



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 20, 2017

Ms. Kristen Lee
Assistant County Attorney
County of Harris
1019 Congress, 15th Floor
Houston, Texas 77002

OR2017-16218

Dear Ms. Lee:

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# 667081 (ORR# 17PIA0233).

The Harris County Attorney's Office (the "county attorney's office") received a request for information related to contracts with and payments to a specified law firm for a specified case during a specified time period. The county attorney's office claims the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code as well as privileged under rule 192.5 of the Texas Rules of Civil Procedure. We have considered the submitted arguments and reviewed the submitted information.

Initially, the county attorney's office indicates some of the requested information was the subject of a prior request from the same requestor, as a result of which this office issued Open Records Letter No. 2017-05008 (2017). In Open Records Letter No. 2017-05008, we determined the county attorney's office may withhold the information we marked within the submitted attorney fee bills pursuant to rule 503 of the Texas Rules of Evidence; (2) may not withhold any of the remaining information under rule 192.5 of the Texas Rules of Civil Procedure; and (3) must release the remaining information pursuant to

section 552.022(a)(16) of the Government Code. Further, we note some of the submitted information was the subject of a previous request for information from a different requestor, as a result of which this office issued Open Records Letter No. 2017-09445 (2017). In Open Records Letter No. 2017-09445, we determined the county attorney's office (1) may withhold the information we marked within the submitted attorney fee bills pursuant to rule 503 of the Texas Rules of Evidence; (2) may not withhold any of the remaining information under rule 192.5 of the Texas Rules of Civil Procedure; (3) may withhold the information not subject to section 552.022 of the Government Code, which we marked, under section 552.107 of the Government Code; (4) must withhold the information we marked under section 552.136 of the Government Code and section 552.137 of the Government Code; and (5) must release the remaining information pursuant to section 552.022(a)(16) of the Government Code. We have no indication there has been any change in the law, facts, or circumstances on which the previous rulings were based. Accordingly, the county attorney's office must rely on Open Records Letter Nos. 2017-05008 and 2017-09445 as previous determinations and withhold or release the identical information at issue in accordance with those rulings. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we note the remaining information contains 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 expressly confidential under the Act or other law. Gov't Code § 552.022(a)(16). The county attorney's office seeks to withhold the information at issue under sections 552.103 and 552.107(1) of the Government Code. However, these exceptions 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. 676 at 10-11 (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, the county attorney's office may not withhold any portion of the submitted fee bills under section 552.103 or section 552.107(1) of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence and the 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). Accordingly, we will address the county attorney's office's claims of the attorney-client and work product privileges under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure for the submitted attorney fee bills. Further, because section 552.136 of the Government Code makes information confidential under the Act, we

will consider the applicability of this exception to the information at issue.¹ We will also address the county attorney's office's arguments under sections 552.103 and 552.107 of the Government Code for the information not subject to section 552.022(a)(16) of the Government Code.

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

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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 county attorney's office asserts the submitted attorney 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 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 county attorney's office may not withhold the entirety of the submitted fee bills under Texas Rule of Evidence 503.

The county attorney's office also asserts the submitted fee bills include privileged attorney-client communications between the county attorney's office's attorneys and county attorney's office officials and staff in their capacities as clients. The county attorney's office states the communications at issue were made for the purpose of the rendition of legal services to the county attorney's office. The county attorney's office indicates the communications at issue have not been, and were not intended to be, disclosed to third parties. Based on these representations and our review of the information at issue, we find the county attorney's office has established the information we have marked constitutes attorney-client communications under rule 503. Thus, the county attorney's office may withhold the information we have marked within the submitted attorney fee bills pursuant to rule 503 of the Texas Rules of Evidence.

However, we find the county attorney's office has failed to demonstrate the remaining information at issue consists of or documents 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 the county attorney's office has failed to demonstrate the remaining information at issue was communicated and it does not reveal a client confidence. Accordingly, no portion of the remaining information at issue may be withheld under rule 503.

We next address Texas Rule of Civil Procedure 192.5 for the remainder of the submitted attorney fee bills. 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 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).

The county attorney's office claims 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 find the county attorney's office has not demonstrated the 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 county attorney's office may not withhold the remaining information at issue under Texas Rule of Civil Procedure 192.5.

The county attorney's office claims section 552.107 of the Government Code for the information not subject to section 552.022 of the Government Code. Section 552.107(1) 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 Open Records Decision No. 676 at 6-7 (2002)*. 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).

As noted above, the county attorney's office informs us the information at issue consists of communications between the county attorney's office's attorneys and county attorney's office officials and staff in their capacities as clients, made for the purpose of the rendition of legal services to the county attorney's office. The county attorney's office states the communications were intended to be confidential. Based on these representations and our review, we find the county attorney's office has demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the county attorney's office may withhold the information not subject to section 552.022 of the Government Code, which we have marked, under section 552.107 of the Government Code.²

Section 552.136 of the Government Code provides, "Notwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). Accordingly, the county attorney's office must withhold the credit card, routing, and bank account numbers we have marked under section 552.136 of the Government Code.

In summary, the county attorney's office must rely on Open Records Letter Nos. 2017-05008 and 2017-09445 as previous determinations and withhold or release the identical information at issue in accordance with those ruling. The county attorney's office may withhold the information we marked within the submitted attorney fee bills pursuant to rule 503 of the Texas Rules of Evidence. The county attorney's office may withhold the information not subject to section 552.022 of the Government Code, which we marked, under section 552.107 of the Government Code. The county attorney's office must withhold the credit card, routing, and bank account numbers we marked under section 552.136 of the Government Code. The county attorney's office must release the remaining information 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/>

²As our ruling is dispositive for this information, we need not address the county attorney's office's remaining argument against its disclosure.

[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 black ink, appearing to read "Claire V. Morris Sloan". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 667081

Enc. Submitted documents

c: Requestor
(w/o enclosures)