



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

May 24, 2017

Mr. Alan Petrov  
Counsel for the City of Bellaire  
Johnson Petrov, LLP  
2929 Allen Parkway, Suite 3150  
Houston, Texas 77019

OR2017-11369

Dear Mr. Petrov:

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# 659144.

The City of Bellaire (the "city"), which you represent, received a request for information related to the city's building permit procedures and correspondence between representatives of the city and a named individual or third party during a specified time period. The city states it is releasing some of the requested information. The city claims the submitted 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. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the information submitted as Exhibit F consists of an attorney fee bill that is subject to section 552.022(a)(16) of the Government Code. Section 552.022(a)(16) provides for required public disclosure of "information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege" unless the information is expressly confidential under the Act or other law. Gov't Code § 552.022(a)(16). The Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will address the city's claim of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the submitted attorney fee bill.

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).

The city asserts the submitted attorney fee bill must be withheld in its 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 Decision 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 city may not withhold the entirety of the submitted fee bill under Texas Rule of Evidence 503.

The city asserts the submitted fee bill includes privileged attorney-client communications between the city's attorneys and city officials and staff in their capacities as clients and with an outside consultant who is also a privileged party. The city states the communications at issue were made for the purpose of the rendition of legal services to the city and indicates 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 city has established the information we have marked constitutes attorney-client communications under rule 503. Thus, the city may withhold the information we have marked within the submitted attorney fee bill pursuant to rule 503 of the Texas Rules of Evidence. However, we find the city has failed to demonstrate the remaining information at issue consists of privileged attorney client communications. Thus, no portion of the remaining information at issue may be withheld under rule 503.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107 are the same as those discussed 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. *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 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).

The city informs us the information submitted as Exhibit B consists of communications between the city's attorneys and city officials and staff in their capacities as clients, made for the purpose of the rendition of legal services to the city. The city states the communications were intended to be confidential. Based on these representations and our review, we find the city has demonstrated the applicability of the attorney-client privilege to Exhibit B. Accordingly, the city may withhold Exhibit B under section 552.107 of the Government Code.

Next, the city claims the information submitted as Exhibit G is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts 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[.]" Gov't Code § 552.111. Section 552.111 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) material 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 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; ORD 677 at 6-8. In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied

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 city claims the attorney work product privilege of section 552.111 of the Government Code for Exhibit G. The city states the information at issue was created by the city's outside consultant at the direction of an attorney for the city and revealing the strategy decisions and mental processes of attorneys for the city. The city states it reasonably anticipated litigation pertaining to the information at issue. Based on these representations and our review, we find the city has demonstrated the applicability of the attorney work product privilege to the information at issue. Accordingly, the city may withhold Exhibit G under the attorney work product privilege of section 552.111 of the Government Code.<sup>1</sup>

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<sup>1</sup>As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

In summary, the city may withhold the information we marked within Exhibit F pursuant to rule 503 of the Texas Rules of Evidence. The city may withhold Exhibit B under section 552.107 of the Government Code and may withhold Exhibit G under the attorney work product privilege of section 552.111 of the Government Code. The city must release the remainder of Exhibit F pursuant to section 552.022(a)(16) 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](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,



Claire V. Morris Sloan  
Assistant Attorney General  
Open Records Division

CVMS/som

Ref: ID# 659144

Enc. Submitted documents

c: Requestor  
(w/o enclosures)