



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 26, 2012

Mr. Slater C. Elza
Counsel for the Clarendon ISD
Underwood Law Firm, P.C.
P.O. Box 9158
Amarillo, Texas 79105-9158

OR2012-15368

Dear Mr. Elza:

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# 466268.

The Clarendon Independent School District (the "district"), which you represent, received a request for (1) the names of the law firms that have worked on or are working on two specified cases; (2) copies of any billing statements sent by these law firms to the district; and (3) copies of all documents showing the amounts billed and when they were paid by the district or any third party. You inform us that the district has released the information requested in item one of the request. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code, and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5.¹ We have considered your arguments and reviewed the submitted information.

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

¹We note that although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, 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). We also note this office has concluded that section 552.101 does not encompass other exceptions found in the Act. *See id.*

(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:

...

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

...

(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)(3), (16). Most of the submitted information consists of attorney fee bills subject to section 552.022(a)(16). The submitted information also contains information in accounts and invoices subject to section 552.022(a)(3). Thus, the attorney fee bills and the information in accounts and invoices, which we have marked, must be released unless this information is made confidential under the Act or other law. *See id.* You seek to withhold this information under sections 552.103 and 552.107 of the Government Code. However, these sections are discretionary exceptions and do not make information confidential under the Act. *See 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); *see also* 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). Therefore, the information subject to section 552.022 may not be withheld under sections 552.103 or 552.107 of the Government Code. The Texas Supreme Court has held, however, 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 address your attorney-client privilege claim under Texas Rule of Evidence 503 and your attorney work product privilege claim under Texas Rules of Civil Procedure 192.5 for the information subject to section 552.022. We will also address your claim under section 552.103 for the information not subject to section 552.022.

We first address your claim under section 552.103 of the Government Code for the information not subject to section 552.022 of the Government Code. Section 552.103 provides, in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform us, and provide documentation showing, the district received the request for information after a lawsuit styled *B.D.S., b/n/f Sherrill Michelle Smith v. Clarendon Independent School District*, Civil Action No. 2:10-cv-284, was filed in the United States District Court for the Northern District of Texas, Amarillo Division. Thus, we find litigation involving the district was pending when it received the request. You state the information at issue is related to the pending litigation. Based on your representations and our review, we agree this information is related to the pending litigation for purposes of section 552.103. Accordingly, the district may withhold the information not subject to section 552.022, which we have marked, under section 552.103 of the Government Code.

However, we note the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Therefore, once the information at issue has been obtained by all parties to the litigation through discovery or otherwise, a section 552.103(a) interest no longer exists as to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We next address your arguments against disclosure of the remaining information, which is subject to section 552.022 of the Government Code. Texas Rule of Evidence 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 claim the attorney fee bills are confidential in their entirety under rule 503. However, as noted above, section 552.022(a)(16) of the Government Code 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 (2002) (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 attorney fee bills that you specifically demonstrate consist of privileged communications.

You also claim portions of the attorney fee bills reveal privileged attorney-client communications. You have identified most of the parties to these communications as the district's attorneys, personnel, and agents. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the district. You inform us that the communications were intended to be confidential and have not been disclosed to third parties. Based on your representations and our review, we find the district has demonstrated the applicability of the attorney-client privilege to some of the information at issue. Thus, the district may withhold the information we have marked in the attorney fee bills under Texas Rule of Evidence 503. However, the remaining information at issue either does not reveal communications, reveals communications with non-privileged parties, or documents communications with individuals you have not identified. Accordingly, none of the remaining information may be withheld under rule 503.

You raise Texas Rule of Civil Procedure 192.5 for the remaining information in the attorney 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* 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 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.

Having considered your arguments regarding the information at issue, we conclude you have not demonstrated that any of this information consists of core work product for purposes of rule 192.5. Therefore, we conclude the district may not withhold any of the remaining information under Texas Rule of Civil Procedure 192.5.

In summary, the district may withhold the information not subject to section 552.022 of the Government Code, which we have marked, under section 552.103 of the Government Code. The district may withhold the information we have marked in the attorney fee bills subject to section 552.022(a)(16) of the Government Code under Texas Rule of Evidence 503. The district must release the remaining information pursuant to section 552.022 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,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/bhf

Ref: ID# 466268

Enc. Submitted documents

c: Requestor
(w/o enclosures)