



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 10, 2003

Mr. Juan J. Cruz
Escamilla & Poneck, Inc.
5219 McPherson, Suite 306
Laredo, Texas 78041

OR2003-8096

Dear Mr. Cruz:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 190735.

The United Independent School District (the "district"), which you represent, received a request for information that the district provided to the Equal Employment Opportunity Commission (the "EEOC"). You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted.

We first note that some of the submitted information is encompassed by section 552.022 of the Government Code. Section 552.022 provides that

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:

...

(10) a substantive rule of general applicability adopted or issued by an agency as authorized by law, and a statement of general policy or interpretation of general applicability formulated and adopted by an agency[.]

Gov't Code § 552.022(a)(10). In this instance, the submitted information includes statements of district policy. The district's policy statements must be released under section 552.022(a)(10) unless they are expressly confidential under other law. Sections 552.103, 552.107, and 552.111 of the Government Code are discretionary exceptions to public disclosure that protect the governmental body's interests and may be waived.¹ As such, sections 552.103, 552.107, and 552.111 are not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold any of the information that is encompassed by section 552.022 under sections 552.103, 552.107, or 552.111.

The Texas Supreme Court has held, however, that the Texas Rules of Evidence and Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The district asserts that the submitted information is protected by the attorney-client and attorney work product privileges. The attorney-client privilege is found at Texas Rule of Evidence 503, and the attorney work product privilege is found at Texas Rule of Civil Procedure 192.5. Therefore, we will consider whether the district may withhold any of the information that is encompassed by section 552.022 under rules 503 and 192.5.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 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;

¹*See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under Gov't Code § 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (discretionary exceptions generally), 630 at 4 (1994) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 542 at 4 (1990) (statutory predecessor to Gov't Code § 552.103 may be waived), 470 at 7 (1987) (statutory predecessor to Gov't Code § 552.111 may be waived).

(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 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 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). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

Texas Rule of Civil Procedure 192.5 enacts the attorney work product privilege. For the purpose of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent that the information implicates the core work product aspect of the work product privilege. *See* 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 mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney’s representative. *See* TEX. R. CIV. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product 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 the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney’s representative. *Id.* The first element of the 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 (1) that 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) that 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 element of the test requires the governmental body to show that the documents at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney’s representative. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both

elements of the work product test is confidential under rule 192.5, provided that the information does not fall within the purview of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

In this instance, the section 552.022 information consists of statements of district policy. You inform us, and the submitted documents confirm, that the information in question was provided to the EEOC by an attorney for the district. Thus, the district has not demonstrated that the information in question qualifies as a privileged attorney-client communication. Likewise, the district has not shown that the policy statements were created in anticipation of litigation or that they reveal the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. Therefore, the district may not withhold any of the information that is encompassed by section 552.022 under Texas Rule of Evidence 503 or Texas Rule of Civil Procedure 192.5.

The district also contends that all of the submitted information is confidential under section 552.101 of the Government Code. Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that another statute makes confidential. You claim that the submitted information is confidential under provisions of part 1610 of subtitle B of title 29 of the Code of Federal Regulations.² We note, however, that these regulations are applicable to records maintained by the EEOC, rather than those held by the district. *See* 29 C.F.R., subtitle B, chapter XIV, parts 1610 (availability of EEOC records), 1611 (Privacy Act regulations); *see also* Open Records Decision Nos. 245 (1980), 155 (1977). Thus, none of the submitted information is excepted from disclosure under section 552.101 of the Government Code in conjunction with the federal regulations. As the district has not demonstrated that any of the information encompassed by section 552.022 is made confidential by law, the district must release that information, which we have marked accordingly.

Next, we address the district's claims with regard to the submitted information that is not encompassed by section 552.022. The district raises section 552.107(1), which protects information that comes within the attorney-client privilege. A governmental body that asserts the attorney-client privilege under section 552.107(1) has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* 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. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative

²We note that a federal statute or an administrative regulation enacted pursuant to statutory authority can provide statutory confidentiality for purposes of section 552.101. *See* Open Records Decision No. 476 (1987) (addressing statutory predecessor to Gov't Code § 552.101).

is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See 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 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. *See* 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. Lastly, 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. *See 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).

