



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 16, 2012

Ms. Leticia D. McGowan  
School Attorney  
Dallas Independent School District  
3700 Ross Avenue  
Dallas, Texas 75204

OR2012-05437

Dear Ms. McGowan:

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# 450998 (ORR# 10863).

The Dallas Independent School District (the "district") received a request for specified agreements, reports, and correspondence pertaining to the E-Rate program. You state you are making some of the requested information available to the requestor. You claim that some of the submitted information is excepted from disclosure under sections 552.107 and 552.111 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.<sup>1</sup> We have considered your arguments and reviewed the submitted information.

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

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<sup>1</sup>Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure, we note section 552.101 does not encompass discovery privileges. *See* Open Records Decision No. 676 at 1-2 (2002), 575 at 2 (1990). We further note section 552.111 of the Government Code is the appropriate exception to raise for the attorney work product privilege for information not subject to section 552.022.

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under [the Act] or other law:

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

Gov't Code § 552.022(a)(1). Some of the submitted information consists of completed investigations that were made by or for the district, which are subject to section 552.022(a)(1). The district must release this information pursuant to section 552.022 unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. *See id.* Although you claim the investigations are subject to sections 552.107 and 552.111 of the Government Code, these sections are discretionary exceptions that do not make information confidential under the Act. *See Open Record Decision Nos. 677 at 8 (2002) (attorney work product privilege under section 552.111 may be waived), 676 at 10-11 (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally).* Therefore, the district may not withhold information subject to section 552.022 under section 552.107 or section 552.111 of the Government Code. However, we note the Texas Supreme Court has held the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" that make information expressly confidential for purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your assertion of the attorney-client privilege under rule 503 and the attorney work product privilege under rule 192.5 for the information subject to section 552.022. We also will consider your arguments under sections 552.107 and 552.111 for the information not subject to section 552.022.

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, orig. proceeding).

You state the district’s outside counsel and the district’s Office of Professional Responsibility made investigations into possible violations of the district’s E-Rate compliance policy at the request of the district’s legal counsel. You explain that the investigations were used by the district’s counsel to provide legal services to the district. You further state this information was not intended to be disclosed to third persons, and the district has not waived this privilege. Based on your representations and our review of the information at issue, we find the completed investigations are privileged under rule 503 of the Texas Rules of Evidence. *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (attorney’s entire investigative report was protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney for purpose of providing legal services and advice). Accordingly, the district may withhold this information, which we have marked, under rule 503.<sup>2</sup>

We now turn to your arguments for the information not subject to section 552.022 of the Government Code. Section 552.107(1) protects information coming within the attorney-client privilege. Gov’t Code § 552.107(1). When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See*

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<sup>2</sup>As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

ORD 676 at 6-7. The elements of the privilege under section 552.107 are the same as those for rule 503 outlined above.

You state the remaining information reveals and reflects communications between the district's representatives and legal counsel that were created for the express purpose of soliciting legal advice and legal interpretation of issues. You state this information was not intended to be disclosed to third persons, and the district has not waived this privilege. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information we have marked. However, we note some of the information at issue does not document privileged attorney-client communications. This information may not be withheld under section 552.107(1) of the Government Code. Accordingly, the district may generally withhold the information we have marked under section 552.107(1) of the Government Code.<sup>3</sup> We note, however, some of these privileged e-mail strings include e-mails to and from non-privileged parties that are separately responsive to the instant request. Consequently, to the extent these e-mails, which we have marked, exist separate and apart from the privileged e-mail strings in which they were included, the district may not withhold them under section 552.107(1) of the Government Code. If these e-mails do not exist separate and apart from the privileged e-mail strings in which they were included, the district may withhold them as privileged attorney-client communications under section 552.107(1) of the Government Code.

You seek to withhold the remaining information, as well as the non-privileged e-mails, if they exist separate and apart from the privileged e-mail strings in which they were included, under section 552.111 of the Government Code, which excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. This exception encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); ORD 677 at 4-8. Rule 192.5 defines work product as:

- (1) [M]aterial prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

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<sup>3</sup>As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that:

a) 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 b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

*Nat'l Tank Co. 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; ORD 677 at 7.

Upon review, we find you have failed to demonstrate the information at issue consists of material prepared or mental impressions developed in anticipation of litigation or for trial by a party or a representative of a party. Accordingly, the district may not withhold any of the information at issue under the work product privilege of section 552.111 of the Government Code.

We note the remaining information and non-privileged e-mails contain information subject to section 552.137 of the Government Code.<sup>4</sup> 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* Gov't Code § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the district must withhold the personal e-mail addresses we have marked in the remaining information, as well as in the non-privileged e-mails to the extent they exist separate and apart from their otherwise privileged e-mail strings, under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.<sup>5</sup>

In summary, the district may withhold the information we have marked under rule 503 of the Texas Rules of Evidence. The district may generally withhold the information we have

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<sup>4</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>5</sup>We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

marked under section 552.107(1) of the Government Code. However, if the non-privileged e-mails, which we have marked, exist separate and apart from the privileged e-mail strings in which they were included, the district may not withhold them under section 552.107(1). The district must withhold the personal e-mail addresses we have marked in the remaining information, as well as in the non-privileged e-mails to the extent they exist separate and apart from their otherwise privileged e-mail strings, under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. 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](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,



Sarah Casterline  
Assistant Attorney General  
Open Records Division

SEC/som

Ref: ID# 450998

Enc. Submitted documents

c: Requestor  
(w/o enclosures)