



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 14, 2014

Mr. David P. Lein
Graves, Dougherty, Hearon & Moody, P.C.
P.O. Box 98
Austin, Texas 78767-0098

OR2014-08163

Dear Mr. Lein:

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# 522580.

The Lost Pines Groundwater Conservation District (the "district"), which you represent, received a request for five categories of information related to the district's engagement of a named attorney, excluding certain permit applications.¹ You state the district has released some of the requested information. You claim some of the remaining requested information is excepted from disclosure under section 552.107 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.² We have considered your claims and reviewed the submitted representative sample of information.³

¹You state the district sought and received clarification of the request. See Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification or narrowing of unclear or overbroad request for information, ten-day period to request attorney general ruling is measured from date request is clarified or narrowed).

²We understand you to raise Texas Rule of Civil Procedure 192.5 based upon your assertion some of the information at issue is subject to the attorney work-product privilege.

³We 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.

We note the submitted information in Tab 2 consists of attorney fee bills which are subject to section 552.022(a)(16) of the Government Code. Section 552.022(a)(16) provides for required public disclosure of "information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege," unless the information is confidential under the Act or other law. Gov't Code § 552.022(a)(16). The Texas Supreme Court has held that 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). Accordingly, we will consider your assertion of the attorney-client privilege and the attorney work product privilege under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure, respectively, for the information subject to section 552.022(a)(16). Further, we will consider your arguments under section 552.107 of the Government Code for the information in Tab 1, which is 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 information you have highlighted in Tab 2 is protected by the attorney-client privilege. You state the information you have marked consists of privileged communications made in furtherance of professional legal services rendered to the district. You further 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 of the information at issue, we find the information we have marked under rule 503 constitutes attorney-client communications. Thus, the district may withhold the information we have marked in Tab 2 pursuant to rule 503 of the Texas Rules of Evidence.⁴ However, we find you have failed to demonstrate the applicability of the attorney-client privilege to the remaining information at issue, and the district may not withhold it under rule 503.

We next address Texas Rule of Civil Procedure 192.5 for the remaining highlighted information in Tab 2. 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* ORD 677 at 9-10. 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

⁴As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

(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 remaining highlighted information in Tab 2 contains 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 at issue 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 district may not withhold any of the remaining information under rule 192.5 of the Texas Rules of Civil Procedure.

You seek to withhold the information in Tab 1 pursuant to section 552.107 of the Government Code. 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 above 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).

You state the information in Tab 1 consists of communications involving attorneys for the district and district employees and officials in their capacities as clients. You also state these communications were made in furtherance of the rendition of professional legal services to the district. You further state these communications were confidential and the district has not waived the confidentiality of the information at issue. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information in Tab 1. Accordingly, the district may withhold the information in Tab 1 under section 552.107(1) of the Government Code.

To summarize: The district may withhold the information we have marked in Tab 2 pursuant to rule 503 of the Texas Rules of Evidence. The district also may withhold the information in Tab 1 under section 552.107(1) of the Government Code. The district 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 522580

Enc. Submitted documents

c: Requestor
(w/o enclosures)