

The ruling you have requested has been modified pursuant to a court order. The court judgment has been attached to this document.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 4, 2007

Ms. Susan K. Bohn
Humble Independent School District
Bracewell & Giuliani, L.L.P.
111 Congress Avenue, Suite 2300
Austin, Texas 78701-4061

OR2007-00129

Dear Ms. Bohn:

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# 268530.

The Humble Independent School District (the "district"), which you represent, received three requests from the same requestor. The first request is for all legal invoices from July 20, 2006 to the present, all itemized billing sheets and time cards for a named person from January 1, 2005 to the present, and the board policy that allows for expenditures without approval or the board minutes detailing the approvals. The second request is for all correspondence regarding fees, invoices, detailed billing records, and requests for payment in any format from February 1, 2006 to November 8, 2006. The third request is for "a copy of any/all legal fees and the invoices associated with those fees paid by the district in association with any/all requests for opinions from the Office of the Attorney General of Texas for the year 2006." You state that you will release some of the requested information with the social security numbers redacted under section 552.147 of the Government Code.¹ You claim, however, that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.114 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.²

¹Section 552.147 of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

²We assume that the representative sample of records submitted to this office 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.

Initially, we note that recently, the United States Department of Education Family Policy Compliance Office informed this office that the Family Education Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g, 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 purposes of our review in the open records ruling process under the Act.³ 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 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”). You have submitted, among other things, redacted education records that you have determined are protected by FERPA for our review. Because our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to the information at issue. Such determinations under FERPA must be made by the educational authority in possession of the education records.⁴ We will, however, address the applicability of the remaining claimed exceptions to the remaining submitted information.⁵

Next, you claim that the requested time sheets of the named person are not public information. Section 552.002 of the Government Code defines “public information” as “information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business [.]” *Id.* § 552.002. Information is generally public information under the Act when it relates to the official business of a governmental body or is used by a public official or employee in the performance of official duties. *See* Open Records Decision No. 635 at 4 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving de minimis use of state resources). Further, the characterization of information as “public information” under the Act is not dependent on whether the requested records are in the possession of an individual or whether a governmental body has a particular policy or procedure that establishes a governmental body’s access to the information. *See id.* at 3-4 (finding that information does not fall outside definition of “public information” in Act merely because individual member of governmental body possesses information rather than governmental body as whole); *see also* Open Records Decision No. 425 (1985) (concluding, among other things, that information sent to individual

³A copy of this letter may be found on the Office of the Attorney General’s website at http://www.oag.state.tx.us/opinopen/og_resources.shtml.

⁴In 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.

⁵Because of this determination, we need not address your claims under section 552.114 of the Government Code.

school trustees' homes was public information because it related to official business of governmental body) (overruled on other grounds by Open Records Decision No. 439 (1986)).

In this instance, the district states that the requested time sheets were created by the named person and maintained by Bracewell & Giuliani, L.L.P. ("Bracewell") for private accounting practices. You also state that the district "does not own the documents or have any right of access to them." In fact, Bracewell indicates that the time sheets "are never disclosed to anyone outside of [Bracewell]," and specifically, the district "has never had access and will never have access to [the named person's] time sheets." Thus, you state that the time sheets were not collected, assembled, or maintained in connection with any official business of the district. Based on your representations and our review of the time sheets, we find that the time sheets do not relate to the transaction of official district business, and thus, do not constitute public information of the district. Accordingly, the district is not required to disclose the time sheets under the Act. *See Open Record Decision No. 635 (1995)* (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving de minimis use of state resources).

Next, we note that the remaining 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). In this instance, the remaining information consists of attorney fee bills. Thus, 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 under section 552.111 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. Furthermore, although you also raise section 552.101 of the Government

Code in conjunction with Texas Rule of Evidence 503, Texas Rule of Civil Procedure 192.5, Federal Rule of Civil Procedure 26(b)(3), and Texas Disciplinary Rule of Professional Conduct 1.05, we note that rule 503, rule 192.5, rule 26(b)(3), and rule 1.05 are not confidentiality provisions for the purposes of section 552.101.⁶ *See* Open Records Decision Nos. 676 at 1-3, 575 at 2 (1990), 416 at 6-7 (1984). Therefore, the district may not withhold any of the information at issue under section 552.101 on the basis of rule 503, rule 192.5, rule 26(b)(3), or rule 1.05.

However, 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 for the attorney fee bills. We note, however, that the Federal Rules of Civil Procedure and the Texas Disciplinary Rules of Professional Conduct have not been held to be “other law” for the purposes of section 552.022. Therefore, the district may not withhold any of the information at issue on the basis of Federal Rule of Civil Procedure 26(b)(3) or Texas Disciplinary Rule 1.05.

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.

⁶Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101.

