



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

April 28, 2017

Mr. Thomas E. Myers  
Counsel for Forest Hill Library District  
Brackett & Ellis, P.C.  
100 Main Street  
Fort Worth, Texas 76102-3090

OR2017-09113

Dear Mr. Myers:

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# 655024.

The Forest Hill Library District (the "district"), which you represent, received a request for e-mails sent to or from four named individuals during a specified time period and a specified invoice. You claim the requested information is excepted from disclosure under sections 552.103, 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.<sup>1</sup>

Initially, we note a portion of the submitted information, which we have marked, is subject to section 552.022. Section 552.022(a) provides, in relevant part:

---

<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 that 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:

...

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

Gov't Code § 552.022(a)(16). The information we have marked consists of attorney fee bills subject to section 552.022(a)(16). Thus, the information we marked must be released unless it is made confidential under the Act or other law. *Id.* You seek to withhold the information subject to section 552.022 under sections 552.103, 552.107, 552.111 of the Government Code. However, sections 552.103, 552.107, and 552.111 are discretionary in nature 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 Gov't Code § 552.103); *see also* Open Records Decision Nos. 677 (2002) (governmental body may waive attorney work product privilege under section 552.111), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived). Therefore, the information at issue may not be withheld under section 552.103, section 552.107, or section 552.111 of the Government Code. 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 attorney fee bills we have marked. Further, we will address your arguments under sections 552.103, 552.107, and 552.111 of the Government Code for the information that is not subject to section 552.022(a)(16) of the Government Code.

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).

You assert the attorney fee bills must be withheld in their entirety under the attorney-client privilege of rule 503. We note section 552.022(a)(16) provides information "that is *in* a bill for attorney's fees" is not excepted from required disclosure unless it is confidential under other law or privileged under the attorney-client privilege. *See* Gov't Code § 552.022(a)(16) (emphasis added). This provision, by its express language, does not permit the entirety of an attorney fee bill to be withheld. *See also* Open Records Decisions Nos. 676 (attorney fee bill cannot be withheld in 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 excepted only to extent information reveals client confidences or attorney's legal advice). Accordingly, the district may not withhold the entirety of the attorney fee bills at issue under Texas Rule of Evidence 503.

You state the information within the attorney fee bills constitutes communications between district attorneys, district employees, and district officials that were made for the purpose of facilitating the rendition of professional legal services to the district. You also state the communications were intended to be confidential and have remained confidential. Based on your representations and our review of the information at issue, we find you have established some of the information at issue constitutes attorney-client communications under rule 503. Thus, the district may withhold the information we have marked within the submitted attorney fee bills pursuant to rule 503 of the Texas Rules of Evidence.<sup>2</sup> However, we find you have failed to demonstrate any of the remaining information at issue consists of privileged attorney-client communications. We note an entry stating a memorandum or an e-mail was prepared or drafted does not demonstrate the document was communicated to the client. Thus, we find you have not demonstrated the remaining information subject to section 552.022(a)(16) was communicated and it does not reveal a client confidence. Accordingly, the remaining information subject to section 552.022(a)(16) may not be withheld on that basis.

Texas Rule of Civil Procedure 192.5 encompasses the attorney work product privilege. For purposes of section 552.022 of the Government Code, information may be withheld 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 677 (2002) 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 when the governmental body received the request for information, and (2) consists of an attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *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 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 prong of the work product test requires the governmental body to show the documents at issue contain the attorney's or the attorney's representative's mental

---

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

impressions, opinions, conclusions, or legal theories. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test may be withheld under rule 192.5, provided the information does not fall within the purview of the exceptions to the privilege enumerated in rule 192.5(c). *See Caldwell*, 861 S.W.2d at 427.

The district contends the remaining information subject to section 552.022(a)(16) constitutes attorney work product protected by rule 192.5 of the Texas Rules of Civil Procedure. Upon review, we find you have not demonstrated any of the remaining information at issue consists of mental impressions, opinions, conclusion, or legal theories of an attorney or an attorney's representative that were created for trial or in anticipation of trial. Therefore, the district may not withhold any of the remaining information subject to section 552.022(a)(16) under rule 192.5 of the Texas Rules of Civil Procedure.

