



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

June 30, 2022

Mr. Mitchell G. Page  
Counsel for the San Jacinto River Authority  
Schwartz, Page & Harding, L.L.P.  
1300 Post Oak Boulevard, Suite 2400  
Houston, Texas 77056

OR2022-19003

Dear Mr. Page:

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# 957029.

The San Jacinto River Authority (the "authority"), which you represent, received a request for seven categories of information pertaining to internal and external communications regarding specified subject matters involving named entities and individuals for a stated timeframe and specified attorney fee bills. You state the authority does not have information responsive to the first category of the request.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. You also claim portions of the submitted information are privileged under Texas Rule of Civil Procedure 192.5 and Texas Rule of Evidence 503. We have considered your arguments and reviewed the submitted representative sample of information.<sup>2</sup> We have also received and considered comments from the requestor. See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

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<sup>1</sup> The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. See *Econ. 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), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</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.

Initially, we note, and you acknowledge, some of the submitted information consists of 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 confidential under the Act or other law. *Id.* § 552.022(a)(16). 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 authority’s attorney-client privilege claim under rule 503 of the Texas Rules of Evidence and attorney work product privilege claim under rule 192.5 of the Texas Rules of Civil Procedure for the information in the submitted fee bills.

Rule 192.5 of the Texas Rules of Civil Procedure 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.

You contend the information you marked constitutes attorney work product protected by rule 192.5 of the Texas Rules of Civil Procedure. You state this information was created in response to, and in support of, specified litigation. 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, the authority may withhold the information you marked under Texas Rule of Civil Procedure 192.5.<sup>3</sup>

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).*

You assert the remaining information at issue relates to pending litigation. You state, and provide documentation showing, prior to receipt of the instant request the authority's appeal styled *City of Conroe, Texas, et al. v. The Attorney General of Texas and San Jacinto River Authority*, No. 03-21-00137-CV was pending before the Court of Appeals, Third District of Texas. Therefore, we agree litigation was pending on the date the authority received the instant request for information. You also state the information at issue pertains to the pending litigation. Based on these representations and our review, we find the information at issue is related to the pending litigation. Therefore, except for the information subject to section 552.022 of the Government Code, we conclude the authority may withhold the remaining information 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

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

In summary, the authority may withhold the information you marked under Texas Rule of Civil Procedure 192.5. Except for the information subject to section 552.022 of the Government Code, the authority may withhold the remaining information under section 552.103 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 <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,

Sarah E. Reese  
Attorney  
Open Records Division

SER/jxd

Ref: ID# 957029

Enc. Submitted documents

c: Requestor  
(w/o enclosures)