



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 22, 2010

Mr. William M. Buechler  
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Austin, Texas 78746

OR2010-03964

Dear Mr. Buechler:

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# 373321.

The Austin Independent School District (the "district"), which you represent, received two requests from the same requestor for several categories of information pertaining to an investigation involving the requestor's client. You state the district will release some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.111, and 552.117 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure. We have considered your arguments and reviewed the submitted information, part of which is a representative sample.<sup>1</sup> We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note section 552.022 of the Government Code is applicable to the submitted information. Section 552.022(a)(1) provides for required public disclosure of "a completed

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<sup>1</sup>We assume 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 those records contain substantially different types of information than that submitted to this office.

report, audit, evaluation, or investigation made of, for, or by a governmental body[,]" unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. *Id.* § 552.022(a)(1). In this instance, the submitted information consists of documents that are part of a completed investigation and thus subject to section 552.022(a)(1). Although you seek to withhold the submitted information under sections 552.103, 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 *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. 663 (1999) (governmental body may waive section 552.111), 677 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 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, 552.107, or 552.111 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Civil Procedure and Texas Rules of Evidence 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 is also found under rule 503 of the Texas Rules of Evidence and the attorney work product privilege is also found under rule 192.5 of the Texas Rules of Civil Procedure. Accordingly, we will consider your assertion of these privileges under rule 503 and rule 192.5 for the submitted information. Furthermore, we note sections 552.101, 552.102, 552.117, and 552.137 of the Government Code are "other law" for section 552.022 purposes.<sup>2</sup> Accordingly, we will also consider your arguments under sections 552.101, 552.102, and 552.117, as well as the applicability of section 552.137, to the submitted information.

You contend Exhibit D is protected by the attorney-client privilege. Rule 503 of the Texas Rules of Evidence 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;

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<sup>2</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(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 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 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 Exhibit D consists of notes taken by the district's attorney "during her investigation of alleged poor working conditions and a hostile working environment" within the district. You indicate the information at issue was gathered and created by the district's attorney for the purpose of providing legal advice to the district. You also indicate this information has remained confidential. Based on these representations and our review of the information at issue, we agree you have established Exhibit D is privileged under Texas Rule of Evidence 503. *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (concluding that attorney's entire investigative report was protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney for purpose of providing legal services and advice). Accordingly, the district may withhold this information under rule 503.<sup>3</sup>

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<sup>3</sup>As our ruling is dispositive for this information, we do not address your remaining arguments against its disclosure.

Next, we address your argument under Texas Rule of Civil Procedure 192.5 for Exhibit E. For the purposes of section 552.022, information is confidential under rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. ORD 677 at 9-10. Core work product is defined as the work product of an attorney or an attorney's representative developed in anticipation of litigation or for trial that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. 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 the material was (1) created for trial or in anticipation of litigation 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 the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate (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 National 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 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).

You indicate Exhibit E consists of core work product. Upon review of the information at issue, we find you have failed to establish any portion of Exhibit E was prepared by district attorneys or their representatives in anticipation of litigation and reflects the attorneys' or their representatives' mental impressions. Therefore, the district may not withhold any portion of Exhibit E under rule 192.5.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by common-law privacy. Section 552.102(a) of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Id.* § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled the test to be applied to information protected under section 552.102 is the same test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540

S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. Accordingly, we will consider your privacy claims under both sections 552.101 and 552.102.

Common-law privacy protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *See Indus. Found.*, 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. This office has found certain kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure).

Upon review, we agree the information we have marked in Exhibit E is protected by common-law privacy. The requestor, however, argues he has a special right of access to certain information relating to his client under section 552.023 of the Government Code. Under section 552.023, a person's authorized representative has a special right of access to private information that would otherwise be excepted from public disclosure on the basis of privacy principles. *See* Gov't Code § 552.023; ORD 481 at 4 (privacy theories not implicated when individual requests information concerning herself or person for whom she is authorized representative). However, a requestor does not have a right of access under section 552.023 to information that is protected from public disclosure by a law that is not based exclusively on the privacy right of the requestor or his client. *Id.* § 552.023(b). In this instance, section 552.101 in conjunction with common-law privacy protects the privacy rights of other individuals and not that of the requestor's client. Consequently, the requestor has no right of access to the information at issue under section 552.023. Thus, the district must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. Furthermore, we find the remaining information in Exhibit E is not highly intimate or embarrassing or consists of employment information that is of legitimate public interest. *See* Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 470 at 4, 444 at 5-6 (1986) (public has legitimate interest in public employee's qualifications, work performance, and circumstances of employee's resignation or termination); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Therefore, the district may not withhold any of the remaining information in Exhibit E under either section 552.101 or section 552.102 on the basis of common-law privacy.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information

be kept confidential under section 552.024 of the Government Code. *See* Gov't Code §§ 552.117(a)(1), .024. Although you raise section 552.117(a)(1) for portions of Exhibit E, we find it does not contain home addresses or telephone numbers, social security numbers, or family member information of current or former district employees. Thus, section 552.117(a)(1) is not applicable to the remaining information.

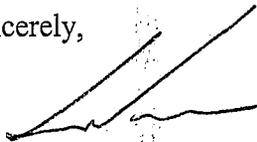
We note the remaining information in Exhibit E contains an e-mail address subject to section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" 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 id.* § 552.137(a)-(c). We have marked an e-mail address that is not of the type specifically excluded by section 552.137(c). Therefore, the district must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the e-mail address affirmatively consents to its release.

In summary, the district may withhold Exhibit D under rule 503 of the Texas Rules of Evidence. In Exhibit E, the district must withhold (1) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and (2) the e-mail address we have marked under section 552.137 of the Government Code. The remaining information in Exhibit E 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](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,



Ana Carolina Vieira  
Assistant Attorney General  
Open Records Division

ACV/eeg

Ref: ID# 373321

Enc. Submitted documents

c: Requestor  
(w/o enclosures)