



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 15, 2015

Mr. Tommy Watson
Chief Appraiser
Galveston Central Appraisal District
9850 Emmett F. Lowry Expressway, Suite A
Texas City, Texas 77591

OR2015-19154

Dear Mr. Watson:

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# 577453.

The Galveston Central Appraisal District (the "district") received a request for forty-six categories of information pertaining to the district's 2014 and 2015 budgets, including information pertaining to consulting services and legal services paid for under the 2014 and 2015 budgets. You state the district does not have information responsive to portions of the request.¹ You state the district has made some of the requested information available to the requestor. You claim portions of the submitted information are excepted from disclosure under sections 552.104, 552.107, and 552.111 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the submitted information.

Exhibit B consists of attorney fee bills for two law firms. We note some of the attorney fee bills for one law firm were the subject of a previous request for information, as a result which this office issued Open Records Letter No. 2015-01925 (2015). In Open Records Letter No. 2015-01925 we determined the district may withhold certain information within these

¹The Act does not require a governmental body to release information that did not exist when it received a request, create responsive information, or obtain information that is not held by the governmental body or on its behalf. See *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

attorney fee bills under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5 and must release the remaining portions of the attorney fee bills. As we have no indication the law, facts, and circumstances on which Open Records Letter No. 2015-01925 was based have changed with respect to this information, the district may continue to rely on that ruling as a previous determination and withhold or release the identical attorney fee bills, which we have marked, in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we note some of the attorney fee bills in Exhibit B for the other law firm may have also been the subject of the request for information in Open Records Letter No. 2015-01925. With respect to these attorney fee bills, in Open Records Letter No. 2015-01925, we determined the district may withhold certain information within the attorney fee bills at issue under Texas Rule of Evidence 503 and must release the remaining portions of the attorney fee bills. You now raise sections 552.107 and 552.111 of the Government Code and Texas Rule of Civil Procedure 192.5 for portions of this information. Section 552.007 of the Government Code, however, provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See* Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the district may not now withhold the previously released information unless its release is expressly prohibited by law or the information is confidential under law. Although you now raise sections 552.107 and 552.111 and rule 192.5 for the information at issue, these exceptions and this rule do not prohibit the release of information or make information confidential. *See* Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 and rule 192.5 may be waived), 676 at 10-11 (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the district may not now withhold information we previously ruled must be released under section 552.107, section 552.111, or rule 192.5. We have no indication the law, facts, and circumstances on which Open Records Letter No. 2015-01925 was based have changed with respect to this information. *See* ORD 673. Accordingly, to the extent the attorney fee bills we have marked are identical to the attorney fee bills previously requested and ruled upon by this office in Open Records Letter No. 2015-01925, the district may continue to rely on that ruling as a previous determination and withhold or release the identical information in accordance with that ruling. *See id.* The remaining submitted information was not at issue in the previous ruling; thus, we will address your arguments against disclosure of this information.

Next, we note Exhibit B consists of attorney fee bills that are subject to section 552.022 of the Government Code. Section 552.022(a)(16) provides for the 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 it is “made confidential under [the Act] or other law[.]” Gov’t Code § 552.022(a)(16). These attorney fee bills must be released unless they are confidential under the Act or other law. Although you assert this information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code, these sections are discretionary and do not make information confidential under the Act. *See* ORDs 677 at 10, 676 at 6; *see also* ORD 665 at 2 n.5. Therefore, the district may not withhold the remaining information in Exhibit B under section 552.107 or section 552.111. 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. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will address your arguments under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5 for the remaining information at issue in Exhibit B.

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 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).

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. 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 id.* 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

You assert the portions of the submitted fee bills you have highlighted and marked are privileged under rule 503. You assert the information at issue documents privileged attorney-client communications between attorneys and outside counsel for the district, consultants hired by the district, and district employees and board members in their capacities as clients. You state the communications at issue were made for the purpose of the rendition of legal services to the district. Further, you state the communications at issue have not been, and were not intended to be, disclosed to third parties. However, you have failed to identify all of the parties to the communications at issue. *See* ORD 676 at 8 (governmental body must inform this office of identities and capacities of individuals to whom each communication at issue has been made; this office cannot necessarily assume that communication was made among only categories of individuals identified in rule 503); *see generally* Gov't Code § 552.301(e)(1)(A). Nevertheless, upon review, we are able to discern from the face of the documents that certain individuals are privileged parties. Based on your representations and our review of the information at issue, we find the district has established most of the information you highlighted and marked constitutes attorney-client communications under rule 503. Thus, the district may withhold this information, which we have indicated, under rule 503.² However, the remaining information at issue either does not document a communication or reflects communications with individuals you have not demonstrated are privileged. We note an entry stating a memorandum, letter, or e-mail was prepared or drafted does not demonstrate the document was communicated to the client. Therefore, we find you have failed to demonstrate how the remaining information at issue consists of privileged attorney-client communications, and the district may not withhold the remaining information at issue under rule 503.

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

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

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.*, 861 S.W.2d at 425.

You claim the information you have marked in Exhibit B consists of attorney core work product. You explain the information at issue pertains to the representation of the district in lawsuits filed by property owners contesting the appraised value of their property or in "other anticipated litigation or adversarial matters." You state the information at issue reflects the attorneys' mental impressions, opinions, conclusions, or legal theories. Having considered your representations and reviewed the information at issue, we find you have demonstrated some of this information constitutes core work product under rule 192.5. Thus, the district may withhold the information we have indicated under rule 192.5. However, we find you have failed to demonstrate how the remaining information at issue consists of mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative created for trial or in anticipation of litigation. Accordingly, we conclude the district may not withhold the remaining information at issue under rule 192.5.

Section 552.104(a) of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The "test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage." *Boeing Co. v. Paxton*, No. 12-1007, 2015 WL 3854264, at *9 (Tex. June 19, 2015). You represent the information you have marked in Exhibits C and D pertains to a competitive bidding situation. In addition, you state the release of the information at issue would harm

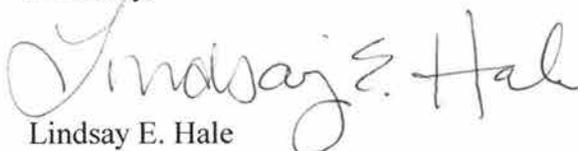
the district in future bids and agreements for consulting services because the bids would be based upon the past agreements and not upon market values. After review of the information at issue and consideration of the arguments, we find the district has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the district may withhold the information you have marked in Exhibits C and D under section 552.104(a).

In summary, to the extent the attorney fee bills we have marked in Exhibit B are identical to the attorney fee bills previously requested and ruled upon by this office in Open Records Letter No. 2015-01925, the district may continue to rely on that ruling as a previous determination and withhold or release the information in accordance with that ruling. The district may withhold the information we have indicated under Texas Rule of Evidence 503. The district may withhold the information we have indicated under Texas Rule of Civil Procedure 192.5. The district may withhold the information you have marked in Exhibits C and D under section 552.104(a) 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,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/bhf

Ref: ID# 577453

Enc. Submitted documents

c: Requestor
(w/o enclosures)