



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

January 8, 2018

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

OR2018-00561

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# 690590 (C.A. File No. 17PIA0642).

The Harris County Attorney's Office (the "county attorney's office") received a request for certain information pertaining to the engagement of legal counsel, including all invoices and fee bills, for two specified cause numbers. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107 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, you inform us some of the requested information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2017-18976 (2017). In that ruling, we determined the county attorney's office (1) may withhold the information not subject to section 552.022 of the Government Code under section 552.103(a) of the Government Code; (2) may withhold the information we marked

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<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.

pursuant to rule 503 of the Texas Rules of Evidence; and (3) must release the remaining information. However, you explain a judgment was signed on June 16, 2017, for the pending litigation the county attorney's office relied on to withhold the information at issue in Open Records Letter No. 2017-18976. Thus, we find the circumstances have changed in regard to the information for which we ruled under section 552.103(a). Consequently, the county attorney's office may not rely on Open Records Letter No. 2017-18976 as a previous determination for the information for which we ruled under section 552.103(a) in this instance. *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 information is or is not excepted from disclosure). As you have not submitted this information for our review, we find the county attorney's office must now release it. *See* Gov't Code §§ 552.301, .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to the requested information, it must release the information as soon as possible). Nevertheless, with regards to the remaining information at issue in Open Records Letter No. 2017-18976, we have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, we conclude the county attorney's office may rely on Open Records Letter No. 2017-18976 as a previous determination and withhold or release the remaining information at issue in that ruling in accordance with that ruling. *See* ORD 673.

Next, we note some of 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:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body; [and]

...

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

Gov't Code § 552.022(a)(3), (16). Some of the information at issue consists of information in an account, voucher, or contract relating to the receipt or expenditure of public or other

funds by a governmental body. Further, some information consists of attorney fee bills that are subject to section 552.022(a)(16). Information subject to section 552.022(a)(3) or 552.022(a)(16) must be released unless such information is made confidential under the Act or other law. *See id.* You seek to withhold the submitted information under sections 552.103 and 552.107 of the Government Code. However, sections 552.103 and 552.107 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. 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 or section 552.107 of the Government Code. However, the Texas Supreme Court has held the Texas Rule 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 information subject to 552.022. We will also address your arguments for the information not subject to 552.022.

Texas Rule of Evidence 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 at 6-7. 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).

You inform us the information at issue was communicated between and among attorneys for the county attorney's office and employees of the county attorney's office for the purpose of the rendition of legal services to the county attorney's office. You inform us the communications at issue were not disclosed to third parties and confidentiality has not been waived. Upon review, we find you have demonstrated the applicability of the attorney-client privilege to the information we have marked. Therefore, the county attorney's office may withhold the information we have marked under rule 503 of the Texas Rules of Evidence.<sup>2</sup> However, the remaining information subject to section 552.022 either reveals a communication with a party who is not identified as privileged or is not a communication. 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. Therefore, we find you have failed to demonstrate the remaining information at issue consists of privileged communications for purposes of rule 503. Consequently, you have failed to demonstrate the applicability of the attorney-client privilege to the remaining information at issue, and the county attorney's office may not withhold it on under rule 503.

Section 552.103 of the Government Code provides as follows:

- (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.

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

(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). A 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 (1) litigation was 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You assert the information not subject to section 552.022 is excepted from disclosure pursuant to section 552.103. You inform us, and provide documentation showing, prior to the receipt of the instant request, a lawsuit styled *Coats v. Harris County*, Cause No. 2012-55551, was filed against Harris County in the 80th Judicial District Court of Harris County, Texas. However, you also state “[a] judgment was recently signed on June 16th, 2017,” which was before the date the county attorney’s office received the instant request for information. Consequently, we find you have failed to demonstrate litigation was pending at the time of receipt of the instant request. Accordingly, the county attorney’s office may not withhold the information at issue under section 552.103.

Next, we address your argument under section 552.107 of the Government Code for the information not subject to section 552.022. Section 552.107(1) protects information coming within the attorney-client privilege. The elements of the privilege under section 552.107(1) are the same as those discussed above 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*, 922 S.W.2d at 923.

You state the information not subject to section 552.022 constitutes communications between and among attorneys for the county attorney’s office and employees of the county attorney’s office for the purpose of the rendition of legal services to the county attorney’s office. You state the communications were intended to be confidential and have remained confidential. Upon review, we find you have demonstrated the applicability of the attorney-client privilege to the information we have marked under section 552.107(1).

Therefore, the county attorney's office may withhold the information we have marked under section 552.107(1) of the Government Code.<sup>3</sup>

We next address Texas Rule of Civil Procedure 192.5 for the remaining information subject to section 552.022(a)(16). 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).

You claim the information at issue consists of attorney core work product that is protected by rule 192.5. Upon review, we find you have demonstrated the information at issue consists of 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. Accordingly, the county attorney's office may withhold the information we have marked under rule 192.5 of the Texas Rules of Civil Procedure. However, upon review we find you

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

have not demonstrated the remaining information 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. Consequently, the county attorney's office may not withhold any of the remaining information under rule 192.5.

In summary, except for the information for which we ruled under section 552.103(a) of the Government Code, the county attorney's office may rely on Open Records Letter No. 2017-18976 as a previous determination and withhold or release the information at issue in accordance with that ruling. The county attorney's office may withhold the information we have marked under (1) rule 503 of the Texas Rules of Evidence, (2) section 552.107(1) of the Government Code, and (3) rule 192.5 of the Texas Rules of Civil Procedure. The county attorney's office 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,



Cole Hutchison  
Assistant Attorney General  
Open Records Division

CH/sb

Ref: ID# 690590

Enc. Submitted documents

c: Requestor  
(w/o enclosures)