



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 25, 2010

Ms. Andrea Sheehan
Ms. Elisabeth A. Donley
Law Offices of Robert E. Luna, P.C.
For Carrollton-Farmers Branch ISD
4411 North Central Expressway
Dallas, Texas 75205

OR2010-01049

Dear Ms. Sheehan and Ms. Donley:

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# 368197.

The Carrollton-Farmers Branch Independent School District (the "district"), which you represent, received a request for e-mail correspondence between particular individuals regarding six specified agendas; legal fees related to four specified matters; costs associated with a particular election; and recordings of six specified meetings of the Board of Trustees.¹ You state you have released some of the requested information to the requestor. You also state that the district has no records responsive to item seven of the request.² You claim that portions of the submitted information are excepted from disclosure under sections 552.103,

¹The district sought and received clarification of the information requested. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed).

²The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

552.107, 552.111, and 552.137 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5.³ We have considered your arguments and reviewed the submitted information.

Initially, we note you have marked information in the submitted documents that you state is nonresponsive to the present request for information. Therefore, the information you have marked is not responsive to the present request. The district need not release nonresponsive information in response to this request, and this ruling will not address that information.

Next, we note that the submitted information in Exhibit B-1 is subject to section 552.022(a)(16) of the Government Code, which provides that information in a bill for attorney's fees must be released unless it is privileged under the attorney-client privilege or is expressly confidential under other law. *See* Gov't Code § 552.022(a)(16). You claim that portions of Exhibit B-1 are excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. These sections, however, are discretionary exceptions to 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); *see also* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, these sections do not make information confidential. Therefore, the district may not withhold any portion of Exhibit B-1 under section 552.103, section 552.107, or section 552.111. However, 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). Accordingly, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503 and the attorney work product privilege under Texas Rule of Civil Procedure 192.5 for the information at issue in Exhibit B-1.

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;

³Although you also claim the submitted information is privileged under Texas Rule of Civil Procedure 192.3, you make no arguments to support this claim. Therefore, we assume you have withdrawn your claim that rule 192.3 applies to the submitted information. *See* Gov't Code §§ 552.301, .302.

(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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state that portions of 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 also state that the communications were intended to be and have remained confidential. You have identified the parties to the communications in the submitted attorney fee bills. Accordingly, the district may withhold the information we have marked in Exhibit B-1 on the basis of the attorney-client privilege under Texas Rule of Evidence 503. However, we find that you have failed to demonstrate that the remaining information at issue documents confidential communications that were made between privileged parties. Therefore, we conclude that Texas Rule of Evidence 503 is not applicable to the remaining information at issue, and it may not be withheld on this basis.

Rule 192.5 of the Texas Rules of Civil Procedure encompasses the attorney work product privilege. For purposes of section 552.022 of the Government Code, information may be withheld under rule 192.5 only to the extent that the information implicates the core work product aspect of the work product privilege. *See* ORD 677 at 9-10. 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 contain the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test may be withheld 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). *See* Caldwell, 861 S.W.2d at 427.

You contend that the attorney fee bills contain attorney work product that is protected by rule 192.5. Having considered the submitted arguments and reviewed the information at issue, we conclude that the information we have marked in the attorney fee bills constitutes privileged attorney work product that may be withheld under rule 192.5 of the Texas Rules of Civil Procedure. However, you have not demonstrated that any of the remaining information you have marked in the submitted fee bills consists of mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative that were created for trial or in anticipation of litigation. We therefore conclude that the district may not withhold any of the remaining information in Exhibit B-1 under Texas Rule of Civil Procedure 192.5.

We next address your argument under section 552.107 of the Government Code regarding the information in Exhibit B-2, which is not subject to section 552.022. Section 552.107(1)

protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. ORD 676 at 6-7. The elements of the privilege under section 552.107 are the same as those for rule 503 outlined above.

You state that the information you have marked in Exhibit B-2 documents communications between an attorney for and representatives of the district that were made in connection with the rendition of professional legal services. You indicate that the communications were intended to be confidential, and you do not indicate that their confidentiality has been waived. You have identified the parties to the communications. Based on your representations and our review of the information at issue, we conclude that the district may withhold the information you have marked in Exhibit B-2 under section 552.107 of the Government Code.

You seek to withhold the e-mail addresses you have marked in Exhibit E as confidential pursuant to section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). See Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a general business address nor to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. We note that one of e-mail addresses you have marked is maintained by a governmental entity for one of its employees. As such, that e-mail address does not fall within the scope of section 552.137(a) and may not be withheld under this exception. You do not state that the owners of the remaining e-mail addresses at issue have consented to the release of their e-mail addresses. Accordingly, with the exception of the information we have marked for release, the district must withhold the e-mail addresses you have marked in Exhibit E under section 552.137 of the Government Code unless the owners affirmatively consent to their disclosure.⁴

In summary, the district may withhold the information (1) we have marked in Exhibit B-1 under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure; and (2) you have marked in Exhibit B-2 under section 552.107 of the Government Code. With the exception of the information we have marked for release, the district must withhold the e-mail addresses you have marked in Exhibit E under section 552.137 of the

⁴We note that this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies, which authorizes withholding of ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

Government Code unless the owners affirmatively consent to their disclosure. The remaining information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 368197

Enc. Submitted documents

c: Requestor
(w/o enclosures)