



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

April 12 2016

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OR2016-08105

Dear Ms. Albright:

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# 605506.

The Chambers-Liberty Counties Navigation District (the "district"), which you represent, received a request for (1) a specified audio tape; (2) all e-mails sent or received by any member of the district's board or two named individuals regarding Sustainable Texas Oyster Resource Management ("STORM") or oysters during a specified period of time; and (3) information pertaining to legal bills, reimbursements, and repayments for STORM-related matters. You state the district has released some of the requested information. You claim some of the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.136 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we note you have marked some of the submitted information as not responsive to the instant request for information. This ruling does not address the public availability of any

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<sup>1</sup>We 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.

information that is not responsive to the request and the district is not required to release such information in response to this request.

Next, we note the responsive information includes agendas of public meetings. The agenda of a governmental body's public meetings is specifically made public under the Open Meetings Act, chapter 551 of the Government Code. *See* Gov't Code §§ 551.041 (governmental body shall give written notice of date, hour, place, and subject of each meeting), .053-.054 (district governing bodies required to post notice of meeting at a place convenient to the public in administrative office of district). As a general rule, the exceptions to disclosure found in the Act do not apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the agendas of the public meetings, which we have marked, must be released pursuant to section 551.041 of the Government Code.

Next, we note some of the remaining responsive 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;

...

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

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(3), (16)-(17). The remaining responsive information contains information in accounts, contracts, invoices, purchase orders, and receipts that are subject to section 552.022(a)(3), attorney fee bills that are subject to section 552.022(a)(16), and court-filed documents that are subject to section 552.022(a)(17), which must be released unless they are made confidential under the Act or other law. *See id.* You seek to withhold this information under sections 552.103 and 552.107 of the Government Code. However, sections 552.103 and 552.107 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

section 552.103); *see also* 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 at issue, which we have marked, may not be withheld under section 552.103 or section 552.107 of the Government Code. We note you seek to withhold portions of the information at issue under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure. 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 and the attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure. Further, as sections 552.117 and 552.136 of the Government Code can make information confidential, we will address the applicability of these sections to the information at issue.<sup>2</sup> Further, we will consider your arguments against disclosure for the information not subject to section 552.022.

Texas Rule of Evidence 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.

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

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, orig. proceeding).

You assert some of the information subject to section 552.022 of the Government Code must be withheld under rule 503. You inform us the information at issue was communicated between outside counsel for the district and employees of the district in their capacities as clients and client representatives. You explain the information was created in furtherance of the rendition of professional legal services to the district. You state the information at issue was intended to be confidential, and you inform us confidentiality has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to some of the information at issue. Accordingly, the district may withhold the information we have marked under rule 503 of the Texas Rules of Evidence.<sup>3</sup> However, we find you have failed to demonstrate the remaining information you have marked in the fee bills at issue 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. Thus, we find you have failed to demonstrate the remaining information at issue was communicated and it does not reveal a client confidence. Accordingly, no portion of the remainder of the fee bills at issue may be withheld under rule 503.

We next address Texas Rule of Civil Procedure 192.5 for the remaining information you have marked in the attorney fee bills. 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 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

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<sup>3</sup>As our ruling is dispositive, we need not consider your remaining argument against disclosure of this information.

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 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 claim the remaining information you have marked in the attorney fee bills consists of attorney core work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. You state this information was created in anticipation of litigation. You further state this information reflects attorneys' legal positions, strategies, or other advice. Upon review, we find you have not demonstrated any of the remaining information at issue contains the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative that were developed in anticipation of litigation or for trial. We therefore conclude the district may not withhold the remaining information at issue under rule 192.5 of the Texas Rules of Civil Procedure.

Section 552.103 of the Government Code provides, in relevant part:

- (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). The governmental body claiming section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) litigation was pending or reasonably anticipated on the date of its receipt of 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 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

You state, and provide documentation showing, prior to the district's receipt of the instant request, a lawsuit styled *State of Texas v. Chambers-Liberty Counties Navigation District*, Cause No. -1-GN-003093, was filed and is currently pending against the district in the Third Court of Appeals. Therefore, we agree litigation was pending on the date the district received the present request for information. You also state the information at issue pertains to the substance of the lawsuit claims. Based on your representations and our review, we find the information at issue is related to the pending litigation. Therefore, we conclude the district may generally withhold the remaining responsive information that is not subject to section 552.022 under section 552.103 of the Government Code.

We note, however, it appears the opposing party has seen or had access to some of the information at issue. The purpose of section 552.103 of the Government Code is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5. Thus, once the opposing party in pending litigation has seen or had access to information that is related to the litigation, there is no interest in withholding such information from public disclosure under section 552.103.<sup>4</sup> *See* Open Records Decision Nos. 49 (1982), 320 (1982). Accordingly, we find the district may not withhold the information we have marked for release under section 552.103. However, the district may withhold the remaining responsive information that is not subject to section 552.022 under section 552.103 of the Government Code. We note the applicability of section 52.103 ends once the litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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<sup>4</sup>As our ruling is dispositive, we need not consider your remaining arguments against disclosure of this information.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 52.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Therefore, if the individual whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. Conversely, if the individual at issue did not timely request confidentiality under section 552.024, the district may not withhold the marked information under section 52.117(a)(1).

Section 552.136 of the Government Code provides, “[n]otwithstanding any other provision of [the Act], 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); *see id.* § 52.136(a) (defining “access device”). Accordingly, the district must withhold the information we have marked under section 52.136 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 52.137(a)-(c). The e-mail address at issue is not excluded by subsection (c). Therefore, the district must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.

In summary, the district must release the agendas of the public meetings, which we have marked, pursuant to section 51.041 of the Government Code. The district may withhold the information we have marked under Texas Rule of Evidence 503. With the exception of the information seen by the opposing party to the pending litigation, which we have marked, the district may withhold the remaining responsive information that is not subject to section 552.022 of the Government Code under section 552.103 of the Government Code. The district must withhold the information we have marked under section 552.117(a)(1) of the Government Code if the individual whose information is at issue timely requested confidentiality under section 552.024 of the Government Code. The district must withhold the information we have marked under section 552.136 of the Government Code. The

district must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner consents to its public disclosure. The district must release the remaining responsive 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](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/bw

Ref: ID# 605506

Enc. Submitted documents

c: Requestor  
(w/o enclosures)