



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

December 17, 2002

Mr. Oscar G. Treviño
Walsh, Anderson, Brown, Schulze & Aldridge
P.O. Box 2156
Austin, Texas 78768

OR2002-7242

Dear Mr. Treviño:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "PIA"), chapter 552 of the Government Code. Your request was assigned ID# 173800.

The Killeen Independent School District (the "district"), which you represent, received a request from Advocacy Incorporated for "any and all records related to any investigation conducted by [the district] into the death of" a named individual. You advise that the district has provided the requestor all responsive records except for the information contained in the submitted Exhibits 2 and 3. You claim that this information is excepted from disclosure under sections 552.026, 552.101, 552.103, 552.107(1), 552.114, and 552.117 of the Government Code, as well as Rule 503 of the Texas Rules of Evidence and Rule 192.5 of the Texas Rules of Civil Procedure. The requestor has also submitted comments to this office — *see* Gov't Code § 552.304 — asserting among other things that the requestor has a special right of access under federal law to the information at issue. We have considered all of the submitted comments and arguments and we have reviewed the submitted information.

Before reaching the requestor's special right of access argument, we first address whether Exhibits 2 and 3 are subject to public release. We note at the outset that the information at issue is subject to section 552.022 of the Government Code. Section 552.022(a) enumerates categories of information that are public information and not excepted from required disclosure under chapter 552 of the Government Code unless they are expressly confidential under other law. Section 552.022(a)(1) states that one such category of information is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental

body[.]” The information at issue was created or acquired by the district in connection with its investigation of the death of the named individual, and the district has apparently completed this investigation. The information in the submitted Exhibits 2 and 3 is therefore subject to section 552.022(a)(1) and must accordingly be released unless it is expressly made confidential under other law.¹

Sections 552.103 and 552.107(1) of the Government Code are discretionary exceptions under chapter 552 and not “other law” for purposes of section 552.022. *See, e.g.,* Open Records Decision Nos. 676 (2002), 677 (2002). Accordingly, none of the information may be withheld under section 552.103 or section 552.107(1).

However, you also assert the attorney-client privilege found in Rule 503 of the Texas Rules of Evidence and the work product privilege found in Texas Rule of Civil Procedure 192.5. 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*, 53 S.W.3d 328 (Tex. 2001). Thus, we will determine whether you have demonstrated the information at issue to be confidential, for purposes of section 552.022, under Rule 503 or under Rule 192.5. Open Records Decision Nos. 677 (2002), 676 (2002).

We first address your Rule 503 assertion for both Exhibits 2 and 3. 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 layer 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

¹The language of section 552.022(a)(1) also provides that the law enforcement exception contained in chapter 552, section 552.108 of the Government Code, may be asserted to protect section 552.022(a)(1) information. The district, however, does not assert section 552.108.

(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).

We find that you have not shown the information contained in Exhibit 3 to be confidential under Rule 503. Exhibit 3 consists of records of interviews of district employees that were obtained by the district following the death of the named individual, as part of the district’s investigation of the matter. Although you characterize this information as notes that “reflect the [district’s] attorney’s interpretation of the witness statements” and not “a verbatim restatement of the witness dialogue[,]” it is nevertheless clear that the attorney for the district did not participate in any of the interviews. Although you generally argue that those who performed the interviews and those who were interviewed qualify as representative of the client for purposes of Rule 503, you did not specifically identify the parties involved in each communication, nor did you specifically explain how each such party qualified as a client representative. *See* Tex. R. Evid. 503(a)(2); *see also* Open Records Decision No. 676 at 8-9 (2002). And although you demonstrate that this information reflects communications made in furtherance of the rendition of professional legal services to the district, neither your comments to this office nor the information itself demonstrates that those who participated in each communication actually intended confidentiality at the time of the communication. *See* Open Records Decision No. 676 at 10 (2002).

