



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 16, 2017

Ms. Marie N. Rovira
Counsel for Dallas Police and Fire Pension System
Messer, Rockefeller & Fort, P.L.L.C
6351 Preston Road, Suite 350
Frisco, Texas 75034

OR2017-10542

Dear Ms. Rovira:

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# 658167 (Request No. 2017-053).

The Dallas Police and Fire Pension System (the "system"), which you represent, received a request for all invoices and related billing records submitted to the system by Diamond McCarthy L.L.P.. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code and privileged under rule 192.5 of the Texas Rules of Civil Procedure. We have considered your arguments and reviewed the submitted information.

Initially, we note some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2016-20208 (2016). In response to Open Records Letter No. 2016-20208, the system filed a lawsuit against our office. *See Dallas Police and Fire Pension System v. Ken Paxton, Attorney Gen. of Tex.*, No. D-1-GN-16-005167 (419th Dist. Ct., Travis County, Tex.). Accordingly, with regard to the information at issue in this lawsuit, we will allow the trial court to resolve the issue of whether the information that is the subject of the pending litigation must be released to the public. To the extent the submitted information is not identical to the information at issue in the pending litigation, we will address the system arguments against disclosure.

Next, we note 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:

...

(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 submitted information consists of attorney fee bills that are subject to section 552.022(a)(16). This information must be released unless it is made confidential under the Act or other law. *See id.* Although you seek to withhold the information subject to section 552.022 under section 552.107 of the Government Code, this exception is discretionary and does not make information confidential under the Act. *See* 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). Therefore, the information subject to section 552.022 may not be withheld under section 552.107 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" that makes information expressly confidential for purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will address the system's claims of the attorney-client privilege and the attorney-work product privilege under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides:

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).

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* ORD 676. 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). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

The system asserts the submitted fee bills must be withheld in their entirety under rule 503. However, section 552.022(a)(16) of the Government Code 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 system may not withhold the entirety of the submitted fee bills under Texas Rule of Evidence 503.

You state the submitted fee bills contain communications between attorneys retained by the system and system authorized representatives that were made for the purpose of facilitating the rendition of legal services to the system. You further state these communications were intended to be, and have remained, confidential. Based on your representations and our review, we conclude the system may withhold the information we marked under rule 503 of the Texas Rules of Evidence. However, you have not demonstrated the remaining

information at issue consists of privileged attorney-client communications. Further, 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. Accordingly, the system may not withhold any of the remaining information at issue under rule 503 of the Texas Rules of Evidence.

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* 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 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 state the information you marked in the remaining information consists of attorney core work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. Upon review, we conclude you have not demonstrated any of the remaining information at issue contains the mental impressions, opinions, conclusions, or legal theories of an attorney or the attorney’s representative that was developed in anticipation of litigation or for trial. We therefore conclude the system may not withhold any of the remaining information at issue under rule 192.5 of the Texas Rules of Civil Procedure.

In summary, the system may withhold the information we marked under rule 503 of the Texas Rules of Evidence. The system 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,

A handwritten signature in cursive script that reads "D. Michelle Case".

D. Michelle Case
Assistant Attorney General
Open Records Division

DMC/eb

Ref: ID# 658167

Enc. Submitted documents

c: Requestor
(w/o enclosures)