



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 1, 2011

Ms. Bertha Bailey Whatley
Chief Legal Counsel
Fort Worth Independent School District
100 North University Drive
Fort Worth, Texas 76107

OR2011-09385

Dear Ms. Whatley:

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# 422518.

The Fort Worth Independent School District (the "district") received a request for copies of all legal fee bills submitted to the district from October 2010 through March 2011. You claim the submitted information is excepted from disclosure under section 552.107 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 arguments and reviewed the submitted representative sample of information.²

The submitted information is subject to section 552.022(a)(16) of the Government Code, which provides in part:

¹Although you raise section 552.022 of the Government Code as an exception to disclosure, that provision does not provide an exception under the Act. Rather, section 552.022 enumerates the categories of information that are not excepted from disclosure unless they are expressly confidential under "other law." See Gov't Code § 552.022. Additionally, although you raise section 552.101 of the Government Code in conjunction with the attorney-client privilege and the attorney work-product privilege, this office has concluded that section 552.101 does not encompass discovery privileges. See Open Records Decision Nos. 676 at 1-2 (2002). In this instance, the proper assertions to raise for information that is subject to section 552.022 of the Government Code are rule 503 of the Texas Rules of Evidence for the attorney-client privilege and rule 192.5 of the Texas Rules of Civil Procedure for the attorney work-product privilege. See *id.*, Open Records Decision No. 677 (2002).

²We assume 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 those records contain substantially different types of information than those submitted to this office.

[T]he 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). In this instance, the submitted information consists of attorney fee bills. Thus, the district must release this information pursuant to section 552.022(a)(16) unless it is expressly confidential under other law. Section 552.107 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. 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 (2000) (discretionary exceptions generally). As such, section 552.107 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold the submitted fee bills under section 552.107 of the Government Code. However, the Texas Supreme Court has held 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 work-product privilege under Texas Rule of Civil Procedure 192.5.

Texas Rule of Evidence 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:

(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 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 you have marked documents communications between clients and licensed attorneys. You contend that these communications were made for the purpose of responding to questions posed by clients and providing legal advice; and they are intended to be confidential. Although you generally state the clients are members of the district’s Board of Education or district staff, you have not identified any of the individuals involved. Further, we note that some of the parties involved in the fee bills at issue are adverse or otherwise non-privileged parties. Based on your representations and our review of the documents, we find the district has established the information we have marked is protected by the attorney-client privilege. Thus, the district may withhold the information we have marked under rule 503 of the Texas Rules of Evidence. However, the remaining information documents communications with individuals you have not identified as privileged or does not document communications. Accordingly, we find you have failed to establish the applicability of the attorney-client privilege to the remaining information you have marked, and none of it may be withheld under rule 503 of the Texas Rules of Evidence.

Next, we address your assertion of the attorney work-product privilege for the remaining information. Rule 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 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 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 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 part of the work-product test requires the governmental body to show that 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.

In this instance, we find you have failed to demonstrate that any of the remaining information in the attorney fee bills consists of mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative created for trial or in anticipation of litigation. Therefore, we conclude the district may not withhold any of the remaining information under rule 192.5 of the Texas Rules of Civil Procedure. As you raise no further exceptions, 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,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/dls

Ref: ID# 422518

Enc. Submitted documents

c: Requestor
(w/o enclosures)