In regard to the information in Exhibit 2, you likewise have not demonstrated the applicability of the attorney-client privilege. Your representations as well as our review of the information at issue indicate that the records in Exhibit 2 each comprise or reflect communications between a district administrator and a student. These records appear to provide a verbatim, or nearly verbatim, account of certain questions that were asked the student and corresponding answers provided by the student. You do not explain, nor can we

ascertain, how the student in each instance qualified as a representative of the district, as client, for purposes of Rule 503 at the time of the interview. *See* Tex. R. Evid. 503(a)(2); *see also* Open Records Decision No. 676 at 8-9 (2002). You also do not explain, nor can we ascertain, whether the parties to these communications actually intended confidentiality at the time of the communication. *See* Open Records Decision No. 676 at 10 (2002).

As noted, in support of withholding Exhibits 2 and 3, you also assert the privilege for work product under Texas Rule of Civil Procedure 192.5. In this regard, we first observe that this office has determined that an attorney's "core work product" as defined in Rule 192.5 is confidential for purposes of section 552.022, but that "other work product" that is subject to section 552.022 may not be withheld on the basis of Rule 192.5. Open Records Decision No. 677 (2002). Accordingly, in regard to your assertion of Rule 192.5, we need address only whether the information at issue qualifies as core work product as defined in 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 representative's mental impressions, opinions, conclusions, or legal theories. 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 contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. 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). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

Upon review of your arguments and representations, we agree that you have shown the information in Exhibits 2 and 3 to have been prepared in anticipation of litigation or for trial for purposes of Rule 192.5. We find that you have not demonstrated, however, that the

information in these exhibits consist of or reflects mental impressions, opinions, conclusions, or legal theories of the district's attorney or a representative of the district's attorney. As previously noted, it is clear that the attorney for the district did not participate in any of the interviews. Because you have not specifically identified the persons who did conduct the interviews, we are unable to conclude that any such persons qualify as representatives of the attorney for purposes of Rule 192.5. We thus conclude that Exhibits 2 and 3 have not been demonstrated to consist of or reveal "core work product" as defined in Rule 192.5. Accordingly, we further conclude that Rule 192.5 does not make Exhibit 2 confidential for purposes of section 552.022. Open Records Decision No. 677 (2002).

However, you also assert section 552.026 of the Government Code, which provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

The Family Educational Rights and Privacy Act of 1974 ("FERPA") provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). We agree with your assertion that the records at issue constitute "education records" under FERPA.

In Open Records Decision No. 634 (1995), this office concluded that an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by section 552.026 without the necessity of requesting an attorney general decision as to that exception. Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 (1982), 206 (1978). We agree that Exhibits 2 and 3 contain student-identifying information that is confidential under FERPA, and that section 552.026 of the Government Code provides that this information is not subject to disclosure under the PIA.

Section 552.117 may also be applicable to some of the submitted information. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be

determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the district may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those employees who timely elected to keep their personal information confidential, the district must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members. The school district may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential.

Having concluded that Exhibits 2 and 3 contain information that must be withheld under FERPA, and that the submitted records also contain information that may be subject to required withholding under section 552.117 of the Government Code, we next address Advocacy Incorporated's arguments that it nevertheless has a special right of access to this information.

Advocacy Incorporated has been designated in Texas as the state protection and advocacy system ("P&A system") for purposes of the federal Protection and Advocacy for Mentally Ill Individuals Act ("PAMII Act"), 42 U.S.C. §§ 10801-10851, and the Developmental Disabilities Assistance and Bill of Rights Act ("DD Act"), *id.* §§ 15041-15045. *See* Attorney General Opinion JC-0461 (2002). Advocacy Incorporated argues that these statutes give it a special right of access to the records at issue.

The district contends that the DD Act does not apply in this instance because the deceased did not meet the definition under the DD Act of a person with a developmental disability. Advocacy Incorporated disagrees, and asserts that the deceased was a person with a developmental disability for purposes of the DD Act. Based on the information provided this office, we are unable to determine whether the deceased qualified as a person with a developmental disability for purposes of the DD Act, and we are therefore unable to conclude that the DD Act applies in this case.

