



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 17, 2017

Ms. Jacqueline E. Hojem
Public Information Coordinator
Metropolitan Transit Authority of Harris County
P. O. Box 61429
Houston, Texas 77208-1429

OR2017-08048

Dear Ms. Hojem:

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# 653496 (MTA No. 2017-0156).

The Metropolitan Transit Authority of Harris County (the "authority") received a request for information pertaining to a specified lawsuit involving the authority. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107(2) of the Government Code and privileged under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure. We have considered the submitted arguments and reviewed the submitted representative sample of information.¹ We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

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:

¹We 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.

(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 that is not privileged under the attorney-client privilege; [and]

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

Id. § 552.022(a)(3), (16), (17). The submitted information includes executed contracts relating to the expenditure of public funds 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). This information, which we marked, must be released unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(3), (16), (17). You seek to withhold the information subject to section 552.022 under section 552.107(2) of the Government Code. Section 552.107(2) allows a governmental body to withhold information if “a court by order has prohibited disclosure of the information.” *Id.* § 552.107(2). You state a court ruled the requestor’s clients “are not entitled to the information being requested under the [Act.]” However, section 552.022(b) provides that a court may not order a governmental body to withhold from public inspection any category of information described by section (a) unless the category of information is expressly made confidential under the Act or other law. *Id.* § 552.022(b). Because section 552.022(b) prohibits a court from ordering the withholding of documents subject to section 552.022, we conclude the authority may not withhold the information subject to section 552.022 under section 552.107(2). Furthermore, although you assert the information subject to section 552.022 is excepted from disclosure under section 552.103 of the Government Code, section 552.103 is a discretionary exception and does 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 No. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the authority may not withhold the information subject to section 552.022 under section 552.103. However, 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). Therefore, we will consider your arguments under rule 503 of the Texas Rules of Evidence

and rule 192.5 of the Texas Rules of Civil Procedure for the information subject to section 552.022 of the Government Code. We will also consider your arguments 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.

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 rule 503 for the information subject to sections 552.022(a)(3) and 552.022(a)(16). You state the information at issue consists of privileged attorney-client communications between the authority's outside counsel and authority employees. You state the communications at issue were made for the purpose of the rendition of legal services to the authority. You indicate the communications at issue have not been, and were not intended to be, disclosed to third parties. Based on your representations and our review of the information at issue, we find the authority has established the information subject to section 552.022(a)(3) and the information we have marked within the submitted attorney fee bills constitute attorney-client communications under rule 503. Thus, the authority may withhold the information subject to section 552.022(a)(3) of the Government Code and the information we have marked within the submitted attorney fee bills under rule 503 of the Texas Rules of Evidence.² Upon review, however, we find you have failed to establish the remaining information subject to section 552.022(a)(16) consists of privileged attorney-client communications. Therefore, the remaining information subject to section 552.022(a)(16) may not be withheld under rule 503 of the Texas Rules of Evidence.

You also assert rule 503 for the information subject to section 552.022(a)(17). One of the documents subject to section 552.022(a)(17) of the Government Code consists of an attachment to an e-mail communication between an attorney for the authority and an authority employee. You state the e-mail communication at issue was made for the purpose of the rendition of legal services to the authority, and you indicate the e-mail communication at issue has not been, and was not intended to be, disclosed to third parties. However, we note this attachment was shared with non-privileged parties. Further, if this attachment 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 marked, is maintained by the authority separate and apart from the otherwise privileged e-mail to which it is attached, then the authority may not withhold this attachment under rule 503 of the Texas Rules of Evidence. If the attachment we marked does not exist separate and apart from the e-mail to which it is attached, the authority may withhold it under rule 503 of the Texas Rules of Evidence. Upon review, however, we find you have failed to establish the remaining information subject to section 552.022(a)(17) consists of privileged attorney-client communications. Therefore, the remaining information subject to section 552.022(a)(17) may not be withheld under rule 503 of the Texas Rules of Evidence.

You claim the remaining information subject to section 552.022 consists of attorney core work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. 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

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

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 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, no writ).

Upon review, we find you have failed to demonstrate any of the 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 authority may not withhold the remaining information subject to section 552.022 under Texas Rule of Civil Procedure 192.5.

You raise section 552.103 of the Government Code for the information not subject to section 552.022 of the Government Code. Section 552.103 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 authority's receipt of the instant request, a lawsuit styled *In re Rucker Law Firm, PLLC and Hamilton G. Rucker*, Case No. 01-16-00233-CV, was filed and is currently pending in the First Court of Appeals of Houston, Texas. You also state, and provide documentation showing, the authority is a real party in interest in the pending litigation. Additionally, you 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 pending litigation to which the authority is a real party. Therefore, we conclude the authority may withhold the information that is not subject to section 552.022 under section 552.103 of the Government Code.³

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See Open Records Decision Nos. 349 (1982), 320 (1982).* Thus, information that has either been obtained from or provided to all parties to the pending litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. *See Attorney General Opinion MW-575 (1982); see also Open Records Decision No. 350 (1982).*

In summary, the authority may withhold the information subject to section 552.022(a)(3) of the Government Code and the information we have marked within the submitted attorney fee bills under rule 503 of the Texas Rules of Evidence. If the non-privileged attachment we marked is maintained by the authority separate and apart from the otherwise privileged e-mail to which it is attached, then the authority must release the attachment at issue. If the

³As our ruling is dispositive, we need not address the remaining arguments against disclosure of the information at issue.

non-privileged attachment we marked does not exist separate and apart from the e-mail to which it is attached, the authority may withhold it under rule 503 of the Texas Rules of Evidence. In either event, the authority must release the remaining information we marked under sections 552.022(a)(16) and 552.022(a)(17) of the Government Code. The authority may withhold the information that is not subject to section 552.022 under section 552.103 of the Government Code.

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,



Meagan J. Conway
Assistant Attorney General
Open Records Division

MJC/sb

Ref: ID# 653496

Enc. Submitted documents

c: Requestor
(w/o enclosures)