



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 27, 2011

Ms. Sarah Dowdy Young
Thompson & Horton
3200 Southwest Freeway, Suite 2000
Houston, Texas 77027

OR2011-10806

Dear Ms. Young:

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# 425109.

The Brownsville Independent School District (the "district"), which you represent, received a request for billing and payment documents related to work performed for the district by Arturo Michel and Thompson & Horton, L.L.P. from November 2010 through May 2011. You explain that no responsive documents exist for November or December of 2010. You state the district has released summaries of legal fees and expenses to the requestor. You claim the marked portions of the submitted itemized billing statements are excepted from disclosure pursuant to rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedures.¹ We have considered your arguments against disclosure and reviewed the submitted information.²

¹Although you raise section 552.101 of the Government Code in conjunction with the attorney-client and attorney work product privileges, this office has concluded that section 552.101 does not encompass discovery privileges. See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

²You note the district has redacted student-identifying information from the submitted billing statements pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code. 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>.

Initially, we note, and you acknowledge, the submitted information is subject to section 552.022(a)(16) 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). 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. 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 attorney 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 assert the highlighted portions of the fee bills reveal privileged attorney-client communications. You have identified the parties to these communications as district employees, board members, district representatives and attorneys for the district. You state the communications at issue were made in furtherance of the rendition of legal services to the district. You also indicate these communications were intended to be confidential and have not been disclosed to third parties. Based on your representations and our review of the information at issue, 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 pursuant to rule 503 of the Texas Rules of Evidence. However, the remaining highlighted information does not document communications or reveal confidential communications. Accordingly, none of the remaining highlighted information may be withheld under rule 503 of the Texas Rules of Evidence.

Next, we address your argument under Texas Rule of Civil Procedure 192.5 for the remaining underlined portions of the submitted fee bills. 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.

You assert the attorney work product privilege for the remaining underlined portions of the fee bills. In order to demonstrate the underlined information was created for trial or in anticipation of litigation, you describe the various lawsuits, grievances, claims, and due process hearings for which the information was created. You also characterize the underlined information as the attorneys' thoughts or strategies related to pending and anticipated litigation. We have marked the information in the fee bills that 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. The district may withhold this information pursuant to rule 192.5 of the Texas Rules of Civil Procedure. The remaining underlined information may not be withheld from disclosure as attorney work product either because you have not demonstrated it was created for trial or in anticipation of litigation, or because you have not demonstrated it reveals the mental impressions of an attorney or attorney representative.

In summary, the district may withhold the highlighted information we have marked under rule 503 of the Texas Rules of Evidence and the underlined information we have marked under rule 192.5 of the Texas Rules of Civil Procedure. 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,

A handwritten signature in black ink, appearing to read "Debbie K. Lee".

Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/KEH/sdk

Ref: ID# 425109

Enc. Submitted documents

c: Requestor
(w/o enclosures)