



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

June 14, 2011

Mr. Albert E. Tovar
Gale, Wilson & Sánchez P.L.L.C.
115 East Travis, 19th Floor
San Antonio, Texas 78205

OR2011-08418

Dear Mr. Tovar:

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# 421567.

The Carrizo Springs Consolidated Independent School District (the "district") received a request for eighteen categories of information including contracts, purchase orders, receipts, correspondence, notes, policies and procedures, budgets, personnel change forms, meeting notes, and other information pertaining to the requestor, a specified grant, and a specified investigation of possible misappropriation of funds. You state some of the requested information does not exist.¹ You state the district will redact social security numbers of individuals under section 552.147(b) of the Government Code.² You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.108, 552.111, 552.117, 552.135, 552.136, and 552.137 of the Government Code and protected under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure. The district also notified the Texas Education Agency (the "TEA") of the request and of its right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.304 (interested party may submit

¹The Act does not require a governmental body to disclose information that did not exist when the request for information was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

²Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code § 552.147.

comments stating why information should or should not be released). We have received comments from the TEA. We have considered the submitted arguments and reviewed the submitted information, a portion of which consists of representative samples.³

Initially, we note a portion of the submitted information is not responsive to the instant request for information because it was created after the date the request was received. This ruling does not address the public availability of non-responsive information, and the district is not required to release non-responsive information in response to this request.

Next, we note portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022(a) provides in relevant part:

[T]he following categories of information are public information and not excepted from required disclosure under [the Act] unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body; [and]

...

(8) a statement of the general course and method by which an agency's functions are channeled and determined, including the nature and requirements of all formal and informal policies and procedures[.]

Gov't Code § 552.022(a)(1), (3), (8). In this instance, the submitted information contains a completed report subject to section 552.022(a)(1); information in accounts, contracts, invoices, purchase orders, and receipts subject to section 552.022(a)(3); and district policies and procedures subject to section 552.022(a)(8). Under section 552.022(a)(1), a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it either is excepted under section 552.108 of the Government Code or is expressly confidential under other law. In addition, the district may only withhold the information subject to subsections 552.022(a)(3) and (a)(8) if it is confidential under other

³We assume the "representative samples" of records submitted to this office are 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.

law. *See id.* Although you raise sections 552.103, 552.107, 552.108, 552.111, and 552.135 of the Government Code for this information, and the TEA raises sections 552.103 and 552.116, these sections are discretionary exceptions to disclosure that protect a governmental body's interests. *See id.* § 552.007; *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. 677 at 8 (2002) (attorney work product privilege under section 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 586 (1991) (governmental body may waive section 552.108), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111). As such, these sections are not "other law" that makes information confidential for purposes of section 552.022(a)(3) and (a)(8). Therefore, the district may not withhold the information subject to section 552.022(a)(3) and (a)(8) under sections 552.103, 552.107, 552.108, 552.111, 552.116, or 552.135 of the Government Code. However, we will consider whether section 552.108 excepts from disclosure the information subject to section 552.022(a)(1). *See Gov't Code* § 552.022(a)(1). In addition, the Texas Supreme Court has held the Texas Rules of Evidence and 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 assertions of the attorney-client privilege under rule 503 of the Texas Rules of Evidence and the attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure for the information subject to section 552.022. Furthermore, because sections 552.101, 552.102, 552.117, 552.136, and 552.137 of the Government Code are other law for purposes of section 552.022, we will address your claims under these exceptions. We will also consider your arguments under sections 552.103, 552.107, 552.108, 552.111, 552.116, and 552.135 and the TEA's arguments under sections 552.103 and 552.116 of the Government Code for the information not subject to section 552.022.

First, we address your claims for the information subject to section 552.022(a)(3) and (a)(8) of the Government Code. 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 it is 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state the information subject to section 552.022(a)(3) and (a)(8) of the Government Code consists of privileged communications you wish to withhold under rule 503. We find, however, the information at issue consists of information in accounts, contracts, invoices, purchase orders, and receipts and district policies and procedures that do not constitute attorney-client communications for purposes of rule 503. Accordingly, we find you have failed to demonstrate how any of the information subject to section 552.022(a)(3) and (a)(8) of the Government Code falls within the scope of the attorney-client privilege. We therefore conclude the district may not withhold any of that information on the basis of rule 503 of the Texas Rules of Evidence.

