



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 14, 2011

Ms. Stephanie S. Rosenberg  
General Counsel  
Humble Independent School District  
P.O. Box 2000  
Humble, Texas 77347

OR2011-02236

Dear Ms. Rosenberg:

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# 409015.

The Humble Independent School District (the "district") received fourteen requests from the same requestor for the legal bills between May 2010 and November 2010 pertaining to two named attorneys. You state the district has provided some of the requested information to the requestor. You also state the district does not have any information responsive to the request for legal bills pertaining to November 2010.<sup>1</sup> You further state the district has redacted student-identifying information from the information submitted to this office pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g(a).<sup>2</sup> You claim the submitted legal bills are excepted from disclosure under

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<sup>1</sup>The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</sup>The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office 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 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>. Accordingly, we do not address your claim under section 552.114 of the Government Code. *See* Gov't Code §§ 552.026 (incorporating FERPA into the Act), .114 (excepting from disclosure "student records"); Open Records Decision No. 539 (1990) (determining same analysis applies under section 552.114 and FERPA).

sections 552.101, 552.107, and 552.111 of the Government Code, and protected under Federal Rule of Civil Procedure 26(b)(3), Texas Rule of Civil Procedure 192.5, Texas Rule of Evidence 503, and Texas Disciplinary Rule of Professional Conduct 1.05.<sup>3</sup> We have considered your arguments and reviewed the submitted information.

Initially, we note you have submitted legal bills that contain information pertaining to several attorneys. As you acknowledge, however, the requestor seeks information pertaining to only the two attorneys named in the requests. Thus, any information in the submitted records that does not pertain to the two attorneys named in the requests is not responsive to the requests. This decision does not address the public availability of the non-responsive information, and that information need not be released.

Next, we must address the district's obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b) of the Government Code, the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. *See Gov't Code* § 552.301(b). You state the district received the requests for information on November 22, 2010, and the district was closed November 24, 25, and 26, 2010, for the Thanksgiving holiday. Accordingly, the district's ten-business-day deadline was December 9, 2010. Although the district timely requested a ruling and raised section 552.101 of the Government Code and the attorney-client privilege on December 8, 2010, the district did not raise its claims under section 552.111 of the Government Code, Federal Rule of Civil Procedure 26(b)(3), Texas Rule of Civil Procedure 192.5, and Texas Disciplinary Rule of Professional Conduct 1.05 until December 16, 2010. Consequently, we find the district failed to comply with the procedural requirements of section 552.301 with respect to its claims under section 552.111 of the Government Code, Federal Rule of Civil Procedure 26(b)(3), Texas Rule of Civil Procedure 192.5, and Texas Disciplinary Rule of Professional Conduct 1.05.

Generally, a governmental body's failure to comply with section 552.301 results in the waiver of its claims under the provisions at issue, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party

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<sup>3</sup>Although you also raise Texas Rule of Civil Procedure 193.3(c), you have not submitted any arguments explaining how this provision applies to the submitted information. Therefore, we presume you have withdrawn your claim under this provision. *See id.* §§ 552.301, .302.

