



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 26, 2019

Ms. Alicia K. Kreh
Counsel for the City of Rhome
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6000 Western Place, Suite 200
Fort Worth, Texas 76107-4654

OR2019-33495

Dear Ms. Kreh:

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# 798525.

The City of Rhome (the "city"), which you represent, received a request for (1) contracts and agreements between the city and a specified company, (2) communications between city officials and employees and agents of the specified company, (3) confirmation of funds received from the specified company, and (4) contracts between the city and a second specified entity. You state the city will withhold information pursuant to sections 552.130(c) and 552.147(b) of the Government Code and pursuant to Open Records Decision No. 684 (2009).¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code and privileged under Texas Rule of Civil Procedure 192.5.² Additionally, you state release of

¹ Section 552.130(c) of the Government Code allows a governmental body to redact the information described in section 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. *See id.* § 552.147(b). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information without the necessity of requesting an attorney general decision.

² Although you also raise Texas Rule of Civil Procedure 192.5 for information not subject to section 552.022 of the Government Code, we note the proper exception to raise when asserting the work product privilege for information not subject to section 552.022 of the Government Code, as in this case, is section 552.111 of the Government Code. *See* Open Records Decision No. 677 at 1 (2002).

portions of the submitted information may implicate the proprietary interests of Chisholm 2000, L.P. and PMB Acquisitions, L.L.C. Accordingly, you state, and provide documentation showing, the city notified the third parties of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the city has not submitted information responsive to the portion of the request for communications between city officials and employees of the specified company or confirmation of funds received from the specified company. Accordingly, to the extent any such information existed on the date the city received the request, we assume the city has released it. If the city has not released any such information, it must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from any third party explaining why the submitted information should not be released. Therefore, we have no basis to conclude any third party has a protected proprietary interest in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the city may not withhold the submitted information on the basis of any proprietary interest any third party may have in it.

Next, we note portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part, the following:

(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[.]

Gov't Code § 552.022(a)(3). Portions of the submitted information consist of information in an account, voucher, or contract relating to the expenditure of funds by a governmental body, which is subject to section 552.022(a)(3). *Id.* Thus, the city must release this information unless it is made confidential under the Act or other law. *See id.* Although you seek to withhold the information at issue under sections 552.107 and 552.111 of the Government Code, these sections are discretionary exceptions to disclosure and do not make information confidential under the Act. *See* Open Records Decision Nos. 677 (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). Accordingly, the city may not withhold the information subject to section 552.022(a)(3) of the Government Code, which we marked, pursuant to sections 552.107 or 552.111 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" for purposes of section 552.022(a). *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Thus, we will consider your assertion of the attorney-client and attorney work product privileges under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5 for the submitted information subject to section 552.022(a)(3). We will also consider your arguments under sections 552.107 and 552.111 of the Government Code for the remaining information at issue.

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. 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 claim the information subject to section 552.022(a)(3) consists of a communication between counsel for the city and city employees and officials that was made for the purpose of facilitating the rendition of legal services to the city. However, upon review, we find the communication at issue was shared with individuals whom you have not established to be privileged parties. Therefore, you have failed to establish how the information at issue constitutes privileged attorney-client communications for the purposes of Texas Rule of Evidence 503. Accordingly, the city may not withhold the information subject to section 552.022(a)(3) of the Government Code, which we marked, pursuant to Texas Rule of Evidence 503.

We next address your argument under Texas Rule of Civil Procedure 192.5 for the some of the information subject to section 552.022 of the Government Code. 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 No. 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). Thus, 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, no writ).

You claim the some of the information subject to section 552.022 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 subject to 552.022(a)(3) of the Government Code 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. Therefore, we conclude the city may not withhold any portion of the information at issue under Texas Rule of Civil Procedure 192.5.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov’t Code § 552.107(1). 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*, 922 S.W.2d at 923.

You assert the remaining information constitutes communications between legal counsel for the city and city employees and officials that were made for the purpose of providing legal advice to the city. We understand these communications were made in confidence and have maintained their confidentiality. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the city may withhold the remaining information under section 552.107(1) of the Government Code.³

In summary, the city may withhold the information not subject to section 552.022(a)(3) of the Government Code under section 552.107(1) of the Government Code. 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.

³ As our ruling is dispositive, we need not address your remaining argument against disclosure of this information

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Sean McCormick
Attorney
Open Records Division

SMC/eb

Ref: ID# 798525.

Enc. Submitted documents

c: Requestor
(w/o enclosures)