confidential under rule 192.5 of the Texas Rules of Civil Procedure only to the extent the information implicates the core work product aspect of the work product privilege. ORD 677 at 9-10. 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 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 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

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

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(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 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, orig. proceeding).

You assert the remaining information you have marked in Exhibit H reveals the mental impressions, opinions, conclusions, or legal theories of outside counsel for the city. Upon review of your representations and the information at issue, we find the information we have marked consists of privileged core attorney work product the city may withhold under Texas Rule of Civil Procedure 192.5. However, we find the city has failed to establish any of the remaining information you have marked in Exhibit H constitutes privileged core attorney work product, and the city may not withhold it on the basis of rule 192.5 of the Texas Rules of Civil Procedure.

Section 552.103 of the Government Code provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov’t Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref’d

n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551.

To establish litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing the claim that litigation may ensue is more than mere conjecture." *See* Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* This office has found a pending complaint with the EEOC indicates litigation is reasonably anticipated. *See* Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982), 281 at 1 (1981).

You state, and provide documentation showing, on November 26, 2012, the city received a notice of charge of employment discrimination against the city's fire department with the EEOC. You also state on May 17, 2013, the Austin Firefighters' Association (the "AFA") sent a written demand to the city seeking payment of costs associated with the AFA's defense against a separate discrimination charge with the EEOC. You inform us after the city declined the AFA's request, the AFA demanded an arbitration of the dispute. You also provide documentation showing the Department of Justice (the "DOJ") has indicated its intent to sue the city as a result of a DOJ investigation into the city fire department's hiring practices. Based on your representations and our review, we find you have established litigation was reasonably anticipated on the date the city received the request for information. You also state the information at issue is related to the anticipated litigation. Based on your representation and our review, we agree the information at issue is related to the anticipated litigation.

Once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the potential opposing parties in the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. We note, and you acknowledge the information at issue has been seen by one of the potential opposing parties in the anticipated litigation. However, this information does not appear to have been seen by all potential opposing parties to the litigation. Therefore, the city may withhold the information in Exhibits D and E under section 552.103 of the Government Code.⁴ We note the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

You claim section 552.107 of the Government Code for the information submitted as Exhibit G. 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

⁴As our ruling is dispositive for this information, we need not consider your remaining argument against its disclosure.

of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). 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).

You inform us Exhibit G consists of communications between the city's attorneys, outside counsel for the city, and city employees in their capacities as clients, made for the purpose of the rendition of legal services to the city. You state the communications were intended to be confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information you have marked. Accordingly, the city may withhold Exhibit G under section 552.107(1) of the Government Code.

In summary, the city may withhold (1) the information we have marked in Exhibit H under rule 503 of the Texas Rules of Evidence; (2) Exhibit F under rule 192.3(e) of the Texas Rules of Civil Procedure; (3) the information we have marked in Exhibit H under rule 192.5 of the Texas Rules of Civil Procedure; (4) Exhibits D and E under section 552.103 of the Government Code; and (5) Exhibit G under section 552.107(1) of the Government Code. The city must release the remaining information.

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

Ref: ID# 516676

Enc. Submitted documents

c: Requestor
(w/o enclosures)