



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 2, 2004

Ms. Sara Hardner Leon
Powell & Leon, L.L.P.
1706 West Sixth Street
Austin, Texas 78703-4703

OR2004-5417

Dear Ms. Leon:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 204477.

The Austin Independent School District (the "district"), which you represent, received a request for several categories of information relating to allegations that grades were changed at a specified district school. You inform us that the district has provided the requestor with some information and claim that other requested information is excepted from disclosure under sections 552.026, 552.107, 552.111, and 552.114 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.²

Initially, we address the scope of the request and of this ruling. In this instance, the request specifically excludes "any information that would identify any . . . student or the grade of any . . . student [as well as] any information that discloses the social security number,

¹Although you also raised sections 552.101 and 552.103 as possible exceptions to disclosure, you have not indicated that any of the submitted information falls within these exceptions and have provided no arguments regarding such exceptions. We therefore assume you are no longer claiming these exceptions. *See* Gov't Code § 552.301.

²We assume that the sample of records submitted to this office as Exhibit D 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.

employee identification number, student identification number, residence address, mailing address, residential telephone number or photograph of any [district] student or [district] employee.” You state that the documents submitted as Exhibit D “contain information such as student and employee data that is expressly excluded” and that the district “intends to exclude these documents in their entirety pursuant to the requestor’s express exclusion.” Although the request excludes certain categories of “information,” it does not exclude entire documents simply because they contain such information. Further, while the request excludes certain types of information relating to district employees, this exclusion does not extend to employees’ names. To the extent Exhibits C and D contain information that is specifically listed in the requestor’s exclusion, such information is not responsive to the present request and need not be released.³ However, the remaining information in Exhibits C and D is responsive to the request and may only be withheld if an exception under the Act applies to it. Because the district has not asserted any exceptions for the remaining information in Exhibit D, it must be released. *See* Gov’t Code §§ 552.301, .302.

We next note that the submitted information is part of a completed investigation made of, for, or by the district. Section 552.022 of the Government Code provides that “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body” constitutes “public information . . . not excepted from required disclosure . . . unless . . . expressly confidential under other law” or excepted from disclosure under section 552.108 of the Government Code. Gov’t Code § 552.022(a)(1). You do not claim that the submitted responsive information is excepted from disclosure under section 552.108. You assert instead that it may be withheld pursuant to sections 552.107 and 552.111 of the Government Code. These sections are discretionary exceptions to disclosure that protect a governmental body’s interests and are therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See* Open Records Decision Nos. 677 at 8 (2002) (section 552.111 is not other law for purposes of section 552.022), 676 at 6 (2002) (section 552.107 is not other law for purposes of section 552.022); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Thus, none of the submitted information may be withheld pursuant to section 552.107 or 552.111.

However, the Texas Supreme Court has held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). This office has determined that when the attorney-client privilege or work-product privilege is claimed for information that is subject to release under section 552.022, the proper analysis is whether the information at

³Because the request specifically excludes student-identifying information, we need not address your arguments regarding sections 552.026 and 552.114. *See* Open Records Decision Nos. 539 (1990) (same analysis under section 552.114 and Family Educational Rights and Privacy Act of 1974 (“FERPA”), 20 U.S.C. § 1232g), 332 (1982), 206 (1978) (information must be withheld from required public disclosure under FERPA only to extent reasonable and necessary to avoid personally identifying particular student).

issue is protected under Texas Rule of Evidence 503 (attorney-client communications) or Texas Rule Civil Procedure 192.5 (work product). Open Records Decision Nos. 676 at 5-6 (2002), 677 at 8-9 (2002). We will therefore consider whether any of the submitted responsive information is protected under the rules.

Rule 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

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. 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. See Open Records Decision No. 676 (2002). Upon a demonstration of all three factors, the entire communication is confidential under Rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *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). Having considered your representations and reviewed the information at issue, we find that you have established that the information in Exhibit B that you wish to withhold constitutes privileged attorney-client communications that may be withheld under Rule 503.⁴

You assert that Exhibit C constitutes attorney work product. For the purpose of section 552.022, information is confidential under Rule 192.5 of the Texas Rules of Civil Procedure 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).

Having considered your arguments and representations, we find that you have failed to establish that the information in Exhibit C was prepared by an attorney or the representative of an attorney or that this information contains an attorney's or an attorney's representative's

⁴As we are able to reach this conclusion, we need not consider your other arguments regarding Exhibit B.

mental impressions, opinions, conclusions, or legal theories. Because you have failed to establish that the information you seek to withhold constitutes core work product, it may not be withheld under Rule 192.5.

Finally, we note that the submitted information includes a private e-mail address. Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee’s work e-mail address because such an address is not that of the employee as a “member of the public” but is instead the address of the individual as a government employee. The e-mail address at issue does not appear to be of a type specifically excluded by section 552.137(c). Therefore, unless the individual at issue consents to release of his e-mail address, the district must withhold it in accordance with section 552.137.

In summary, the information in Exhibit B that you seek to withhold may be withheld under Rule 503. The marked e-mail address must be withheld under section 552.137 unless the district receives consent for its release. The remaining responsive information must be released.

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

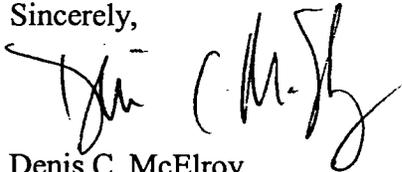
of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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 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,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/krl

Ref: ID# 204477

Enc. Submitted documents

c: Ms. Terry J. Johnson
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(w/o enclosures)