ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 1, 2010

Ms. Sarah Dowdy Young
Thompson & Horton, L.L.P.
711 Louisiana Street, Suite 2100
Houston, Texas 77002-2746

OR2010-07887

Dear Ms. Young:

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# 381131.

The Spring Independent School District (the "district"), which you represent, received a request for copies of specified invoices.[1] You state some of the requested invoices do not exist.[2] You state that some of the submitted information has been redacted pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the

[1]You inform us the district sought and received clarification of this request for information. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

[2]We note the Act does not require a governmental body to release information that did not exist at the time the request for information was received or create new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.— San Antonio 1978, writ dism'd).

United States Code.[3] You claim that the submitted information is excepted from disclosure under Texas Rule of Evidence 503, Texas Rule of Civil Procedure 192.5, and Texas Disciplinary Rule of Professional Conduct 1.05.[4] We have considered the submitted arguments and reviewed the submitted representative sample of information.[5]

Initially, we note that the purpose of the Act is to prescribe conditions under which members of the general public can obtain information from a governmental body. *See* Attorney General Opinion JM-119 (1983) (statutory predecessor). An official of a governmental body who, in an official capacity, requests information held by the governmental body does not act as a member of the public in doing so. Thus, exceptions to public disclosure under the Act do not control the right of access of an official of a governmental body to information maintained by the governmental body. *See id.* at 3 (member of community college district board of trustees, acting in official capacity, has an inherent right of access to information maintained by district). Here, the requestor is a member of the district's Board of Trustees (the "board"). Consequently, whether the requestor in this instance has a right of access to the requested information depends on whether she is seeking the information in her official capacity. This office cannot resolve factual issues in the decisional process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where fact issues cannot be resolved as a matter of law, we must rely on the facts alleged to us by the governmental body that is requesting our decision or on those facts that are discernible from the documents submitted for our inspection. *See* ORD 552 at 4. In this instance, you state the board voted under district Policies BBE Legal and Local that the requestor could have access to the requested documents to *review* in her official capacity, but her request for *actual* copies of the invoices should be treated as a request from a private individual. We note, however, whether a requestor is seeking actual copies of requested information as opposed to access to the requested information for review is not determinative of whether

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[3]The United States Department of Education Family Policy Compliance Office (the "DOE") has 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. The DOE has determined that FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: http://www.oag.state.tx.us/open/20060725usdoe.pdf.

[4]Although you also raise section 552.101 of the Government Code in conjunction with rules 503 and 192.5, 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).

[5]We 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.

the requestor is seeking the information in his or her official capacity. *See* Open Records Decision Nos. 678 at 4 (2003) (*transfer* of county registrar's list of registered voters to the secretary of state and elected officials is not a release to the public prohibited by Gov't Code § 552.1175), 464 at 5 (1987) (*distribution* of evaluations by university faculty members among faculty members does not waive exceptions to disclosure with respect to general public) (overruled on other grounds by Open Records Decision No. 615 (1993)). Nevertheless, you state the board made an official determination that the requestor did not make this request in her official capacity and is treating the instant request as a request from a member of the public. Based upon these representations, we conclude the requestor is not seeking this information in her official capacity, and we will consider your arguments against disclosure.

Next, you inform us that a portion of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2010-01372 (2010). In that decision, we ruled that the district may withhold portions of the information at issue under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5 and release the remaining information. As we have no indication that the law, facts, or circumstances on which the prior ruling was based have changed, the district may continue to rely on Open Records Letter No. 2010-01372 as a previous determination and withhold or release the same information in accordance with the previous determination. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

The submitted information 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). 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. We note, however, the Texas Disciplinary Rules of Professional Conduct are not considered other law for purposes of section 552.022. Therefore, we do not address your argument under Rule 1.05, and thus, none of the submitted information may be withheld on this basis. *See* ORD 676 at 3-4.

Rule 503 enacts the attorney-client privilege, providing in relevant part:

> 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:
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> (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
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> (B) between the lawyer and the lawyer's representative;
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> (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;
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> (D) between representatives of the client or between the client and a representative of the client; or
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> (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 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). However, section 552.022(a)(16) of the Government Code provides that information "that is *in* a bill for attorney's fees" is not excepted from required disclosure unless it is confidential under other law or privileged under the attorney-client privilege. *See* Gov't Code § 552.022(a)(16) (emphasis added). This provision, by its express language, does not permit the entirety of an attorney fee bill to be withheld. *See* Open Records Decision Nos. 676 (2002) (attorney fee bill cannot be withheld in entirety on basis it contains or is attorney-client communication pursuant to language in section 552.022(a)(16)), 589 (1991) (information in attorney fee bill

excepted only to extent information reveals client confidences or attorney's legal advice). This office has found that only information that is specifically demonstrated to be protected by the attorney-client privilege or made confidential by other law may be withheld from fee bills. *See* ORD No. 676.

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 contains information that reveals confidential communications between privileged parties. Accordingly, the district may withhold the information we have marked under Texas Rule of Evidence 503. We note, however, that you have failed to identify some of the parties to some of the communications or explain their relationship with the district. *See* Open Records Decision No. 676 at 8 (governmental body must inform this office of identities and capacities of individuals to whom each communication at issue has been made; this office cannot necessarily assume that communication was made only among categories of individuals identified in rule 503). Accordingly, we find that you have failed to demonstrate that the remaining information documents confidential communications that were made between privileged parties. Therefore, we conclude that Texas Rule of Evidence 503 is not applicable to any portion of the remaining information, and it may not be withheld on this 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 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 state portions of the submitted information pertain to legal services related to litigation matters or matters the district reasonably believed there was a substantial chance of litigation involving the district. You state the information you have marked reveals attorney thoughts or strategies related to pending or anticipated litigation. Based on your representations and our review of the information at issue, we agree that some of the information the district has marked is protected core work product. Accordingly, we find that the district may withhold that information, which we have marked, under Texas Rule of Civil Procedure 192.5. However, we conclude you have failed to demonstrate that the remaining information at issue reflects the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative, and therefore, the district may not withhold any of the remaining information under Texas Rule of Civil Procedure 192.5. We also note that in some of the remaining information you have failed to demonstrate that all parties to the communication are privileged parties. *See* TEX. R. EVID. 511 (stating that a person waives a discovery privilege if he voluntarily discloses the privileged information). Thus, the district may not withhold these portions of the information under Texas Rule of Civil Procedure 192.5.

In summary, the district may rely on Open Records Letter No. 2010-01372 as a previous determination and continue to treat any previously ruled upon information in accordance with that ruling. The district may withhold the information we have marked under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure. As you raise no further exceptions against 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,

Paige Lay

Paige Lay
Assistant Attorney General
Open Records Division

PL/eeg

Ref: ID# 381131

Enc. Submitted documents

cc: Requestor
(w/o enclosures)