



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 31, 2014

Ms. Rebecca E. Quinn
Assistant County Attorney
El Paso County
500 East San Antonio, Room 503
El Paso, Texas 79901

OR2014-13300

Dear Ms. Quinn:

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# 531189 (CA-OP-14-0235).

The El Paso County Attorney's Office (the "county attorney's office") received a request for all communications that relate to unpaid judgments from a named bail bond company during a specified time period, as well as any other similar information. You state some of the responsive information has been released to the requestor. You claim the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code and privileged under rule 192.5 of the Texas Rules of Civil Procedure.¹ We have considered your arguments and reviewed the submitted information.

Initially, we note the submitted information contains fingerprints. The public availability of fingerprints is governed by sections 560.001, 560.002, and 560.003 of the Government Code. Section 560.003 of the Government Code provides, "[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act]." Gov't Code § 560.003; *see id.* § 560.001(1) ("biometric identifier" means retina or iris scan, fingerprint,

¹Although you raise section 552.101 of the Government Code in conjunction with section 552.111, this office has concluded section 552.101 does not encompass other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Therefore, we do not address your argument under section 552.101.

voiceprint, or record of hand or face geometry). Section 560.002 of the Government Code provides, however, “[a] governmental body that possesses a biometric identifier of an individual . . . may not sell, lease, or otherwise disclose the biometric identifier to another person unless . . . the individual consents to the disclosure[.]” *Id.* § 560.002(1)(A). The requestor is an attorney for the individual whose fingerprints are at issue. Thus, the requestor has a right of access to his client’s fingerprints under section 560.002(1)(A). The general exceptions found in the Act, such as sections 552.107 and 552.111 of the Government Code, cannot impinge on a statutory right of access to information. *See* Open Records Decision Nos. 613 at 4 (1993), 451 at 4 (1986). Therefore, the county attorney’s office must release the requestor’s client’s fingerprints pursuant to section 560.002 of the Government Code.

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

(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:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov’t Code § 552.022(a)(3). The submitted information contains receipts and checks relating to the receipt of public funds by a governmental body that is subject to section 552.022(a)(3), which must be released unless it is made confidential under the Act or other law. *See id.* You seek to withhold this information under section 552.107 of the Government Code. You also seek to withhold some of this information under rule 192.5 of the Texas Rules of Civil Procedure. Section 552.107, however, is a discretionary exception and does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov’t Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the information subject to section 552.022 may not be withheld under section 552.107. However, the Texas Supreme Court has held the Texas Rules of Evidence and the 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 address your claim 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 that is subject to section 552.022(a)(3). We will also address your arguments against disclosure for 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 information that is subject to section 552.022(a)(3) of the Government Code, which we have marked, should be withheld under rule 503 of the Texas Rules of Evidence. You assert the information at issue consists of attachments to a privileged attorney-client communication between assistant county attorneys, county employees, and a county board

official that was made for the purpose of providing legal services to the County of El Paso (the “county”). You state the communication at issue was made for the purpose of the rendition of legal services to the county. You also state the communication at issue has not been, and was 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 communication at issue. We note, however, the privileged communication includes attachments received from or sent to individuals you have not demonstrated are privileged parties. Furthermore, these attachments are separately responsive to the request. Therefore, to the extent these attachments exist separate and apart from the otherwise privileged communication to which they are attached, the county attorney’s office may not withhold them under rule 503 of the Texas Rules of Evidence. If these attachments do not exist separate and apart from the privileged communication to which they are attached, the county attorney’s office may withhold them under rule 503 of the Texas Rules of Evidence.

Rule 192.5 of the Texas Rules of Civil Procedure 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. 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 privileged 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, 425 (Tex. App.—Houston [14th Dist.] 1993, no writ).

Upon review, we find you have failed to demonstrate the 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. Accordingly, the county attorney's office may not withhold any of the attachments at issue under rule 192.5 of the Texas Rules of Civil Procedure.

We now turn to your arguments against disclosure of the information not subject to section 552.022(a)(3) of the Government Code. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov't Code § 552.107(1). The elements of the privilege under section 552.107(1) are the same as those discussed above in 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. ORD 676 at 6-7. Section 552.107(1) generally excepts an entire communication that a governmental body has demonstrated as being 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 Attachment B consists of communications between assistant county attorneys, county employees, and a county board official that were made for the purpose of providing legal services to the county. Further, you state these communications were intended to be confidential and have remained confidential. Based on your representations and our review of the information at issue, we find you have demonstrated the applicability of the attorney-client privilege to the information we have marked. Thus, the county attorney's office may generally withhold the information we have marked under section 552.107(1) of the Government Code. We note, however, one of the privileged communications include attachments received from or sent to individuals you have not demonstrated are privileged parties. If these attachments are removed from the communication and stand alone, they are responsive to the request for information. Therefore, if the non-privileged attachments we have marked are maintained by the county attorney's office separate and apart from the otherwise privileged communication in which they appear, then the county attorney's office may not withhold these non-privileged attachments under section 552.107(1) of the Government Code.