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 is confidential under rule 192.5 only to the extent 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 and (2) consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *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 litigation would ensue, and (2) the party resisting discovery believed in good faith there was a substantial chance 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 part of the work product test requires the governmental body to show the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both parts of the work product test is confidential under rule 192.5, provided the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp.*, 861 S.W.2d at 427.

You generally claim the information subject to section 552.022(a)(3) and (a)(8), which consists of information in accounts, contracts, invoices, purchase orders, and receipts and district policies and procedures, is confidential under rule 192.5. However, you do not explain how this information reflects the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. Thus, we find the district has failed to demonstrate the applicability of the attorney work product privilege to the information at issue. Accordingly, the district may not withhold any of the information subject to section 552.022(a)(3) and (a)(8) of the Government Code under rule 192.5 of the Texas Rules of Civil Procedure.

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 made confidential by other statutes. Prior decisions of this office have held section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]" *See* 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993). Upon review, we find you have failed to demonstrate the information subject to section 552.022(a)(3) and (a)(8) falls within the definition of "return information" under section 6103(b)(2). Therefore, none of the information at issue is

confidential under section 6103(a), and the district may not withhold the information under section 552.101 on that ground.

Section 552.101 also encompasses the doctrine of common-law privacy, which 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, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* at 683. In addition, this office has found personal financial information not related to a financial transaction between an individual and a governmental body is highly intimate and embarrassing and of no legitimate public interest. *See* Open Records Decision Nos. 600 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (information about employee decision to allocate salary to deferred compensation plan, to participate in voluntary investment program, to elect optional insurance coverage, employee's mortgage payments, assets, bills, and credit history). However, because there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body, financial information related to such transactions is generally not excepted from disclosure. *See* Open Records Decision Nos. 600 (information revealing employee participates in group insurance plan funded party or wholly by governmental body not excepted from disclosure), 545 (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy), 373 (1983), 342 (1982). Whether financial information is subject to a legitimate public interest and therefore not protected by common-law privacy must be determined on a case-by-case basis. *See* Open Records Decision No. 373 (1983). Upon review, we find none of the information subject to section 552.022(a)(3) or (a)(8) is highly intimate or embarrassing, and the district may not withhold it under section 552.101 of the Government Code on the basis of common-law privacy.

You also claim portions of the information subject to section 552.022(a)(3) or (a)(8) are excepted from disclosure under section 552.102(a) of the Government Code. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). Upon review, we find none of the information at issue is excepted under section 552.102(a) of the Government Code. Accordingly, none of the information may be withheld on that basis.

Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former 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.

Id. § 552.117(a)(1). None of the information subject to section 552.022(a)(3) or (a)(8) consists of the home address, telephone number, social security number, or family member information of a district official or employee. Accordingly, the district may not withhold any of the information at issue under section 552.117 of the Government Code.

Section 552.136 of the Government Code provides “[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.” *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Accordingly, the district must withhold the credit card numbers we have marked in the information subject to section 552.022 under section 552.136 of the Government Code.⁴

You claim some of the remaining information subject to section 552.022(a)(3) and (a)(8) is excepted under 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). Upon review, none of the remaining information at issue consists of an e-mail address of a member of the public. Accordingly, the district may not withhold any of this information under section 552.137 of the Government Code.

You raise section 552.108 of the Government Code for the remaining information, including the completed report subject to section 552.022(a)(1). Section 552.108(a)(1) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). In this instance, the information at issue consists of administrative records. We note section 552.108 is generally not applicable to purely administrative records that do not involve the investigation or prosecution of crime. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.). You provide a letter from the chief of the district’s police department stating the requested information relates to an ongoing investigation into to possible misuse or misappropriation of district funds and property. The police chief further states disclosure of such information would interfere with the detection, investigation and prosecution of a possible crime. Based on these representations and our review, we determine the release of the remaining information would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests present

⁴This office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies, which authorizes withholding of ten categories of information, including a credit card number under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

in active cases); *see also* Open Records Decision No. 474 at 4-5 (1987) (section 552.108 may be invoked by proper custodian of information relating to pending investigation or prosecution of criminal conduct). Therefore, the district may withhold the remaining information under section 552.108(a)(1) of the Government Code.⁵

In summary, the district must release the information we have marked that is subject to subsections 552.022(a)(3) and (a)(8) of the Government Code; however, in doing so, the district must withhold the information we have marked under section 552.136 of the Government Code. The district may withhold the remaining information under section 552.108(a)(1) of the Government Code.

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/em

Ref: ID# 421567

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁵As our ruling is dispositive, we need not address the remaining arguments against disclosure of the remaining information.