



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 1, 2010

Ms. Andrea Sheehan
Ms. Elisabeth A. Donley
Law Offices of Robert E. Luna, P.C.
4411 North Central Expressway
Dallas, Texas 75205

OR2010-16441

Dear Ms. Sheehan and Ms. Donley:

On behalf of the Carrollton-Farmers Branch Independent School District (the "district"), 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# 398823.

The district received a request for billings for legal services rendered by three law firms for certain time periods. You claim that the submitted information is excepted from disclosure under sections 552.107, 552.111, and 552.136 of the Government Code, and privileged under Texas Rule of Evidence 503 ("Rule 503"), and Texas Rule of Civil Procedure 192.5 ("Rule 192.5").¹ We have considered your claims and reviewed the submitted information.²

¹You have marked portions of the submitted as "not responsive." The Act does not require the district to release the nonresponsive information to the requestor.

²You state you have redacted student names and other personally identifiable information in the responsive documents in accordance with the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g, and the 2006 letter to this office from the United States Department of Education Family Compliance Office ("DOE"), available at www.oag.state.tx.us/open/20060725usdoe.pdf. In the 2006 letter, the DOE 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 determined that FERPA determinations must be made by the educational authority in possession of the education records.

The information at issue is subject to section 552.022(a)(16) of the Government Code. That provision states information in a bill for attorney's fees that is not subject to the attorney-client privilege is not excepted from required disclosure under chapter C unless it is expressly confidential under other law. Gov't Code 552.022(a)(16). Sections 552.107 and 552.111 of the Government Code are discretionary exceptions under the Act and do not constitute "other law" for purposes of section 552.022. Open Records Decision Nos. 676 at 6 (2002) (determining 552.107(1) is exception to disclosure under Act and not "other law" that makes information "expressly confidential"), 677 at 8 (2002) (determining 552.111 is exception under Act and not "other law" for purposes of section 552.022). Thus, the information at issue is not excepted from disclosure under sections 552.107 and 552.111. Gov't Code § 552.022(a)(16).

Next, we address your claims under Rule 503 and Rule 192.5. The Texas Supreme Court held "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will consider whether you have established the submitted information is privileged under these rules. We first consider whether you have established Rule 503, which encompasses the attorney-client privilege, applies to the information. Rule 503(b)(1) 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. TEX. R. EVID. 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. *See* Open Records Decision No. 676 (2002). Upon a demonstration of all three factors, the entire communication is confidential under Rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (holding privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (finding privilege attaches to complete communication, including factual information).

You state the billing records at issue were submitted to the district and have not been, nor intended to be, disclosed to third parties, other than attorneys for the district, representatives of attorneys for the district, and district employees who are charged with review or payment of the fee bills. You further state the fee bills were submitted to the district in furtherance of the rendition of professional legal services to the district. You contend portions of the bills refer to communications between representative of the district and the district's attorney or a representative of the attorney or between the district's attorneys or their representatives. In addition, you have submitted exhibits listing the communicants in the communications at issue and their roles at the time of the communications.

After review of the information at issue and consideration of your arguments, we conclude the district has established portions of the submitted fee bills at issue are confidential attorney-client communications based on Rule 503. Consequently, the district may withhold these communications, which we have marked, based on Rule 503. However, you have not demonstrated any portion of the remaining information at issue consists of privileged attorney-client communications. Thus, none of the remaining information at issue may be withheld under Rule 503.

Rule 192.5 encompasses the attorney work product privilege. 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. Open Records Decision No. 677 at 9-10 (2002). 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 that

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 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 billing records were created while litigation was anticipated and in the course of preparing for litigation. You have provided for our review several exhibits, including a written demand letter and court-filed pleadings, for the purpose of demonstrating that litigation was anticipated or pending when the information was created. You argue the information reflects attorneys' mental impressions, opinions, conclusions, and legal theories and reveals strategy decisions and legal conclusions. You assert the "information reflects issues reviewed, issues researched, documents drafted, and other items that reflect and reveal attorneys' mental impressions, opinions, conclusions and legal theories." After review of the information and consideration of your arguments, we conclude portions of the remaining information at issue are privileged based on Rule 192.5. Consequently, the district may withhold this information, which we have marked, pursuant to Rule 192.5. However, you have not demonstrated any portion of the remaining information at issue consists of privileged attorney work product. Thus, none of the remaining information at issue may be withheld under Rule 192.5.

Finally, we consider your claim under section 552.136. Section 552.136 states "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental

body is confidential.” Gov’t Code § 552.136. The district must, therefore, withhold the marked bank account numbers under section 552.136.³

In summary, based on Rule 503 and Rule 192.5, the district may withhold the information we have marked. Based on section 552.136, the district must withhold the marked bank account numbers. The district must release the remaining information.

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,



Kay Hastings
Assistant Attorney General
Open Records Division

KH/bs

Ref: ID# 398823

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³As you acknowledge, 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 bank account and routing numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.