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ATTORNEY GENERAL OF TEXAS

September 22, 2016

Mr. Shan Rutherford
Counsel for the City of Bastrop
Law Offices of JC Brown, P.C.
1411 West Avenue, Suite 100
Austin, Texas 78701

OR2016-21412

Dear Mr. Rutherford:

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# 627291.

The City of Bastrop (the "city"), which you represent, received a request for e-mails and communications between named individuals and documents pertaining to groundwater and a specified property. You state you have released some information. You claim the submitted information is excepted from disclosure under sections 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 representative sample of information.¹

¹This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Initially, we note some 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:

...

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

Gov't Code § 552.022(a)(17). The submitted information contains a document signed by a judge that is subject to section 552.022(a)(17). Thus, the information at issue must be released unless it is made confidential under the Act or other law. *See id.* You seek to withhold the information at issue under sections 552.107 and 552.111 of the Government Code. However, these sections are discretionary exceptions and do not make information confidential under the Act. *See Open Records Decision Nos. 677 (2002) (governmental body may waive attorney work product privilege under section 552.111), 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).* Thus, the information subject to section 552.022 may not be withheld under section 552.107 or section 552.111 of the Government Code. However, we note 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 work product privilege under rule 192.5 of the Texas Rules of Civil Procedure for the information subject to section 552.022(a)(17). We will also consider your arguments against disclosure of 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 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 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).

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. 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).

The information subject to section 552.022(a)(17) consists of an attachment to an e-mail communication between city attorneys and city staff in their capacity as clients that was made for the purpose of providing legal services to the city. You state the communication was intended to be confidential and has remained confidential. However, we note the attachment has been seen by non-privileged parties, and if it is removed from the e-mail and stands alone, it is responsive to the request for information. Therefore, if this non-privileged attachment, which we have marked, is maintained by the city separate and apart from the otherwise privileged e-mail to which it is attached, then the city may not withhold the attachment under Texas Rule of Evidence 503. If the attachment subject to section 552.022 we have marked does not exist separate and apart from the e-mail to which it is attached, the city may withhold it under rule 503.

To the extent the non-privileged attachment is maintained separate and apart from the other privileged e-mails, the city also argues Texas Rule of Civil Procedure 192.5, which 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 that there was a substantial chance that litigation would ensue, and (2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See Nat'l Tank Co. 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 that 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 contend the information subject to section 552.022 of the Government Code contains attorney core work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. However, as previously noted, the information at issue has been disclosed to non-privileged parties. Therefore, the work product privilege has been waived for this information and the city may not withhold any of the information subject to section 552.022 under rule 192.5.

You claim section 552.107 of the Government Code for the submitted information not subject to section 552.022. Section 552.107(1) 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 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. 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 communications at issue were made for purposes of seeking and rendering legal advice to the city, were intended to remain confidential, and have not been disclosed to non-privileged parties. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the city may generally withhold the information at issue under section 552.107(1) of the Government Code.² We note, however, one of these e-mail strings includes an attachment sent to an individual you have not demonstrated is a privileged party. Furthermore, if the attachment sent to the non-privileged party is removed from the e-mail string and stands alone, it is responsive to the request for information. Therefore, if this non-privileged attachment, which we marked, is maintained by the city separate and apart from the otherwise privileged e-mail to which it is attached, then the city may not withhold this non-privileged attachment under section 552.107(1).

To the extent the non-privileged attachment exists separate and apart, we will address your attorney work product claim under section 552.111 of the Government Code. Section 552.111 also 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); ORD 677 at 4-8. As noted above, rule 192.5 defines work product and 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. TEX. R. CIV. P. 192.5(a); 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.

To the extent the non-privileged attachment exists separate and apart from the otherwise privileged e-mail string, you contend it consists of attorney work product. However, as previously noted, the information at issue consists of information that was sent to a third party you have not demonstrated is a privileged party. Therefore, because a non-privileged party has had access to this information, the work product privilege under section 552.111 has been waived. Accordingly, the city may not withhold any of the information at issue under the work product privilege of section 552.111 of the Government Code.

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

In summary, if the attachment subject to section 552.022 of the Government Code, which we have marked, does not exist separate and apart from the otherwise privileged e-mail to which it is attached, the city may withhold it under Texas Rule of Evidence 503; however if this attachment does exist separate and apart from the otherwise privileged e-mail to which it is attached, then it must be released. The city may generally withhold the information not subject to section 552.022 of the Government Code under section 552.107(1) of the Government Code; however, if attachment we marked is maintained by the city separate and apart from the otherwise privileged e-mail string to which it is attached, the city must release this marked attachment.

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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/som

Ref: ID# 627291

Enc. Submitted documents

c: Requestor
(w/o enclosures)