You claim the attorney work product privilege of section 552.111 of the Government Code for the non-privileged attachments in Attachment B and the information in Attachment C. Section 552.111 excepts from disclosure "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]" *See* Gov't Code § 552.111. This section encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as:

(1) [M]aterial prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD 677 at 6-8. The test to determine whether information was created or developed in anticipation of litigation is the same as that discussed above concerning rule 192.5.

You state the information in Attachment C was "created after the [c]ounty decided to exercise its rights under a specific Deed of Trust and proceed with foreclosure of the property at issue[.] You explain Attachment C consists of communications between employees of the county attorney's office regarding the status of litigation involving the foreclosure of the specified property. You further explain Attachment C includes communications between the county attorney's office and its insurer of the property. You state the information at issue reveals the mental impressions, opinions, conclusions, and legal theories of the county attorney's office and its representatives. Based on these representations and our review, we conclude the county attorney's office may withhold Attachment C as attorney work product under section 552.111 of the Government Code.

Furthermore, to the extent the non-privileged attachments in Exhibit B exist separate and apart from the otherwise privileged communication, you contend they consist of attorney work product. However, as previously noted, this information was sent to or received from third parties you have not demonstrated are privileged. Therefore, because non-privileged parties have had access to this information, the work product privilege under section 552.111 has been waived. Accordingly, the county attorney's office may not withhold any of the non-privileged attachments in Exhibit B under the work product privilege of section 552.111 of the Government Code.

To the extent the non-privileged attachments in Attachment B exist separate and apart from the otherwise privileged communication, we note some of this information is subject to sections 552.101, 552.130 and 552.136 of the Government Code.² Section 552.101 of the

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has also found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. *See generally* Open Records Decision Nos. 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the county attorney’s office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator’s or driver’s license issued by an agency of this state or another state or country is excepted from public release. *See* Gov’t Code § 552.130. However, we note section 552.130 protects personal privacy. Thus, the requestor has a special right of access to his client’s driver’s license information. *See id.* § 552.023(a) (person or a person’s authorized representative has special right of access, beyond the right of general public, to information held by a governmental body that relates to person and is protected from public disclosure by laws intended to protect person’s privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Accordingly, the county attorney’s office must withhold the information we have marked, which pertains to individuals other than the requestor’s client, under section 552.130 of the Government Code.

Section 552.136 of the Government Code provides “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b). An access device number is one that may be used to (1) obtain money, goods, services, or another thing of value, or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument, and includes an account number. *See id.* § 552.136(a) (defining “access device”). Accordingly, the county attorney’s office must

withhold the insurance policy number we have marked under section 552.136 of the Government Code.³

In summary, the county attorney's office must release the marked fingerprints pursuant to section 560.002 of the Government Code. To the extent the attachments marked under section 552.022(a)(3) of the Government Code do not exist separate and apart from the privileged communication to which they are attached, the county attorney's office may withhold them under rule 503 of the Texas Rules of Evidence; otherwise, the county attorney's office must release these attachments. The county attorney's office may generally withhold the information we have marked under section 552.107(1) of the Government Code; however, if the non-privileged attachments we have marked are maintained by the county attorney's office separate and apart from the otherwise privileged communication in which they appear, then the county attorney's office may not withhold these non-privileged attachments under section 552.107(1) of the Government Code. The county attorney's office may withhold Attachment C as attorney work product under section 552.111 of the Government Code. To the extent the non-privileged attachments we have marked in Attachment B exist separate and apart from the otherwise privileged communication, then the county attorney's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and sections 552.130 and 552.136 of the Government Code. The county attorney's office must release the remaining information.⁴

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.

³Section 552.136(c) authorizes a governmental body to redact information protected by section 552.136(b) without requesting a decision. *See* Gov't Code § 552.136(d)-(e) (providing requestor may appeal governmental body's decision to withhold information under section 552.136(c) to attorney general, and governmental body withholding information pursuant to section 552.136(c) must provide notice to requestor).

⁴We note the requestor has a right of access to some of the information being released. Thus, if the county attorney's office receives another request for this information from a different requestor, the county attorney's office must seek another ruling from this office. However, the county attorney's office is authorized to redact the requestor's client's driver's license information under section 552.130(c) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). We also note the information being released contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. However, the information contains the requestor's client's social security number, which may not be withheld in this instance. *See id.* § 552.023(a) (person or person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person's privacy interests). Therefore, with the exception of the requestor's client's social security number, the county attorney's office may withhold the remaining social security numbers under section 552.147(b) of the Government Code.

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,

A handwritten signature in cursive script that reads "Tamara H. Holland". The signature is written in black ink and is positioned above the typed name.

Tamara H. Holland
Assistant Attorney General
Open Records Division

THH/ac

Ref: ID# 531189

Enc. Submitted documents

c: Requestor
(w/o enclosures)