OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

February 10, 2003

Ms. Beverly W. Irizarry
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San Antonio, Texas 78205

OR2003-0897

Dear Ms. Irizarry:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 176160.

The South San Antonio Independent School District (the "district"), which you represent, received a request for three categories of information pertaining to a grievance filed by a named district employee. In particular, the request asks for 1) "a listing or compilation of supporting documentation" for each district employee charged with a felony or misdemeanor within the last five years; 2) "a listing or compilation of supporting documentation" for any actions, including adverse employment actions, directed against each employee identified in item one of the request; and 3) the personnel file of the requestor's client, the named employee at issue. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552,103, 552.107, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

First, we note that the submitted information includes medical records, access to which is governed by the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

> (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

> (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). We have marked medical records that may be released only as provided under the MPA. Open Records Decision No. 598 (1991).

Next, we note that the employee's personnel file contains information subject to section 552.022 of the Government Code, which provides in relevant part:

> 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:
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> > (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

The personnel file at issue includes completed evaluations. Therefore, as prescribed by section 552.022, the district must release the evaluations unless they are excepted from disclosure under section 552.108 or confidential under other law. You do not raise section 552.108 with respect to the evaluations. Furthermore, sections 552.103 and 552.107 are discretionary exceptions to disclosure that protect the governmental body's interests and are therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *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 4-5 (1994) (governmental body may waive statutory predecessor to section 552.107); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the district may not withhold the evaluations under sections 552.103 and 552.107 of the Government Code.

You also contend that the responsive information is protected by the attorney-client privilege under Rule 503 of the Texas Rules of Evidence, and the attorney work product privilege under 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*, 53 S.W.3d 328

(Tex. 2001). Thus, we will determine whether the evaluations at issue are confidential under Rule 503 or Rule 192.5.

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:
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> > (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
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> > (B) between the layer and the lawyer's representative;
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> > (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;
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> > (D) between representatives of the client or between the client and a representative of the client; or
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> > (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). Upon review, we determine that the evaluations at issue are not confidential communications between privileged parties made in furtherance of the rendition of professional legal services. Accordingly, the evaluations are not confidential under Rule 503 of the Texas Rules of Evidence.

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
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> (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.

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). Upon review, we determine that the evaluations at issue are not material, communications, or mental impressions created for trial or in anticipation of litigation. Accordingly, the evaluations are not confidential under Rule 192.5 of the Texas Rules of Civil Procedure.

We next address your claims under sections 552.101 and 552.102 of the Government Code with respect to the evaluations. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Public Information Act.[1] *See Industrial Found. v. Texas Indus.*

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[1] Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

Accident Bd., 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Accordingly, we will consider your section 552.102 claim as a claim under common-law privacy pursuant to section 552.101.

In *Industrial Foundation,* the Texas Supreme Court stated that information is excepted from disclosure under common-law privacy if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. We note that the evaluations at issue pertain solely to the job performance of the district employee and, consequently, are subject to a legitimate public interest. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute the public employee's private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Therefore, we determine that the submitted evaluations are not excepted under section 552.102 of the Government Code and must be released to the requestor.

We next address your arguments regarding section 552.103 for the remainder of the responsive information. Section 552.103 provides in 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.
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> . . . .
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> (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.

A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the government body receives the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.–Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.–Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991). In Open Records Decision No. 336 (1982), this office concluded that litigation was

reasonably anticipated when a potential opposing party filed a complaint with the Equal Employment Opportunity Commission (the "EEOC"). You have submitted information to this office showing that prior to the date of the request for information, the requestor filed a complaint with the Texas Commission on Human Rights (the "TCHR") alleging discrimination on the basis of age. The TCHR operates as a federal deferral agency under section 706(c) of title VII, 42 U.S.C. § 2000e-5. The EEOC defers jurisdiction to the TCHR over complaints alleging employment discrimination. *Id.* Therefore, we agree that you have established that litigation was reasonably anticipated. We also find that the submitted information is related to the anticipated litigation for purposes of section 552.103(a). Thus, we agree that section 552.103 is generally applicable to the remaining responsive information.

We note, however, that once information has been obtained by all parties to litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982).[2] Thus, information that has either been obtained from or provided to all opposing parties in the anticipated litigation is generally not excepted from disclosure under section 552.103(a) and must be disclosed. In this case, it is clear that the requestor has seen many of the documents in the requestor's personnel file. This information is not excepted from disclosure under section 552.103.

We note, however, that the personnel records to which the requestor has had access include the requestor's I-9 form. Section 1324a of title 8 of the United States Code provides that an Employment Eligibility Verification Form I-9 "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). The release of the submitted I-9 form in response to this request for information would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, the I-9 form at issue is excepted from disclosure under section 552.101 of the Government Code in conjunction with federal law and may be released only for purposes of compliance with the federal laws and regulations governing the employment verification system.

We next address section 552.102 with respect to the personnel records seen or obtained by the requestor. We note that the records in the requestor's personnel file are not highly intimate and embarrassing. Moreover, information in the personnel file pertaining to the requestor's qualifications and performance are subject to a legitimate public interest. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976); *see also* Open Records Decision Nos. 470 (1987) (public employee's job qualifications and performance do not generally constitute the public employee's private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444

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[2] We also note that the applicability of section 552.103(a) ends when the anticipated litigation has concluded or is no longer anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

(1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Therefore, we determine that the personnel records seen or obtained by the requestor are not excepted from disclosure under section 552.102 of the Government Code.

Next, section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Finally, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "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). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein). Upon review, we find that the personnel records seen or obtained by the requestor are not confidential communications between privileged parties made in furtherance of the rendition of professional legal services. Thus, the district may not withhold any personnel records seen

or obtained by the requestor pursuant to the attorney-client privilege and section 552.107 of the Government Code.[3]

In summary, the marked medical records may be released only as provided under the MPA. The marked evaluations must be released pursuant to section 552.022(a)(1) of the Government Code. The district must withhold the marked I-9 form pursuant to section 552.101 and federal law. With the exception of information provided to or obtained by the requestor, the remainder of the responsive information may be withheld under section 552.103 of the Government Code. As we are able to make a determination under section 552.103 with respect to this information, we do not reach your claim under section 552.108 of the Government Code. We note that because some of the responsive personnel records to be released to this requestor may be confidential with respect to other requestors, in the event the district receives another request for this information from someone other than this requestor or his authorized representative, the district must ask this office for a decision whether the information is subject to public disclosure. *See also* Gov't Code § 552.023(a) (a requestor has a special right of access to information that is excepted from public disclosure under laws intended to protect the requestor's own privacy).

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

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[3] Because the remaining documents are not subject to section 552.022 of the Government Code, Rule 503 of the Texas Evidence Code and Rule 192.5 of the Texas Rules of Civil Procedure may not be used to withhold these documents. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). We further note that you do not raise section 552.108 with respect to the responsive records from the requestor's personnel file.

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,

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Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 176160

Enc: Submitted documents

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