



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 21, 2004

Ms. Dorcas A. Green
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
P.O. Box 2156
Austin, Texas 78768

OR2004-10793

Dear Ms. Green:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 215503.

The Navarro Independent School District (the "district"), which you represent, received a request for five categories of information, including attorney fee bills for the months of June, July, August, and September of 2004. You inform us that the district has released all of the requested information except the requested attorney fee bills. You claim that the requested attorney fee bill information is excepted from disclosure under sections 552.026, 552.101, 552.103, 552.107, 552.111, and 552.114 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

We first note that the submitted information is subject to section 552.022 of the Government Code. This section provides in part 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:

...

(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). Because the submitted information consists of the district's attorney fee bills, the district must release this information pursuant to section 552.022(a)(16) unless it is expressly confidential under other law.

The district seeks to withhold this information under sections 552.103, 552.107, and 552.111. We note, however, that these sections are discretionary exceptions to public disclosure that protect the governmental body's interests and may be waived. *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 section 552.103); Open Records Decision Nos. 677 at 10 (attorney work product privilege may be waived) 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103, 552.107, and 552.111 do not qualify as other law that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold any portion of the submitted attorney fee bills under section 552.103, section 552.107, or section 552.111. However, because you contend that a portion of the information is confidential under the Family Educational Rights and Privacy Act of 1974 ("FERPA"), section 1232g of title 20 of the United States Code, we will address the applicability of FERPA to this information. Furthermore, you contend that the fee bills contain information that is protected by the attorney-client privilege and the attorney work product privilege. The Texas Supreme Court has held 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 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. Accordingly, we will also consider your claims pursuant to Rule 503 and Rule 192.5.

You indicate that the attorney fee bills submitted as Exhibit 5 contain information that is confidential under FERPA. 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); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). Section 552.026 of the Government Code incorporates FERPA into chapter 552 of the Government Code. *See* Open Records Decision No. 634 at 6-8 (1995). Section 552.026 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.

Gov't Code § 552.026. "Education records" under FERPA are those records that contain information directly related to a student and that are maintained by an educational agency or institution, or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A). Section 552.114(a) of the Government Code excepts from disclosure "information in a student record at an educational institution funded wholly or partly by state revenue." This office generally has treated "student record" information under section 552.114(a) as the equivalent of "education record" information that is protected by FERPA. *See* Open Records Decision No. 634 at 5 (1995).

We agree that the attorney fee bills submitted as Exhibit 5 contain information directly related to a district student and are therefore "education records" for purposes of FERPA. 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). You contend that release of "the substance of the attorney fee bills" in Exhibit 5 would give the requestor "access to personally identifiable student information," and you therefore argue that Exhibit 5 must be withheld in its entirety. Upon review, however, we find that redacting the student's name from this information is sufficient to avoid personally identifying the student in this instance. Accordingly, we have marked student identifying information in Exhibit 5 that is confidential under FERPA and must be withheld.

We now turn to your arguments under the attorney-client privilege and the attorney work product privilege for the remaining information in the submitted fee bills. Rule 503 of the Texas Rule of Evidence encompasses the attorney-client privilege and 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. *Id.* 503(a)(5). Thus, 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 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).

You indicate that the submitted information consists of or documents confidential communications between representatives of the district and its attorneys. Based on your representations and our review of the submitted information, we agree that the attorney fee bills submitted as Exhibits 5 through 11 contain information that reveals confidential communications between privileged parties. Accordingly, we have marked the information in Exhibits 5 through 11 that we find is protected by the attorney-client privilege and may therefore be withheld pursuant to Rule 503 of the Texas Rules of Evidence. The remaining information in Exhibits 5 through 11, however, does not consist of or reveal confidential communications between representatives of the district and district attorneys or attorney representatives. We therefore determine that the remaining information in Exhibits 5 through 11 is not protected under the attorney-client privilege and may not be withheld under Rule 503. Furthermore, upon review we determine that the attorney fee bills submitted as Exhibits 12 through 16 do not consist of or reveal confidential communications between representatives of the district and district attorneys or attorney representatives. Thus, the district may not withhold any of the information in Exhibits 12 through 16 pursuant to the attorney-client privilege under Rule 503.

We next address your claim under Rule 192.5 with respect to the remaining submitted information. Rule 192.5 of the Texas Rules of Civil Procedure encompasses 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)*. Rule 192.5 defines core work product 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 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 the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *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 part of the work product test requires the governmental body to show that the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney's or an attorney's representative. See TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both parts of the work product test is confidential under Rule 192.5, provided that the information does not fall within the scope 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).

You contend that the submitted attorney fee bills also contain core work product that was prepared in anticipation of litigation by the district's attorneys. You state, "[t]he attorney fee bills reflect the attorney's mental impressions and conclusions about information conveyed during the conversations and conferences [and] . . . reflect strategy decisions and issue formulations by the attorneys . . . [as well as] reveal the attorney's legal objective." Upon review, however, we find that the submitted attorney fee bills consist solely of brief descriptions of services rendered or actions taken and do not reveal any mental impressions or legal conclusions formed by district attorneys concerning the matters for which the attorneys are providing legal services to the district. Furthermore, we find that the fee bills do not reveal any mental impressions, opinions, or conclusions of district attorneys regarding legal issues, strategy, or objectives. We therefore determine that none of the information at issue consists of core attorney work product, and we find the district may not withhold any of the remaining submitted information pursuant to the attorney work product privilege under Rule 192.5.

In summary, we have marked student identifying information in the attorney fee bills submitted as Exhibit 5 that is confidential under FERPA and must be withheld. We have also marked information in the attorney fee bills submitted as Exhibits 5 through 11 that is protected by the attorney-client privilege and may be withheld under Rule 503 of the Texas

Rules of Evidence. The remainder of the submitted information is not excepted from disclosure and 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 thirty calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within ten 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 ten 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 ten 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); *Tex. 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 ten calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Saldivar", with a long horizontal flourish extending to the right.

David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 215503

Enc: Submitted documents

c: Mr. Jeffrey A. Howey
105 Dunn Street #18
Seguin, Texas 78155
(w/o enclosures)