



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

June 17, 2020

Mr. Joe Rivera  
Counsel for Bell County  
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P. O. Box 1470  
Waco, Texas 76703-1470

OR2020-16285

Dear Mr. Rivera:

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# 832877.

Bell County (the "county") received two requests from the same requestor for information pertaining to a specified lawsuit involving the requestor. You state the county does not possess information responsive to portions of the requests.<sup>1</sup> You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure. We have considered submitted arguments and reviewed the submitted information.

Initially, we note some of the submitted information, which we marked, is subject to section 552.022 of the Government Code. Section 552.022 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:

...

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

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<sup>1</sup> The Act does not require a governmental body to release information that did not exist when it received a request, create responsive information, or obtain information that is not held by the governmental body or on its behalf. See *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(16), (17). The submitted information includes attorney fee bills that are subject to section 552.022(a)(16), and court-filed documents that are subject to section 552.022(a)(17). This information must be released unless it is confidential under the Act or other law. *See id.* You seek to withhold the information subject to section 552.022(a) under section 552.103 of the Government Code. However, this section is discretionary in nature and does 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. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the county may not withhold any of the information subject to section 552.022 under this exception. However, the Texas Supreme Court has held the Texas Rules of Evidence and the Texas Rules of Civil Procedure are “other law” for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will consider the county's 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 section 552.022 of the Government Code. Additionally, we will address the county's arguments against disclosure of the remaining information.

Section 552.103 of the Government Code provides, in relevant part:

(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.

...

(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). The governmental body claiming section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information, and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

The county states, and provides documentation showing, prior to its receipt of the instant request, a lawsuit styled *Watson v. Bell County*, Cause No. 6:19-CV-626, was filed and is currently pending appeal in the United States Court of Appeals for the Fifth Circuit. Therefore, we agree litigation was pending on the date the county received the present request for information. The county also states the information at issue pertains to the substance of the lawsuit claims. Based on these representations and our review, we find the information at issue is related to the pending litigation. Therefore, we conclude the county may withhold the information not subject to section 552.022 of the Government Code under section 552.103 of the Government Code.

Generally, however, once information has been obtained by all parties to the litigation though discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the pending litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

Texas Rule of Civil Procedure 192.5 encompasses the attorney work product privilege. 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). 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. *Id.* 192.5; Open Records Decision Nos. 677 at 6-8 (2002). In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied that

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; ORR 677 at 7.

You claim some of the remaining information constitutes attorney work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. You state this information was created in support of pending litigation. You further state this information reflects an attorney’s mental impressions, conclusions, or legal theories. Having considered the submitted arguments and reviewed the information at issue, we conclude some of the information at issue constitutes privileged attorney work product that may be withheld under rule 192.5. Accordingly, we find the county may withhold the information we marked under Texas Rule of Civil Procedure 192.5.<sup>2</sup> However, we find you have not demonstrated the remaining 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. Therefore, we conclude the county may not withhold any portion of the remaining information under Texas Rule of Civil Procedure 192.5.

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).

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

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 [14<sup>th</sup> Dist.] 1993, orig. proceeding). Upon review, we find you failed to demonstrate the applicability of rule 503 to the remaining information at issue, and the county may not withhold any of it on that basis.

In summary, the county may withhold the information not subject to section 552.022 of the Government Code under section 552.103 of the Government Code. The county may withhold the information we marked under Texas Rule of Civil Procedure 192.5. The county 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 <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,

Matthew Taylor  
Assistant Attorney General  
Open Records Division

MT/jxd

Ref: ID# 832877

Enc. Submitted documents

c: Requestor  
(w/o enclosures)