



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 2, 2006

Ms. Marquette Maresh
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
P.O. Box 2156
Austin, Texas 78768

OR2006-12997

Dear Ms. Maresh:

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# 263552.

The Leander Independent School District (the "district"), which you represent, received a request for billings for legal services during a specified time interval. The district seeks to withhold some of the requested information under sections 552.101, 552.103, 552.104, 552.105, 552.107, 552.111, and 552.114 of the Government Code, Texas Rule of Evidence 503, Texas Rule of Civil Procedure 192.5, and the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code. We have considered your arguments and have reviewed the information you submitted.

You state that some of the requested information relates to students. The United States Department of Education Family Policy Compliance Office (the "DOE") recently informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.¹ Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit

¹ A copy of this letter may be found on the Office of the Attorney General's website: http://www.oag.state.tx.us/opinopen/og_resources.shtml.

education records to this office in unredacted form, that is, in a form in which “personally identifiable information” is disclosed. *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”). Thus, because our office is prohibited from reviewing education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted information.² Such determinations under FERPA must be made by the educational authority that is in possession of the education records.³

Next, we note that the submitted information is contained in attorney fee bills and therefore is subject to section 552.022 of the Government Code. Section 552.022(a) provides for the required public disclosure of “information that is in a bill for attorney’s fees and that is not privileged under the attorney-client privilege,” unless the information is expressly confidential under other law. Gov’t Code § 552.022(a)(16). Although you seek to withhold the submitted information under sections 552.103, 552.105, 552.107, and 552.111 of the Government Code, these sections are discretionary exceptions to disclosure that protect a governmental body’s interests and may be waived. *See id.* § 552.007; *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), 564 (1990) (governmental body may waive statutory predecessor to Gov’t Code § 552.105). As such, sections 552.103, 552.105, 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 submitted information under section 552.103, section 552.105, section 552.107, or section 552.111.

The Texas Supreme Court has held, however, that the Texas Rules of Evidence and the Texas Rules of Civil Procedure are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege also is found at Texas Rule of Evidence 503, and the attorney work product privilege also is found at Texas Rule of Civil Procedure 192.5. Accordingly, we will address your assertion

² Section 552.114 of the Government Code excepts from disclosure “information in a student record at an educational institution funded wholly or partly by state revenue.” Gov’t Code § 552.114. 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).

³ In the future, if the district does obtain parental consent to submit unredacted education records and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

of these privileges under rule 503 and rule 192.5.⁴ We also will address your claim under section 552.104 of the Government Code. *See* Gov't Code § 552.104(b) (information protected by Gov't Code § 552.104 not subject to required public disclosure under Gov't Code § 552.022(a)).

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;
- (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

⁴ You also raise section 552.101 of the Government Code, which excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. We note, however, that section 552.101 does not encompass the attorney-client and attorney work product privileges. *See* Open Records Decision No. 676 at 1-3 (2002) (Gov't Code § 552.101 does not encompass discovery privileges). Accordingly, we do not address your claim that information contained in the submitted attorney fee bills is confidential under section 552.101 in conjunction with rules 503 and 192.5. We do not understand you to argue that the submitted information is confidential on any other basis under section 552.101.

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 state that the submitted attorney fee bills document communications between the district's attorneys and their clients that were made in connection with the rendition of professional legal services to the district. You have identified most of the parties to the communications. You also state that the communications were intended to be and remain confidential. Based on your representations and our review of the information at issue, we have marked the information that the district may withhold on the basis of the attorney-client privilege under Texas Rule of Evidence 503.

Texas Rule of Civil Procedure 192.5 encompasses the attorney work product privilege. For purposes 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 also assert that the attorney fee bills contain core attorney work product that is protected by rule 192.5. You state that the documents contain information that was developed in connection with pending or anticipated litigation and that reveals the mental impressions, opinions, conclusions, or legal theories of the district's attorneys. You also state that the attorney work product privilege has not been waived. Based on your representations and our review of the remaining information in question, we have marked the information that the district may withhold on the basis of the attorney work product privilege under Texas Rule of Civil Procedure 192.5.

You contend that section 552.104 of the Government Code is applicable to some of the remaining information. Section 552.104 excepts from public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). This exception protects a governmental body's interests in connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the "competitive advantage" aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate that it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body's legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body's demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

You state that the information in Exhibits 18 through 20 relates to pending acquisitions of real property by the district. You are concerned that the release of this information would give an unfair advantage to other competing buyers that may be interested in the property. You contend that release of the information in question would allow competing buyers an opportunity to offer the seller more favorable terms than those that the district is negotiating. Having considered your arguments and reviewed the submitted information, we conclude that you have not demonstrated that release of the information in question will result in any specific harm to the district's marketplace interests. We therefore conclude that the district may not withhold any of the remaining information under section 552.104 of the Government Code.

In summary: (1) the district may withhold the marked information that is protected by Texas Rule of Evidence 503; and (2) the district also may withhold the marked information that is protected by Texas Rule of Civil Procedure 192.5. The rest of the submitted information must be released. This ruling does not address the applicability of FERPA to the submitted information. Should the district determine that all or portions of the submitted information consists of "education records" that must be withheld under FERPA, the district must dispose of that information in accordance with FERPA, rather than the Act.

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).

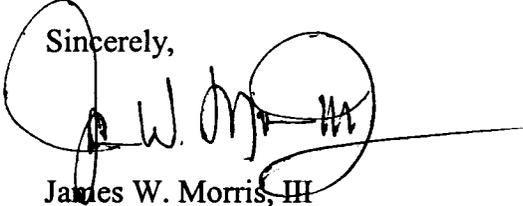
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 "J.W. Morris, III", is written over a circular stamp. The signature is fluid and cursive, with a long horizontal line extending to the right.

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

JWM/sdk

Ref: ID# 263552

Enc: Submitted documents

c: Mr. Pete Isburgh
c/o Ms. Marquette Maresh
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(w/o enclosures)