



May 7, 2001

Mr. Clay T. Grover
Feldman & Rogers, L.L.P.
Coastal Banc Plaza
5718 Westheimer, Suite 1200
Houston, Texas 77057

OR2001-1858

Dear Mr. Grover:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID#146845.

The Longview Independent School District (the "district"), which you represent, received a request for all district legal bills for a specified time period and data supplied to the district board members to assist in the superintendent's job evaluation, as well as sample questions used by the superintendent to prepare for the job evaluation. You claim that the requested information is excepted from disclosure under the attorney-client and work-product privileges and section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Attorney fee bills, such as those at issue here, are subject to section 552.022(a) of the Government Code, which provides in pertinent part as follows:

- (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

.....

¹We note that you argue that the submitted information is excepted from disclosure under section 552.022 of the Government Code. However, section 552.022 does not serve as an exception to the release of information but rather, provides a list of eighteen categories of public information that generally may be withheld only if confidential by 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). Under section 552.022, fee bills must be released unless they are expressly confidential under other law. Section 552.107 of the Government Code, which excepts information within the attorney-client privilege, is a discretionary exception under the Public Information Act and does not constitute "other law" for purposes of section 552.022. *See* Open Records Decision No. 630 at 4 (1994) (governmental body may waive section 552.107(1)). However, the attorney-client privilege is also found in Rule 503 of the Texas Rules of Evidence. Recently, the Texas Supreme Court held 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*, No. 00-0453, 2001 WL 123933, at *8 (Tex. Feb. 15, 2001). Thus, we will determine whether the information is confidential under Rule 503.

Rule 503(b)(1) provides:

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. *See* Tex. R. Evid. 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. Upon a demonstration of all three factors, the document containing privileged information is 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 [14th Dist.] 1993, no writ); *see also* Tex. R. Evid. 511 (waiver of privilege by voluntary disclosure).

After reviewing your arguments and the attorney fee bills submitted to this office as Exhibit A, we conclude that you have demonstrated that most of the attorney invoices contain entries that are confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. Where a document contains confidential attorney-client communications, the privilege attaches to the entire document, not just to specific portions relating to legal advice, opinions, or mental analysis. *See Pittsburgh Corning*, 861 S.W.2d at 427. On the other hand, we believe that two invoices do not contain entries that reveal confidential communications. We have marked the invoices that may be withheld in their entirety under Rule 503.² However, if the district chooses to waive the privilege, it need not withhold the entire invoice. *See* Tex. R. Evid. 511(1). The remaining submitted information may not be withheld under Rule 503.

With regard to the invoices not excepted under the attorney-client privilege, we will address the work-product privilege. Section 552.111 of the Government Code, which excepts information within the attorney work product privilege, is also a discretionary exception under the Public Information Act and does not constitute “other law” for purposes of section 552.022. *See* Open Records Decision No. 473 (1987) (governmental body may waive section 552.111). However, the attorney work product privilege is also found in Rule 192.5 of the Texas Rules of Civil Procedure. Recently, the Texas Supreme Court held 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*, No. 00-0453, 2001 WL 123933, at *8 (Tex. Feb. 15, 2001). Thus, we will determine whether the information is confidential under Rule 192.5.

An attorney’s core work product is confidential under Rule 192.5. Core work product is defined as the work product of an attorney or an attorney’s representative developed in anticipation of litigation or for trial that contains the attorney’s or the attorney’s

² We have no information to establish the applicability of an exception to the attorney-client privilege in this case. *See* Tex. R. Evid. 503(d).

representative's mental impressions, opinions, conclusions, or legal theories. *See* Tex. R. Civ. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under Rule 192.5, a governmental body must demonstrate that the material was 1) created for trial or in anticipation of litigation and 2) consists of an attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *Id.* The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. 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.

The second prong of the work product test requires the governmental body to show that the documents at issue contain the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *See* Tex. R. Civ. P. 192.5(b)(1). A document containing core work product information that meets both prongs of 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). *See Pittsburgh Corning*, 861 S.W.2d at 427. After reviewing the submitted invoices, we believe that you have failed to demonstrate that the marked entries contain an attorney's mental impressions, opinions, conclusions, or legal theories. Accordingly, you may not withhold the submitted invoices pursuant to Rule 192.5

You also claim that a document submitted as Exhibit B must be withheld under section 21.355 of the Education Code. Section 21.355 of the Education Code provides, "A document evaluating the performance of a teacher or administrator is confidential." This office interprets this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. *See Open Records Decision No. 643* (1996). You state that the document in Exhibit B was created by the superintendent for the benefit and use of the district Board of Trustees during the course of the superintendent's evaluation process. Although the document might have been used in the evaluation process, we do not believe that this document itself evaluates the performance of the superintendent, but rather documents the superintendent's accomplishments. Accordingly, the district may not withhold the submitted document in Exhibit B under section 552.101 in conjunction with section 21.355 of the Education Code. As you raise no other exception to disclosure for this document, you must release the document to the requestor.

In conclusion, you may withhold the marked invoices in Exhibit A pursuant to Rule 503 of the Texas Rules of Evidence. You must release the remaining submitted information in Exhibit A and the document in Exhibit B.

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 Department of Public 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 General Services 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. 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,



Jennifer H. Bialek
Assistant Attorney General
Open Records Division

JHB/tr

Ref: ID# 146845

Encl: Marked documents

cc: Mr. Steven L. Wilmeth
205 Hunters Creek Drive
Longview, Texas 75605
(w/o enclosures)