KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 10, 2015

Mr. Jerry E. Drake, Jr.
First Assistant City Attorney
City Attorney's Office
215 East McKinney
Denton, Texas 76201

OR2015-16503

Dear Mr. Drake:

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# 574770.

The City of Denton (the "city") received a request for all service agreements and invoices from attorneys and consultants who worked on specified topics. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5.[1] We have considered the submitted arguments and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released).

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

[1]Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

> (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 [and]
>
> . . .
>
> (16) information that is in a bill for attorney's fees and that is not privileged under the attorney client privilege[.]

Id. § 552.022(a)(3), (16). The submitted information consists of information in an account, voucher, or contract that is subject to section 552.022(a)(3) and attorney-fee bills that are subject to section 552.022(a)(16). This information must be released unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(3), (16). Although you raise section 552.107 of the Government Code for this information, this exception is discretionary in nature and does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (governmental body may waive attorney-client privilege under section 552.107(1)), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the district may not withhold any of the submitted information 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" that make information expressly confidential for the purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your arguments under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5.

Rule 503(b)(1) provides:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:
>
> (A) between the client or the client's representative and the client's lawyer or the lawyer's representative;
>
> (B) between the client's lawyer and the lawyer's representative;

> (C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;
>
> (D) between the client's representatives or between the client and the client's representative; or
>
> (E) among lawyers and their representatives representing the same client.

Tex. R. Evid. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made to further the rendition of professional legal services to the client or reasonably necessary to transmit the communication. *Id.* 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must 1) show that 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 that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. *See* Open Records Decision No. 676 (2002). Upon a demonstration of all three factors, the entire communication is confidential under Rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

You contend the attorney-client privilege is applicable to the entirety of the information in the submitted attorney fee bills. However, section 552.022(a)(16) provides information "that is *in* a bill for attorney's fees" is not excepted from disclosure unless the information is confidential under the Act or other law or protected by the attorney-client privilege. *See* Gov't Code § 552.022(a)(16) (emphasis added). Thus, by its express language, section 552.022(a)(16) does not permit an attorney fee bill to be withheld in its entirety. *See also* Open Records Decisions Nos. 676 (attorney fee bill cannot be withheld in its entirety on basis it contains or is attorney-client communication pursuant to language in section 552.022(a)(16)), 589 (1991) (information in attorney fee bill is excepted only to extent it reveals client confidences or attorney's legal advice). Accordingly, the city may not withhold the entirety of the submitted fee bills under rule 503. You assert the submitted fee bills include privileged attorney-client communications. You state the submitted information

consists of communications between city attorneys, city employees, outside counsel for the city, and the city's consulting experts that were made for the purpose of facilitating the rendition of professional legal services to the city. You state the communications were intended to be, and have remained, confidential. Having considered your representations and reviewed the information at issue, we find you have established some of the information, which we have marked, constitutes privileged attorney-client communications the city may withhold under rule 503 of the Texas Rules of Evidence.[2] However, we find you have failed to demonstrate the remaining information you marked consists of privileged attorney client communications. We note an entry stating a memorandum or an email was prepared or drafted does not demonstrate the document was communicated to the client. Accordingly, no portion of the remaining information at issue may be withheld under rule 503, and it must be released.

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* 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

---

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

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, orig. proceeding).

You assert the remaining information is core work product under Texas Rule of Procedure 192.5. However, upon review, we find the city has failed to establish any of the remaining information constitutes privileged core attorney work product. Therefore, the city may not withhold any of the remaining information on the basis of rule 192.5 of the Texas Rules of Civil Procedure.

In summary, the city may withhold the information we have marked under Texas Rule of Evidence 503. 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,

Meredith L. Coffman
Assistant Attorney General
Open Records Division

MLC/dls

Ref: ID# 574770

Enc. Submitted documents

c: Requestor
(w/o enclosures)