



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.  
The ruling and judgment can be viewed in PDF  
format below.



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

July 11, 2017

Mr. Michael Shaunessy  
Counsel for the City of Hutto  
McGinnis Lochridge  
600 Congress Avenue, Suite 2100  
Austin, Texas 78701

**The ruling you have requested has been amended as a result of litigation and has been attached to this document.**

OR2017-15407

Dear Mr. Shaunessy:

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# 665643.

The City of Hutto (the "city"), which you represent, received a request for the invoice related to a specified investigation. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted information consists of attorney fee bills that are 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 confidential under the Act or other law. Gov't Code § 552.022(a)(16). You seek to withhold the submitted information under sections 552.103, 552.107, and 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), 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). 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 assertion of the attorney-client privilege under Texas Rule of Evidence 503 and the attorney work product privilege under Texas Rule of Civil Procedure 192.5 for the submitted information.

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 explain the information you have marked consists of privileged attorney-client communications between the attorneys for the city and city officials and representatives in their capacities as clients. You state the communications at issue were made for the purpose of the rendition of legal services to the city. You also state the city has not waived the attorney-client privilege with regard to the communications. Based on your representations and our review of the submitted information, we find you have established most of the information you have marked constitutes privileged attorney-client communications under rule 503. Thus, except for the information we have marked for release, the city may withhold the information you have marked pursuant to rule 503 of the Texas Rules of Evidence. However, we find you have failed to demonstrate any portion of the remaining information at issue consists of privileged attorney-client communications. We note an entry stating a memorandum or an email was prepared or drafted does not demonstrate the document was communicated to the client. Accordingly, no portion of the remaining information may be withheld under rule 503.

We next address Texas Rule of Civil Procedure 192.5 for the remaining information at issue. 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* 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 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.*, 861 S.W.2d at 427.

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

In summary, with the exception of the information we have marked for release, the city may withhold the information you have marked pursuant to rule 503 of the Texas Rules of Evidence. The city 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](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,



Ian Lancaster  
Assistant Attorney General  
Open Records Division

IML/tdw

Ref: ID# 665643

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Velva L. Price  
District Clerk  
Travis County  
D-1-GN-17-004073  
Alexus Rodriguez

CAUSE NO. D-1-GN-17-004073

CITY OF HUTTO, TEXAS,

*Plaintiff,*

V.

KEN PAXTON ATTORNEY  
GENERAL OF TEXAS,

*Defendant.*

§  
§  
§  
§  
§  
§  
§  
§  
§

THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

53<sup>RD</sup> JUDICIAL DISTRICT

**NOTICE OF NONSUIT WITH PREJUDICE**

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff City of Hutto, Texas (“Plaintiff”), advises this Court that it is nonsuiting its claims against Defendant Ken Paxton, Attorney General of Texas, in this matter, with prejudice, based on the fact that Plaintiff has produced all of the responsive documents pursuant to the underlying Attorney General’s Opinion in this matter.

WHEREFORE, PREMISES CONSIDERED, Plaintiff nonsuits all of its claims against Defendant in this matter with prejudice.

Respectfully submitted,  
Bojorquez Law Firm, PC



Erin Higginbotham  
State Bar No. 24065418  
erin@texasmunicipallawyers.com  
Bojorquez Law Firm  
11675 Jollyville Rd. Ste. 300  
Austin, Texas 78759  
Work: (512) 250-0411  
Fax: (512) 250-0749

ATTORNEY FOR PLAINTIFF  
CITY OF HUTTO

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document has been served upon all known counsel of record pursuant to the Texas Rules of Civil Procedure on this 29<sup>th</sup> day of July, 2020.

Cole Hutchison  
Administrative Law Division  
Office of the Attorney General of Texas  
P.O. Box 12548  
Austin, TX 78711  
Cole.hutchison@oag.texas.gov



---

Erin Higginbotham