



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

April 7, 2003

Mr. Eric G. Calhoun
Lawson Fields McCue Lee & Campbell, P.C.
14135 Midway Road, Suite 250
Addison, Texas 75001

OR2003-2325

Dear Mr. Calhoun:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 179528.

The Dallas Police and Firefighters Pension System (the "System"), which you represent, received a request to inspect the original documents relating to the following three categories of information:

1. All billings by Lawson & Fields, P.C. and Lawson, Fields, McCue, Lee & Campbell, P.C. recorded by the System for the period of January 1, 2002 through December 31, 2002.
2. All storage and archival records prepared by and/or on behalf of the System for the storage and retrieval of System documents from its offsite storage facility from October 1, 1995 through January 21, 2003.
3. All System Board of Trustee minutes of meetings, including subcommittees, held during the period from January 1, 2002 through December 31, 2002.

We have received a copy of a letter the requestor sent to you in which he clarifies his request for information. Though his request remains unchanged with respect to categories one and three, the requestor has withdrawn his request to inspect documents responsive to category two. Further, the requestor has accepted your offer to inspect the requested meeting minutes

upon confirmation of a specified date and time. You assert the information responsive to category one of the request is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have reviewed the information you submitted and we have considered the exceptions you claim.

Initially, we note you have submitted unresponsive information for our review. As the request encompasses fee bills from January 1, 2002 through December 31, 2002, we find the submitted fee bills dated December 31, 2001 are outside the scope of this request. Therefore, this ruling does not address the releasability of this information.

Next, the responsive fee bills you seek to withhold are subject to section 552.022 of the Government Code, which provides, in pertinent part, as follows:

[T]he following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under 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). Thus, information contained in attorney fee bills must be released under section 552.022 unless it is expressly confidential under other law. Sections 552.103, 552.107, and 552.111 of the Government Code are discretionary exceptions to disclosure under the Public Information Act (the "Act") and not other law that makes information confidential for purposes of section 552.022. *See, e.g.*, Open Records Decision Nos. 677 (2002), 676 (2002). Accordingly, the System may not withhold the fee bill information on the basis of section 552.103, 552.107, or 552.111 of the Government Code.

Nevertheless, the Texas Supreme Court has determined that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); *see also* Open Records Decision Nos. 676 (2002), 677 (2002). Accordingly, we will address the confidentiality of the requested fee bills under Rule 503 or Rule 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 for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; 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 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).

Thus, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body: (1) must show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) must identify the parties involved in the communication; and (3) must show 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* Open Records Decision No. 676 (2002). 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). *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, 4527 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (privilege attaches to complete communication, including factual information).

You have highlighted portions of the requested attorney fee bills that you claim are privileged attorney-client communications. After reviewing your arguments and the attorney billing statements submitted to this office, we believe that you have demonstrated some of the entries contained therein constitute confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. Accordingly, we have marked the information the System may withhold under Rule 503 of the Texas Rules of Evidence.

You also assert the work product privilege contained in Rule 192.5 of the Texas Rules of Civil Procedure excepts portions of the submitted fee bills. An attorney's work product is confidential under Rule 192.5. Work product is defined 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). Accordingly, to withhold attorney work product from disclosure under Rule 192.5, a governmental body must demonstrate that the material, communication, or mental impression was created for trial or in anticipation of litigation. *Id.* To show that the information at issue was created in anticipation of litigation, a governmental body must demonstrate that 1) 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 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See National 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. Information that meets the work product test is confidential under Rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in Rule 192.5(c). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

In this instance, you have shown some of the information at issue was either created for trial or in anticipation of litigation. Thus, you have met the first prong of this test. Further, you have demonstrated some of the information in the submitted fee bills consists of an attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. Accordingly, we have marked the information the System may withhold under Rule 192.5 of the Texas Rules of Civil Procedure.

Next, we address some other exceptions that apply to the submitted information.¹ First, section 552.117(1) excepts from disclosure the home address and telephone number,

¹ The Office of the Attorney General will raise a mandatory exception like section 552.117 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024. Whether section 552.117 protects information from disclosure depends on when the request for information is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the System must withhold information under section 552.117 on behalf of a current or former official or employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the System received the present request for information. If one of the individual's discussed in the information timely elected to keep his personal information confidential, then the System must withhold the information we have marked under section 552.117(1) of the Government Code. The System may not withhold this information under section 552.117 if the individual did not make a timely election to keep the information confidential.

Second, section 552.136 of the Government Code states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. In this case, the submitted information contains bank account numbers. Therefore, the System must withhold these numbers, which we have marked, under section 552.136 of the Government Code.

Finally, the submitted documents contain an e-mail address subject to section 552.137 of the Government Code. Specifically, section 552.137 states the following:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Govt. Code § 552.137. This provision makes certain e-mail addresses confidential. *See* Gov't Code § 552.137. You do not inform us that the member of the public has affirmatively consented to the release of the e-mail address contained in the submitted materials. Therefore, the System must withhold the e-mail address of the member of the public, which we have marked, under section 552.137 of the Government Code.

In summary, the System may withhold the information we have marked under Rule 503 of the Texas Rules of Evidence or Rule 192.5 of the Texas Rules of Civil Procedure. Also, if applicable, the System must withhold the information we have marked under section 552.117 of the Government Code. In addition, the System must withhold the marked bank account numbers under section 552.136 of the Government Code. Further, the System must withhold

the e-mail address, which we have marked, in accordance with section 552.137 of the Government Code. Lastly, the System must release the remainder of the information to the requestor under section 552.022(a)(16) of the Government Code.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Christen Sorrell
Assistant Attorney General
Open Records Division

CHS/sdk

Ref: ID# 179528

Enc: Submitted documents

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