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 attorney fee bills contain confidential communications between the district’s attorneys and the district that were made for the purposes of facilitating the rendition of professional legal services to the district. Based on your representations and our review of the submitted information, we agree that the attorney fee bills contain information that reveals confidential communications between privileged parties. Accordingly, we have marked the information that is protected by the attorney-client privilege and may therefore be withheld pursuant to rule 503 of the Texas Rules of Evidence. Some of the remaining information, however, does not consist of or reveal confidential attorney-client communications. Further, some of the remaining information documents communication to individuals who you have not identified as clients, client representatives, lawyers, or lawyer representatives. Thus, you have failed to demonstrate that any of this remaining information documents privileged attorney-client communications. Accordingly, none of the remaining information at issue may be withheld under Texas Rule of Evidence 503.

Next, 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 prong 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.*, 861 S.W.2d at 427.

You claim that some of the remaining portions of the submitted fee bills contain core attorney work product that is protected by rule 192.5. Although you argue that portions of the remaining submitted information reveal the mental impressions, opinions, conclusions, or legal theories of the district’s attorneys regarding anticipated litigation, upon review, we find that none of the remaining information is protected by the attorney work product privilege. Therefore, none of the remaining information at issue may be withheld under Texas Rule of Civil Procedure 192.5.

In summary, the district may withhold the information we have marked under rule 503 of the Texas Rules of Evidence. As you do not raise any other exceptions against disclosure, the remaining 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, 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,



Jaclyn N. Thompson
Assistant Attorney General
Open Records Division

JNT/dh

Ref: ID# 268530

Enc. Submitted documents

c: Ms. Cheryl Burbano
8103 Hurst Forest
Humble, Texas 77346-4511
(w/o enclosures)

HUMBLE INDEPENDENT SCHOOL DISTRICT,
Plaintiff,

V.

GREG ABBOTT, ATTORNEY GENERAL FOR THE STATE OF TEXAS,
Defendant.

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§

IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

345th JUDICIAL DISTRICT

Filed in The District Court of Travis County, Texas

DEC 18 2007
At: T. S. O. M.
Amalia Rodriguez-Mendoza, Clerk

AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for agreed final judgment. Plaintiff Humble Independent School District (Humble ISD) and Defendant Greg Abbott, Attorney General of Texas, appeared by and through their respective attorneys and announced to the court that all matters of fact and things in controversy between them had been fully and finally compromised and settled. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code Ann. ch. 552 (West 2004 & Supp. 2006).

The parties represent to the Court that, in compliance with Tex. Gov't Code § 552.325(c), the requestor, Cheryl Burbano, was sent reasonable notice of this setting and of the parties' agreement that Humble Independent School District may withhold the information at issue; that the requestor was also informed of her right to intervene in the suit to contest the withholding of this information; and that the requestor has not informed the parties of her intention to intervene. Neither has the requestor filed a motion to intervene or appeared today. After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. The information at issue, specifically, the descriptions, or parts thereof, in invoice ##'s 21309015, 21309073, 21291833, 21293652, 21297694, 21297695, 21297687, 21297692, 21297688, 21297690, 21299537, 21299536, 21299531, 21299529 of Bracewell & Giuliani LLP, is excepted from disclosure by Tex. R. Evid. 503 or Tex. R. Civ. P. 192.5 and may be withheld by Humble ISD.

2. Any other information in other invoices for the specified time period, for which the pink highlighted information specified in ¶ 1 of this Judgment is a representative sample, is excepted from disclosure by Tex. R. Evid. 503 or Tex. R. Civ. P. 192.5 and may be withheld by Humble ISD.

3. Invoice # 12516 of Rusty Hardin and Associates, P.C., for January 2005 through November 15, 2006, as marked in pink highlight, by the Office of the Attorney General, is excepted from disclosure by Tex. R. Evid. 503 or Tex. R. Civ. P. 192.5 and may be withheld by Humble ISD.

4. Humble ISD may redact the descriptions, or parts thereof, in the legal invoices as enumerated in ¶¶ 1 through 3 of this Judgment, along with any other information in the legal invoices that the Attorney General determined was excepted from disclosure in OR2007-00129.

5. If it has not already done so, Humble ISD shall release the legal invoices, with the information described in ¶¶ 1 through 3 redacted, to the requestor promptly upon receipt by Humble ISD of an agreed final judgment signed by the Court.

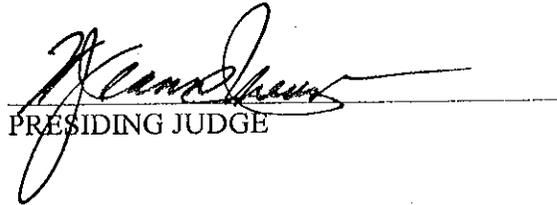
6. This settlement applies only to Ms. Burbano's requests made on October 10, 2006, November 8, 2006, and November 15, 2006.

7. All costs of court are taxed against the parties incurring the same;

8. All relief not expressly granted is denied; and

9. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendant and is a final judgment.

SIGNED this the 18 day of December, 2007.


PRESIDING JUDGE

APPROVED:

Eric Storm w/permission
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