



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

September 17, 2003

Ms. Diane J. Cordova
Assistant General Counsel
Houston Independent School District
3830 Richmond Avenue
Houston, Texas 77027-5838

OR2003-6516

Dear Ms. Cordova:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 187744.

The Houston Independent School District (the "district") received a request for various information relating to the district and the law firm of Bracewell and Patterson. You inform us that all existing information that is responsive to the request is being provided to the requestor, with the exception of itemized billing statements from Bracewell and Patterson from January 1, 2001 to the present. You claim that portions of the itemized billing statements are excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

First, we note that some of the requested information was the subject of Open Records Letter No. 2003-6353 (2003). Specifically, that ruling encompassed billing statements provided

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

to the district by the law firm of Bracewell and Patterson pertaining to certain matters. In that ruling, this office found that certain information was excepted from disclosure under Rule 503 of the Texas Rules of Evidence. As we are aware of no change in the facts, law, or circumstances relating to the information, the district must rely on our decision in Open Records Letter No. 2003-6353 (2003) as a previous determination in withholding the information requested in this instance that this office ruled was excepted from disclosure in that decision. *See* Open Records Decision No. 673 (2001). We have marked the information subject to the previous determination.

With regard to the remaining submitted information, we note that the information you seek to withhold is 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 and 552.107 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 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. 663 (1999) (governmental body may waive sections 552.103 and 552.111), 630 at 4-5 (1994) (governmental body may waive section 552.107). Accordingly, the district may not withhold the fee bill information on the basis of section 552.103 and 552.107 of the Government Code.

You also state that you raise sections 552.103 and 552.107 "in conjunction with 552.101." Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." However,

as noted, sections 552.103 and 552.107 are discretionary exceptions that do not make information held by a governmental body confidential, and therefore, these subsections may not be argued in conjunction with section 552.101 to except public information from disclosure. Thus, we find that none of the submitted information may be withheld under section 552.101.

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. 677 (2002), 676 (2002). Accordingly, we will address the confidentiality of the requested fee bills under Rule 503 of the Rules of Evidence and Rule 192.5 of the Rules of Civil Procedure.

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). *See 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); *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ); *see also* Open Records Decision No. 676 (2002).

We note that you have failed to identify the parties to the communications in the submitted attorney billing statements. *See* Open Records Decision No. 676 at 8 (governmental body must inform this office of identities and capacities of individuals to whom each communication at issue has been made; this office cannot necessarily assume that communication was made only among categories of individuals identified in Rule 503). Nevertheless, in certain instances, we are able to ascertain the identities of the parties involved. Thus, we have marked those portions of the billing statements that reflect confidential communications made for the purpose of facilitating the rendition of professional legal services to the client pursuant to Rule 503. We find, however, that you have not demonstrated the applicability of Rule 503 for the remaining marked information. *See generally* Open Records Decision No. 150 (1977) (stating that predecessor to Public Information Act places burden on governmental body to establish why and how exception applies to requested information); *see also Strong v. State*, 773 S.W.2d 543, 552 (Tex. Crim. App. 1989) (burden of establishing attorney-client privilege is on party asserting it). Thus, you may not withhold any of the remaining marked information under Rule 503.

You also assert that the work product privilege, which is contained in Rule 192.5 of the Texas Rules of Civil Procedure, excepts portions of the submitted fee bills. For the purpose of section 552.022, information is confidential under Rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. Open Records Decision No. 677 at 9-10 (2002). 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 Nat'l 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).

In this instance, you have shown that 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 that some of the information in the submitted fee bills consists of an attorney's or an attorney's representative's mental impressions, opinions, conclusions, or legal theories. Accordingly, we have marked the information the district may withhold under Rule 192.5 of the Texas Rules of Civil Procedure.

In summary, the district must rely on Open Records Letter No. 2003-6353 (2003) to withhold or release the portion of the submitted information that we have marked as subject to the previous ruling. The district may withhold a portion of the submitted information we have marked under Rule 503 of the Texas Rules of Evidence and Rule 192.5 of the Texas Rules of Civil Procedure. The remaining 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

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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,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/jh

Ref: ID# 187744

Enc. Submitted documents

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(w/o enclosures)