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ATTORNEY GENERAL OF TEXAS

June 28, 2022

Mr. Lance Vincent
Counsel for the City of Jefferson
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821 Ese Loop 323, Suite 530
Tyler, Texas 75701

OR2022-18507

Dear Mr. Vincent:

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# 954166 (ORR# 951131).

The City of Jefferson (the "city"), which you represent, received a request for nine categories of information pertaining to a specified city council meeting, named individuals, specified agreements, and the city's police department. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code.¹ We have considered the submitted arguments and reviewed the submitted representative sample of information.

Initially, we note the city has not submitted information responsive to all the categories of information to which the requestor seeks access. Although the city states it has submitted a representative sample of the requested information, we find the submitted information is not representative of all of the types of information at issue. Please be advised, this open records letter ruling applies only to the types of information you have submitted for our review. This ruling does not authorize the city to withhold any information that is substantially different from the types of information the city submitted to this office. *See* Gov't Code § 552.302 (where request for attorney general decision does not comply with requirements of Gov't Code § 552.301, information at issue is presumed to be public). 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 id.* §§ 552.301(a), .302; *see also* Open Records Decision No.

¹ We note, although you also raise section 552.022 of the Government Code, section 552.022 is not an exception to disclosure. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are made confidential under the Act or other law. *See* Gov't Code § 552.022.

664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

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:

...

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

Gov't Code § 552.022(a)(16). A portion of submitted information consists of attorney fee bills subject to section 552.022(a)(16). Thus, this information at issue, which we have marked, must be released unless it is made confidential under the Act or other law. *See id.* Although you assert the information subject to section 552.022(a)(16) is excepted from disclosure under sections 552.103 and 552.107 of the Government Code, these sections are discretionary 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 section 552.103); Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, none of the information subject to section 552.022(a)(16), which we have marked, may be withheld under section 552.103 or section 552.107. However, the Texas Supreme Court has held the Texas Rules of Evidence and Texas Rules of Civil Procedure are “other law” that make information expressly confidential for the purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, 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 section 552.022(a)(16) of the Government Code. Additionally, we will consider your submitted arguments for the information not subject to section 552.022 of the Government Code.

You assert the submitted attorney fee bills must be withheld in their entirety under rules 503 and 192.5. 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 district

may not withhold the entirety of the submitted fee bills under Texas Rule of Evidence 503 or Texas Rule of Civil Procedure 192.5.

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 No. 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; ORD 677 at 7.

The city claims the submitted attorney fee bills consist of mental impressions and material prepared and communicated by attorneys in anticipation of litigation. Having considered the submitted argument and reviewed the information at issue, we conclude some of the information at issue, which we have marked, constitutes privileged attorney work product that may be withheld under rule 192.5. Accordingly, the city may withhold the information we have marked under Texas Rule of Civil Procedure 192.5.² However, we find the city 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 city may not withhold the remaining information at issue under Texas Rule of Civil Procedure 192.5.

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

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides the following:

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).

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. *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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

You claim the remaining information at issue consists of privileged attorney-client communications. However, upon review, we find you have failed to demonstrate the remaining information at issue constitutes privileged attorney-client communications for the purposes of rule 503 of the Texas Rules of Evidence. Therefore, the city may not withhold any portion of the remaining information under rule 503 of the Texas Rules of Evidence.

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 city states, and provides documentation showing, prior to its receipt of the instant request, a lawsuit styled *Carroll, v. City of Jefferson*, Cause No. 2:21-cv-00392, was filed and is currently pending against the city in the United States District Court for the Eastern District of Texas. Therefore, we agree litigation was pending on the date the city received the present request for information. The city 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, the city may withhold the information we have marked under section 552.103 of the Government Code.³

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*

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

Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the city may withhold the information we have marked under Texas Rule of Civil Procedure 192.5. The city may withhold the information we have marked under section 552.103 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.

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,

Colin Henry
Attorney
Open Records Division

CEH/eb

Ref: ID# 954166

Enc. Submitted documents

c: Requestor
(w/o enclosures)