In this instance, the information that is not encompassed by section 552.022 was communicated to the EEOC. Thus, this information was not communicated between or among clients, client representatives, lawyers, and lawyer representatives. Therefore, the district may not withhold any of the information that is not encompassed by section 552.022 under section 552.107(1).

The district also seeks to withhold the information that is not encompassed by section 552.022 under the attorney work product privilege. Section 552.111 of the Government Code encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure.³ *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product 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

³Section 552.111 excepts from required public disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.”

(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.

A governmental body that seeks to withhold information under section 552.111 and the attorney work product privilege bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *See* TEX. R. CIV. P. 192.5; Open Records Decision No. 677 at 6-8. In order for this office to conclude that information was created or developed in anticipation of litigation, we must be satisfied that

(a) 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 (b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. 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; Open Records Decision No. 677 at 7.

The information that the district seeks to withhold as attorney work product was disclosed to the EEOC. We note that the attorney work product privilege can be waived if privileged information is voluntarily disclosed in a non-privileged context. *See Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 554 (Tex. 1990); *Carmona v. State*, 947 S.W.2d 661, 663 (Tex. App.—Austin 1997, no writ); *Arkla, Inc. v. Harris*, 846 S.W.2d 623, 630 (Tex. App.—Houston [14th Dist.] 1993, no writ); *State v. Peca*, 799 S.W.2d 426, 431 (Tex. App.—El Paso 1990, no writ). Therefore, assuming that any of the information not encompassed by section 552.022 otherwise qualifies as privileged attorney work product, we conclude that the district has waived the attorney work product privilege with regard to all of the information at issue in disclosing the information to the EEOC. Therefore, the district may not withhold any of the information that is not encompassed by section 552.022 under the attorney work product aspect of section 552.111.

Lastly, we address the district's claim under section 552.103 of the Government Code. This exception 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.

...

(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.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (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.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* You inform us that the requestor has filed a charge of discrimination with the EEOC. This office has determined that the filing of a complaint with the EEOC indicates that litigation is reasonably anticipated. *See* Open Records Decision No. 336 (1982). Therefore, based on your representations, we find that the district reasonably anticipated litigation on the date of its receipt of this request for information. We also find that the submitted information that is not encompassed by section 552.022 relates to the anticipated litigation. We therefore conclude that you have demonstrated that section 552.103 is applicable in this instance.

We note, however, that the district seeks to withhold information that the opposing party to the anticipated litigation already has seen or to which she has already had access. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that relates to the litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). Thus, if the opposing party to anticipated litigation has already seen or had access to information that relates to the litigation, through discovery or otherwise, there is no interest in now withholding such information under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the submitted information that the opposing party has already seen or to which she has already had access may not be withheld under section 552.103. We

have marked that information, which the district must release.⁴ The district may withhold the rest of the submitted information that is not encompassed by section 552.022 under section 552.103. We note that section 552.103 will no longer be applicable to that information once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). The district must not release confidential information, however, even at the conclusion of the related litigation. *See* Gov't Code §§ 552.007, .352.

In summary, the district must release the submitted information that is encompassed by section 552.022 of the Government Code. The district also must release the information not encompassed by section 552.022 that the opposing party to the anticipated litigation has already seen or to which she has already had access. The district may withhold the rest of the information that is not encompassed by section 552.022 under section 552.103 of the Government Code.

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

⁴We note that under other circumstances, the district might be required to withhold some of the information that is not excepted under section 552.103, in order to protect the requestor's privacy. *See, e.g.*, Gov't Code §§ 552.024, .117. In this instance, however, the requestor has a special right of access to her own private information. *See id.* § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual asks governmental body to provide her with information concerning herself). If the district receives another request for this information from a person who would not have a right of access to it, the district should resubmit this same information and request another decision.

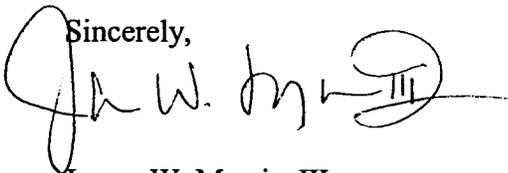
fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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 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,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is written in a cursive style with a large initial "J" and a distinct "III" at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 190735

Enc: Submitted documents

c: Ms. Harriet Wilson
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(w/o enclosures)