

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 8, 2008

Ms. Stephanie S. Rosenberg
General Counsel
Humble Independent School District
P.O. Box 2000
Humble, Texas 77347-2000

OR2008-00301

Dear Ms. Rosenberg:

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# 299246.

The Humble Independent School District (the "district") received a request for "the records complete, any and all legal bills, invoices, remittances, or any other document presented to the district or district representatives to secure funds for legal services."¹ You state that the district has released some of the requested information.² You claim that portions of the submitted information are excepted from disclosure under sections 552.103, 552.107,

¹You state, and provide documentation showing, that you sought and received clarification from the requestor. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

²We note that the requestor agreed to the redaction of student information in accordance with the federal Family Education Rights and Privacy Act ("FERPA"). Accordingly, we do not address your arguments under section 552.114 of the Government Code. *See* Gov't Code §§ 552.026 (incorporating FERPA into the Act), .114 (excepting from disclosure "student records"); Open Records Decision No. 539 (1990) (determining the same analysis applies under section 552.114 of the Government Code and FERPA).

552.111 of the Government Code.³ You claim that the remaining information is privileged under Texas Rules of Civil Procedure 192.5⁴ and Texas Rule of Evidence 503.⁵ We have considered your arguments and reviewed the submitted information.

Initially, you inform this office that Exhibit K is related to a lawsuit pending against the Office of the Attorney General: *Humble Indep. Sch. Dist. v. Abbott*, Cause No. D-1-GV-07-000097, 345th District Court of Travis County, Texas. We note, however, that Exhibit K is not at issue in that lawsuit. Therefore, we will address the submitted arguments to withhold Exhibit K under the Act.

Next, we 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). In this instance, the submitted 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. You claim that portions of the submitted attorney fee bills are excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. However, sections 552.103, 552.107, and 552.111 are discretionary exceptions under the Act and do not constitute "other law" for purposes of section 552.022. 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. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions

³Although you also raise section 552.101 in conjunction with the Texas Rule of Civil Procedure 192.5 and Texas Rule of Evidence 503, this office has concluded that section 552.101 does not encompass discovery privileges. See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

⁴You also raise Texas Rule of Civil Procedure 193.3. We note that this rule instructs a party on how to preserve a privilege from written discovery.

⁵While you also raise Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct, you have provided no argument explaining how this rule is applicable to the submitted information. Therefore, we presume you no longer assert this exception to disclosure. Gov't Code §§ 552.301, .302.

generally). Accordingly, the district may not withhold the information at issue under sections 552.103, 552.107, and 552.111.

The Texas Supreme Court has held 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). We will therefore consider your arguments under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 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 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 a portion of the attorney fee bills contain information that reveals confidential communications between privileged parties. Accordingly, the district may withhold the information we have marked under Texas Rule of Evidence 503.⁶ However, the district has failed to demonstrate how any of the remaining information constitutes confidential communications between privileged parties made for the purpose of facilitating the rendition of professional legal services. Therefore, none of the remaining information may be withheld on that basis.

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 when the governmental body received the request for information 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

⁶As our ruling is dispositive, we need not address your argument under rule 192.5 for this 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 reviewed the information at issue, we conclude you have not demonstrated that any of the remaining information consists of core work product for purposes of Texas Rule of Civil Procedure 192.5. Thus, the district may not withhold any of the remaining information under rule 192.5.

To conclude, the district may withhold the information in the attorney fee bills that we have marked under Texas Rule of Evidence 503. 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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 that reads "Jordan Johnson". The signature is written in a cursive style with a large, looped "J" and "J".

Jordan Johnson
Assistant Attorney General
Open Records Division

JJ/jb

Ref: ID# 299246

Enc. Submitted documents

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

CAUSE NO. D-1-GV-08-000161

HUMBLE INDEPENDENT
SCHOOL DISTRICT,
Plaintiff,

V.

GREG ABBOTT, ATTORNEY GENERAL
OF TEXAS,
Defendant.

§ IN THE DISTRICT COURT OF
§
§
§
§ TRAVIS COUNTY, TEXAS
§
§
§ 53RD JUDICIAL DISTRICT

Filed in The District Court
of Travis County, Texas

JL NOV 20 2008
At 2:17 P.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, 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. 2007). 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 the 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 the attorney fee bills received by the District, for September 2007, as marked by the District, except for descriptions, or parts thereof, marked with a blue "X," on page 3, 5, 8, 11, 13, and 18 by the Office

of the Attorney General ("blue 'X' information"), is excepted from disclosure by Tex. R. Evid. 503.

2. The District may redact the descriptions, or parts thereof, in the attorney fee bills as enumerated in ¶ 1 of this Judgment, except for the blue "X" information, redacting also any other information in the attorney fee bills that the Attorney General determined was excepted from disclosure in OR2008-003301.

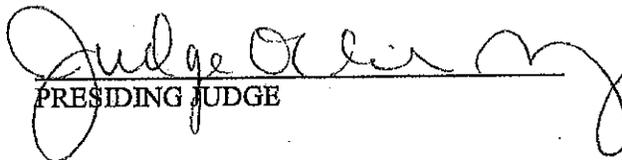
3. The District shall release the attorney fee bills and related communications, with the information described in ¶¶ 1 and 2 of this Judgment redacted, to the requestor promptly upon receipt by the District of this Judgment signed by the Court.

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

5. All relief not expressly granted is denied; and

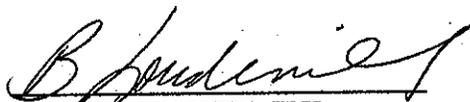
6. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendant and is a final judgment.

SIGNED this the 20 day of November, 2008.


PRESIDING JUDGE

APPROVED:


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