



August 12, 2002

Mr. Jeffrey L. Rogers
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5718 Westheimer, Suite 1200
Houston, Texas 77057

OR2002-4409

Dear Mr. Rogers:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 166962.

The Spring Branch Independent School District (the "district") received a request for "copies of all attorney/law firm retainer agreements, records of attorneys fees, as well as all associated costs, billing, and payment records" related to the requestor's son. You state that only the requested attorney fee bills are in existence. The Public Information Act (the "Act") applies only to information in existence at the time the governmental body receives the request for information. *See* Open Records Decision Nos. 452 at 2-3 (1986) (document is not within the purview of the Act if, when a governmental body receives a request for it, it does not exist), 342 at 3 (1982) (Act applies only to information in existence, and does not require the governmental body to prepare new information). Furthermore, the Act does not require a governmental body to create information in response to a request. *See* Open Records Decision 452 (1986). Therefore, the Act applies only to the requested attorney fee bills, and not to the remainder of the requested information.

You claim that the attorney fee bills are excepted from disclosure under sections 552.103 and 552.107 of the Government Code. The district also raises the attorney-client and work product privileges. We have considered the exceptions and privileges you claim and reviewed the submitted information.

We first note that the submitted information is subject to the Federal Educational and Privacy Rights Act ("FERPA.") 20 U.S.C. § 1232g. FERPA protects a student's privacy interests in "education records." *See* 20 U.S.C. § 1232g. "Education records" are defined as those records which contain information that is directly related to a student and which are maintained by an educational agency or institution or by a party acting for such agency or institution. Under FERPA, an education agency or institution is generally required to provide parents of minor students access to the students's education records. However, an educational institution may deny a parent's request to inspect an education record based on

attorney-client privilege or work product grounds. See letter from LeRoy S. Rooker, Director, Family Policy Compliance Office, United States Department of Education, to Loretta R. DeHay, Assistant Attorney General, Office of the Attorney General (Dec. 15, 1994)(on file with the Open Records Division, Office of the Attorney General). Thus, the requestor's right to the requested information is subject to the applicability of these privileges.

The submitted information is 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:

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(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)(3), (16). The submitted documents include account information and attorney fee bills that are subject to sections 552.022(a)(3) and (16). Therefore, these documents must therefore be released under section 552.022 except to the extent the information is within the attorney-client privilege or unless the information is expressly made confidential under other law. Sections 552.103 and 552.107 of the Government Code are discretionary exceptions under the Public Information Act and do not constitute "other law" for purposes of section 552.022. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.-Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive section 552.107(1)), 522 at 4 (1989) (discretionary exceptions in general). Accordingly, we do not address your claims regarding these exceptions to disclosure with respect to the documents that are subject to section 552.022(a) of the Government Code.

However, you also argue that the submitted information is confidential under the attorney-client and attorney work product privileges. We begin by considering your claim under the attorney-client privilege, which is found in Rule 503 of the Texas Rules of Evidence. 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*, 53 S.W.3d 328 (Tex. 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.

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. 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). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). Thus, when invoking the attorney-client privilege the governmental body bears the burden of explaining how the particular information requested is protected by the attorney-client privilege. When it is not apparent on the face of the document, the governmental body should indicate whether the communication is to or from an attorney, a client, or a representative of either, and identify all individuals with whom the communication has been shared.

Under the Act, an entire fee bill is not a privileged communication. *See* Gov't Code § 552.022(a)(16). In this case, the district neither marked any particular entries in the submitted fee bills as confidential, nor identified any of the parties to the communication. Accordingly, we find that the district did not meet its burden under the attorney-client privilege. Consequently, the district may not withhold from disclosure any information under Rule 503 of the Texas Rules of Evidence.

The attorney work product privilege is similarly considered "other law" for purposes of section 552.022. The privilege is found in Rule 192.5 of the Texas Rules of Civil Procedure. *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Thus, we will determine whether the information is confidential under Rule 192.5.

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, in order 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). We have marked the information on the fee bills that you may withhold under Rule 192.5 of the Texas Rules of Civil Procedure.

Finally, we note that some of the submitted information consists of credit card, debit card, charge card, or access device numbers made confidential under section 552.136. Section 552.136 provides as follows:

(a) In this section, “access device” means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding 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. We have marked the information that the district must withhold from disclosure under section 552.136.

In summary, the district may withhold the information we have marked based on Rule 192.5 of the Texas Rules of Civil Procedure. The district may not, however, withhold any information based on Rule 503 of the Texas Rules of Evidence. The district must withhold from disclosure the information we have marked under section 552.136. The remainder of the submitted information must be released to the requestor.

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 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,



V.G. Schimmel
Assistant Attorney General
Open Records Division

VGS/sdk

Ref: ID# 166962

Enc: Submitted documents