interests are at stake. Open Records Decision No. 150 at 2 (1977). You raise section 552.101 of the Government Code in conjunction with Federal Rule of Civil Procedure 26(b)(3), Texas Rule of Civil Procedure 192.5, and Texas Disciplinary Rule of Professional Conduct 1.05. Although section 552.101 can provide a compelling reason to withhold information, this office has concluded section 552.101 does not encompass discovery privileges, such as rule 192.5. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Furthermore, section 552.101 does not encompass rule 26(b)(3) or rule 1.05. *See* Gov't Code § 552.101 (excepting from required public disclosure information considered confidential by law, either constitutional, statutory, or by judicial decision). Because you have not claimed section 552.101 in conjunction with any law that makes information confidential, the district may not withhold any of the submitted responsive information under section 552.101 of the Government Code. You also claim the information at issue is excepted from disclosure under section 552.111 of the Government Code, Federal Rule of Civil Procedure 26(b)(3), and Texas Rule of Civil Procedure 192.5. This exception and these rules, however, are discretionary in nature. They serve only to protect a governmental body's interests and may be waived. *See* Open Records Decision Nos. 677 at 10 (2002) (attorney work-product privilege under section 552.111 or rule 192.5 is not compelling reason to withhold information under section 552.302), 665 at 2 n.5 (2000) (discretionary exceptions in general). As such, they do not constitute compelling reasons to withhold information for purposes of section 552.302. With regard to your claim under Texas Disciplinary Rule of Professional Conduct 1.05, we note rule 1.05 concerns the confidentiality of client information. *See* Tex. Disciplinary R. Prof'l Conduct Rule 1.05(a)(1). This office has concluded, in the open records context, an attorney's duty of confidentiality is limited to attorney-client privileged material. *See* Open Records Decision No. 574 at 2-5 (1990) (discussing rule 1.05(a)(1) in context of predecessor provision of section 552.107(1)). Thus, given its limitation in the open records context, the applicability of rule 1.05 also cannot overcome the presumption of openness of section 552.302. Consequently, the district may not withhold any of the submitted responsive information pursuant to section 552.111 of the Government Code, Federal Rule of Civil Procedure 26(b)(3), Texas Rule of Civil Procedure 192.5, or Texas Disciplinary Rule of Professional Conduct 1.05. We will, however, consider your timely raised attorney-client privilege claim for the submitted responsive information.

We note, and you acknowledge, the submitted responsive information is subject to section 552.022 of the Government Code, which provides, in part:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(16). The submitted responsive information consists of attorney fee bills. Such information must be released unless it is expressly confidential under other law. You assert portions of the submitted fee bills are excepted from disclosure under the attorney-client privilege encompassed by section 552.107(1) of the Government Code and Texas Rule of Evidence 503. We note, however, section 552.107(1) is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (discretionary exceptions generally). As such, section 552.107(1) is not "other law" for purposes of section 552.022. Therefore, the district may not withhold any of the information at issue under section 552.107(1) of the Government Code. The Texas Supreme Court, however, has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your arguments under Texas Rule of Evidence 503 for the submitted responsive information.

Texas Rule of Evidence 503 provides, 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:

(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 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 it was not intended to be disclosed to third persons and 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 claim the entire narrative entries in the submitted fee bills are privileged because the fee bills themselves are attorney-client communications. Because the substance of any attorney-client privileged communications would be contained only in the narrative entries, we see no distinction between claiming the entire narrative entries are privileged and claiming the entire fee bills are privileged. Section 552.022(a)(16) of the Government Code, however, provides 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 also* Open Records Decision Nos. 676 (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). Thus, under rule 503, the district may withhold only the parts of the submitted attorney fee bills that you specifically demonstrate consist of privileged communications.

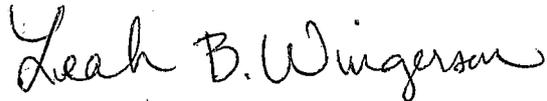
You also claim the information you have marked within the fee bills consists of communications between district officials and attorneys for the district made for the purpose of facilitating the rendition of professional legal services to the district. You state the communications were made in confidence, and that confidentiality has been maintained. Based on your representations and our review of, we find you have demonstrated the applicability of the attorney-client privilege to some of the information at issue. Thus, the district may withhold this information, which we have marked, under Texas Rule of Evidence 503. However, the remaining information you seek to withhold either reveals communications with a party who is not identified as privileged or does not reveal communications. Therefore, you have failed to demonstrate the remaining information you seek to withhold is protected under the attorney-client privilege. Consequently, the district may not withhold any of the remaining information at issue under Texas Rule of Evidence 503. As you have not claimed any other exceptions to 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](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,

A handwritten signature in cursive script that reads "Leah B. Wingerson".

Leah B. Wingerson  
Assistant Attorney General  
Open Records Division

LBW/eb

Ref: ID# 409015

Enc. Submitted documents

c: Requestor  
(w/o enclosures)