



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 22, 2005

Mr. Dennis Eichelbaum  
Schwartz & Eichelbaum, P.C.  
7400 Gaylord Parkway  
Frisco, Texas 75034

OR2005-08653

Dear Mr. Eichelbaum:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 232850.

The Waxahachie Independent School District (the "district"), which you represent, received a request for five categories of information relating to legal services incurred by the district. You claim that portions of the submitted attorney fee bills are protected from disclosure under sections 552.107 and 552.111 of the Government Code and section 101.104 of the Civil Practice and Remedy Code. We have considered your claims and reviewed the submitted information.

The submitted attorney fee bills are 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 under section 552.022(a)(16) unless it is expressly confidential under other law.

The district contends some of the responsive information is confidential under section 101.104 of the Civil Practice and Remedies Code, which states the following:

(a) Neither the existence nor the amount of insurance held by a governmental unit is admissible in the trial of a suit under [the Texas Tort Claims Act].

(b) Neither the existence nor the amount of the insurance is subject to discovery.

Civ. Prac. & Rem. Code § 101.104; see *In re Sabine Valley Center*, 986 S.W.2d 612 (Tex. 1999) (statute "prohibits discovery of insurance covering claims against a governmental unit and against its employees for which it could be liable, directly or vicariously, under the [Texas Tort Claims] Act"). Although the statute provides that the information at issue is not subject to discovery, the statute does not make the information expressly confidential. See *Open Records Decision No. 551* at 3 (1990) (provisions of section 101.104 "are not relevant to the availability of the information to the public"). The Texas Supreme Court has determined that the discovery privileges found in the Texas Rules of Civil Procedure and the 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). However, section 101.104 of the Civil Practices and Remedies Code is not such a privilege. Thus, we determine that the submitted information may not be withheld from disclosure under section 101.104 of the Civil Practice and Remedies Code.

The district also raises sections 552.107 and 552.111. However, these sections are discretionary exceptions to public disclosure that protect the governmental body's interests and may be waived. See *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 552.107 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 552.107 or 552.111 of the Government Code.

The district contends that the fee bills contain information that is protected by the attorney-client privilege and the attorney work product privilege. As noted above, 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. 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 consider your claims under Rule 503 and Rule 192.5.

Rule 503 of the Texas Rules 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 assert that the submitted information includes 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 at issue contain information that is protected by the attorney-client privilege. We have marked the information the district may withhold pursuant to Rule 503 of the Texas Rules of Evidence.

Next, we turn to your claim under Rule 192.5 of the Texas Rules of Civil Procedure, which 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).

We understand you to contend that the submitted attorney fee bills also contain core work product that was prepared by the district's attorneys in anticipation of litigation. Based on your representations and our review, we agree that the submitted attorney fee bills contain core work product that is protected from disclosure by the attorney work product privilege.

Accordingly, we have marked the information the district may withhold pursuant to Rule 192.5 of the Texas Rules of Civil Procedure.

In summary, we have marked the portions of the submitted attorney fee bills that are protected by the attorney-client privilege and may be withheld under Rule 503 of the Texas Rules of Evidence. We have also marked the portions of the fee bills that are protected by the attorney work product privilege and may be withheld pursuant to Rule 192.5 of the Texas Rules of Evidence. The remainder of the 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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 Forrest".

James Forrest  
Assistant Attorney General  
Open Records Division

JF/seg

Ref: ID# 232850

Enc: Submitted documents

c: Mr. Tom Johnson  
301 Sioux Drive  
Waxahachie, Texas 75165-1560  
(w/o enclosures)