You claim section 552.107 of the Government Code for the information not subject to section 552.022(a)(16) of the Government Code. Section 552.107(1) protects information that comes within the attorney-client privilege. *See* Gov't Code § 552.107(1). The elements of the privilege under section 552.107 are the same as those for rule 503 discussed above. 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. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the remaining information consists of communications between district attorneys, district officials, and district employees. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the district and these communications have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information we have marked. Thus, the district may generally withhold the information we have marked under section 552.107(1) of the Government Code. We note, however, one of the e-mail strings at issue includes an e-mail received from or sent to individuals you have not identified as privileged parties. Furthermore, if the e-mail received from or sent to non-privileged parties is removed from the e-mail string and stands alone, it is responsive to the request for information. Therefore, if the non-privileged e-mail, which we have marked, is maintained by the district separate and apart from the otherwise privileged e-mail string in which it appears, then the district may not withhold the non-privileged e-mail under section 552.107(1) of the Government Code. However, the remaining information consists of a communication with individuals you have not demonstrated are privileged parties. Thus, we find you have not demonstrated the remaining information constitutes privileged attorney-client communications for the purposes of section 552.107(1). Accordingly, the

district may not withhold the remaining information under section 552.107(1) of the Government Code.

Next, we address your arguments under sections 552.103 and 552.111 of the Government Code for the remaining information and the non-privileged e-mail, if it is maintained separate and apart from the otherwise privileged e-mail string in which it appears. Section 552.103 of the Government Code provides:

(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 has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

The district states the information at issue relates to a lawsuit that was pending when the request was received as well as litigation the district anticipates. We note the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information related to litigation through the discovery process. *See* ORD 551 at 4-5. Thus, any information obtained from or provided to all other parties in the anticipated or pending litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. The information at issue was provided to opposing party in the pending litigation and the opposing party in the anticipated litigation. Therefore, the district may not withhold the information at issue under section 552.103 of the Government Code.

Section 552.111 of the Government Code exempts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” See Gov’t Code § 552.111. This section 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); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as:

- (1) [M]aterial prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). 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. *Id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

- a) 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 b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

*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; ORD 677 at 7.

The work product doctrine under section 552.111 of the Government Code is applicable to litigation files in criminal and civil litigation. *Curry v. Walker*, 873 S.W.2d 379, 381 (Tex. 1994); see also *United States v. Nobles*, 422 U.S. 225, 236 (1975). In *Curry*, the Texas Supreme Court determined a request for a district attorney’s “entire file” was “too broad” and, citing *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993), held “the decision as to what to include in [the file] necessarily reveals the attorney’s thought processes concerning the prosecution or defense of the case.” *Curry*, 873 S.W.2d at 380. Accordingly, if a requestor seeks an attorney’s entire litigation file, and a governmental body demonstrates the file was created in anticipation of litigation, we will presume the entire file

is excepted from disclosure under the attorney work product aspect of section 552.111. Open Records Decision No. 647 at 5 (1996) (organization of attorney's litigation file necessarily reflects attorney's thought processes (citing *Nat'l Union*, 863 S.W.2d at 461)). However, we note the court in *National Union* also concluded a specific document is not automatically considered to be privileged simply because it is part of an attorney's file. 863 S.W.2d at 461. The court held an opposing party may request specific documents or categories of documents that are relevant to the case without implicating the attorney work product privilege. *Id.*; ORD 647 at 5.

You assert the remaining information and the non-privileged e-mail, if it is maintained separate and apart from the privileged e-mail string, contain mental impressions, conclusions, and legal theories of an attorney representing the district created for trial or in anticipation of trial. However, we note the information at issue was sent to or received from non-privileged parties. Therefore, because non-privileged parties have had access to this information, the work product privilege under section 552.111 has been waived. Accordingly, the district may not withhold the information at issue marked for release as attorney work product under section 552.111 of the Government Code.

We note some of the remaining information consists of personal e-mail addresses subject to section 552.137 of the Government Code.<sup>3</sup> Section 552.137 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* Gov't Code § 552.137(a)-(c). The e-mail addresses at issue are not a type specifically excluded by section 552.137(c). Accordingly, the district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure.

In summary, the district may withhold the information we have marked within the submitted attorney fee bills pursuant to rule 503 of the Texas Rules of Evidence. The district may withhold the information we have marked under section 552.107(1) of the Government Code; however, if the non-privileged e-mail, which we have marked, is maintained by the district separate and apart from the otherwise privileged e-mail string in which it appears, then the district may not withhold the non-privileged e-mail under section 552.107(1) of the Government Code. The district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure. The remaining information must be released.

---

<sup>3</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,



Jennifer Copeland  
Assistant Attorney General  
Open Records Division

JC/sb

Ref: ID# 655024

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