The PAMII Act provides, in relevant part, that Advocacy Incorporated "shall . . . have access to all records of

- (B) any individual (including an individual who has died or whose whereabouts are unknown);
- (i) who by reason of the mental or physical condition of such individual is unable to authorize the [P&A system] to have such access;
- (ii) who does not have a legal guardian, conservator, or other legal representative, or for whom the legal guardian is the State; and

(iii) with respect to whom a complaint has been received by the [P&A system] or with respect to whom as a result of monitoring or other activities (either of which result from a complaint or other evidence) there is probable cause to believe that such individual has been subject to abuse or neglect[.]

42 U.S.C § 10805(a)(4)(B). Advocacy Incorporated essentially represents to this office that the above requirements for Advocacy Incorporated to have access to the records at issue are met in this case. The district provides this office no indication that the above-described requirements are not met, but the district does assert that the PAMII Act does not apply to the records at issue. The term “records” as used in the above-quoted section 10805(a)(4)(B) includes “reports prepared by any staff of a *facility rendering care and treatment* [to the individual] . . . that describe incidents of abuse, neglect, and injury occurring at such facility and the steps taken to investigate such incidents[.]” *Id.* § 10806(b)(3)(A) (emphasis added). We understand the district to argue that its records do not meet this definition because the district was not a “facility rendering care and treatment” to the individual whose death the district investigated. The district specifically contends that the PAMII Act “does not apply to school districts because these institutions do not meet the [PAMII Act’s] statutory definition of ‘facilities.’” The PAMII Act defines the term “facilities” and states that the term “may include, but need not be limited to, hospitals, nursing homes, community facilities for individuals with mental illness, board and care homes, homeless shelters, and jails and prisons.” 42 U.S.C. § 10802(3). The district argues that school districts are not “facilities” under this definition because they “do not fit the custodial or residential setting characteristic” of the examples cited in the definition. Advocacy Incorporated disagrees and argues that because the PAMII Act explicitly states that it may extend to records of an individual who “lives in a community setting, including their own home[.]” the implication is that the reach of the PAMII Act is not limited to only custodial or residential settings. *See* 42 U.S.C. § 10802(4)(B)(ii). Advocacy Incorporated also points out that the federal regulations promulgated under the PAMII Act define “care and treatment” to include special education services. *See* 42 C.F.R. § 51.2. We find no authority that addresses this question. However, we cannot conclude that the PAMII Act’s definition of a “facility” extends to the district. The district is correct that the types of entities named in the definition are custodial or residential in nature. Accordingly, we are unable to conclude that the “records” to which Advocacy Incorporated is granted access under section 10805(a)(4)(B) of the PAMII Act includes records of the district.

Finally, Advocacy Incorporated argues that it has a right of access “under the PAIR program” to the information at issue and states that “the protections afforded under the [DD Act and PAMII Act] are extended generally to persons with disabilities who do not meet the statutory definitions of an individual with a developmental disability under the DD Act or an individual with a mental illness under the PAMII Act.” *See* 29 U.S.C. § 794e. Thus, Advocacy Incorporated asserts that the PAIR program provides it access to information to the same extent as the DD Act and the PAMII Act. For the reasons cited above, however, we cannot determine from the information provided the applicability of the DD Act to the

information at issue. And as noted, we have concluded that the PAMII Act does not apply to the records at issue. Accordingly, we have no basis for finding that Advocacy Incorporated has a right of access to the records at issue by virtue of the PAIR program.

In summary, we conclude that the district must withhold information under FERPA as provided above, and may be required to withhold the information that is subject to section 552.117, as explained above. The remaining 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,

A handwritten signature in black ink, appearing to read "Michael Garbarino", written over a printed name.

Michael Garbarino
Assistant Attorney General
Open Records Division

MG/sdk

Ref: ID# 173800

Enc. Submitted documents

c: Mr. Richard La Vallo
Advocacy, Incorporated
7800 Shoal Creek Boulevard, Suite 171-E
Austin, Texas 78757-1014
(w/o enclosures)