



ATTORNEY GENERAL OF TEXAS
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Ms. Sandra D. Carpenter
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OR2010-09164

Dear Ms. Carpenter:

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# 383755.

The Alvarado Independent School District (the "district"), which you represent, received two requests from the same requestor for payments to a specified law firm during a specified time frame and for files containing disciplinary actions against five named district employees. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.102 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.¹ We have considered your

¹ Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Additionally, although you raise section 552.022 of the Government Code, that provision is not an exception to disclosure under the Act. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are expressly confidential under other law. *See* Gov't Code § 552.022. Finally, although you raise section 552.024 of the Government Code, we note this section also is not an exception to public disclosure. Rather, this section permits a current or former official or employee of a governmental body to choose whether to allow public access to certain information relating to the current or former official or employee that is held by the employing governmental body. *See* Gov't Code § 552.024. We further note that section 552.024(c)(2) of the Government Code now allows a governmental body to redact certain personal information pertaining to employees who properly elected to keep their information confidential without the necessity of requesting a ruling from this office. *See id.* § 552.024(c)(2).

arguments and reviewed the submitted information. We have also received and considered comments from 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 you only submitted information relating to four of the five named employees. To the extent information responsive to the remaining portions of the request existed on the date the district received this request, we assume you have released it. If you have not released any such information, you must do so at this time. *See id.* §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we note a portion of the submitted information, which we have marked, is not responsive to the instant request for information because it was created after the date the district received the instant request for information. *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). This ruling does not address the public availability of any information that is not responsive to the request, and the district is not required to release that information in response to the request.

Next, we note portions of the submitted information constitute completed evaluations subject to section 552.022(a)(1) of the Government Code and attorney fee bills subject to section 552.022(a)(16) of the Government Code. Section 552.022(a)(1) provides for required public disclosure of “a completed 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. Gov't Code § 552.022(a)(1). Section 552.022(a)(16) 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 the submitted information subject to section 552.022(a)(1) is excepted from disclosure under section 552.101 of the Government Code and the submitted information subject to section 552.022(a)(16) is protected under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure. As you assert the information subject to section 552.022(a)(1) may be confidential under other law, specifically, section 21.355 of the Education Code and on privacy grounds, we will consider your arguments under section 552.101. In addition, 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 subject to section 552.022(a)(16).

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;

(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 claim the portions of the fee bills you have marked are confidential under Texas Rule of Evidence 503. 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 state the submitted attorney fee bills document communications between the district's attorneys and the district that were made in connection with the rendition of professional legal services to the district. You do not indicate the privilege against disclosure of that information has been waived. Based on your representations and our review of the information at issue, we conclude that the information we have marked is encompassed by the attorney-client privilege under Texas Rule of Evidence 503 and may be withheld on that basis. However, we find you have not demonstrated any of the remaining information at issue is protected by the attorney-client privilege; therefore, we conclude the district may not withhold any of the remaining information under rule 503.

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 the attorney fee bills contain core attorney work product that is protected by rule 192.5. Having

considered your representations and reviewed the information at issue, we conclude you have not established that any of the submitted information consists of privileged core work product; therefore, the district may not withhold this information 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 other statutes, such as section 21.355 of the Education Code. Section 21.355 provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or an administrator. *See* Open Records Decision No. 643 (1996). We have determined that for the purposes of section 21.355, the word "teacher" means a person who is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055 and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See* ORD 643 at 4. We also have determined that the word "administrator" in section 21.355 means a person who is required to and does in fact hold an administrator's certificate under subchapter B of chapter 21 of the Education Code and is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *Id.*

You assert portions of the submitted information constitute evaluations for the purposes of section 21.355 of the Education Code. You do not indicate whether the individuals whose evaluations are at issue held a teacher's certificate or permit or an administrator's certificate under chapter 21 of the Education Code and were performing the functions of a teacher or administrator at the time of the evaluations. Therefore, we must rule conditionally. To the extent the individuals in question held the appropriate certificate or permit and were functioning as teachers or administrators at the time of the evaluations, the district must withhold the documents we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. To the extent the individuals in question did not hold the appropriate certificate or permit or were not functioning as teachers or administrators at the time of the evaluation, then the information at issue is not confidential under section 21.355 of the Education Code and may not be withheld under section 552.101 of the Government Code. Further, we conclude the self-appraisal form does not evaluate the employees for purposes of section 21.355. Therefore, the district may not withhold this information, which we have marked for release, under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

You raise sections 552.101 and 552.102 for the remaining information that is not subject to section 552.022. Section 552.101 also encompasses the doctrine of 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). Section 552.102 is applicable to information that

relates to public officials and employees. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). The privacy analysis under section 552.102(a) is the same as the common-law privacy standard under section 552.101. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (addressing statutory predecessor). We will, therefore, consider the applicability of common-law privacy under section 552.101 together with your claim regarding section 552.102.

Common-law privacy protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *See id.* at 681-82. This office has found some 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) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find none of the information you have marked is highly intimate or embarrassing; therefore the district may not withhold any information under section 552.101 of the Government Code in conjunction with common-law privacy or under section 552.102.

We note a portion of the remaining information may be subject to section 552.117 of the Government Code.² Section 552.117(a)(1) excepts from disclosure the home addresses, home 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. *See* Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Thus, the district may only withhold information under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential. The submitted documents contain personal information of a district employee. Because you have not indicated if this employee made a proper election under section 552.024, we must rule conditionally. Thus, to the extent the employee made a timely election under section 552.024, the district must withhold the information we have marked under section 552.117(a)(1). The district may not withhold this information under section 552.117(a)(1)

² 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).

if the employee did not make a timely election under section 552.024 to keep this personal information confidential.

In summary, except for the information we have marked under rule 503 of the Texas Rules of Evidence, the district must release the information we have marked under section 552.022(a)(1) and section 552.022(a)(16) of the Government Code. The district must withhold the evaluations of teachers and administrators to the extent the individuals in question held the appropriate certificate or permit and were functioning as teachers or administrators at the time of the evaluations under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district must withhold the information we have marked under section 552.117 of the Government Code to the extent the individual whose information is at issue made a timely election under section 552.024. The remaining responsive 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,



Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/sdk

Ref: ID# 383755

Enc. Submitted documents

c: Requestor
(w/o enclosures)