ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 18, 2012

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

OR2012-20360

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# 474174 (ORR# 11569).

The Dallas Independent School District (the "district") received a request for information related to a specified case, specified legal bills during a specified time period, and specified communications pertaining to the specified case.[1] You claim that the submitted information is excepted from disclosure under sections 552.103, 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.[2] We have considered your submitted arguments and reviewed the submitted information. We have also received and considered

[1]You note that the district received clarification of the information requested. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

[2]Although you also raise section 552.101 of the Government Code in conjunction with the attorney-client privilege found in rule 503 of the Texas Rules of Evidence and the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2(1990). Further, section 552.111 is the proper exception to raise for your attorney work product privilege claim and section 552.107(1) of the Government Code is the proper exception to raise for information not subject to section 552.022.

comments from the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, 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.[3] Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. *See* 34 C.F.R. § 99.3 (defining "personally identifiable information"). The submitted information contains unredacted education records. Because our office is prohibited from reviewing these records to determine the applicability of FERPA, we will not address the applicability of FERPA to any of the submitted records. Such determinations under FERPA must be made by the educational authority in possession of such records.[4] We will, however, address the applicability of the claimed exceptions to the submitted information.

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

> (a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:
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> . . .
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> (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body; [and]
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> . . .
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> (16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

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[3]A copy of this letter may be found on the Office of the Attorney General's website: http://www.oag.state.tx.us/open/20060725usdoe.pdf.

[4]In the future, if the district does obtain parental consent to submit unredacted education records and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

Gov't Code § 552.022(a)(3), (16). In this instance, the submitted information includes information in a contract relating to the expenditure of public funds by the district and information in attorney fee bills. Thus, the district must release this information pursuant to subsection 552.022(a)(16) unless the information is confidential under the Act or other law. *Id.* Although you raise section 552.103 of the Government Code for this information, section 552.103 is discretionary in nature and does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 439, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the district may not withhold the information subject to section 552.022 under this section. 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 rule 503 of the Texas Rules of Evidence and attorney work product privilege claim under rule 192.5 of the Texas Rules of Civil Procedure for the information 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:
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> > (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
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> > (B) between the lawyer and the lawyer's representative;
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> > (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;
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> > (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 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 that 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 that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that 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). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state this information reveals communications made in furtherance of the rendition of legal services, and were intended to be, and have remained, confidential. However, you have failed to identify the parties to the communications in the fee bills. *See* Open Records Decision No. 676 at 8 (2002) (governmental body must inform this office of identities and capacities of individuals to whom each communication at issue has been made; this office cannot necessarily assume that communication was made only among categories of individuals identified in rule 503). *See generally* Gov't Code § 552.301(e)(1(A); *Strong v. State*, 773 S.W.2d 543, 552 (Tex. Crim. App. 1989) (burden of establishing attorney-client privilege is on party asserting it). Nevertheless, upon review, we are able to discern from the face of the documents that certain individuals are privileged parties. Accordingly, we conclude the district may withhold the information we have marked on the basis of the attorney-client privilege under Texas Rule of Evidence 503. However, the remaining information you have marked concerns communications with non-privileged parties or individuals you have not demonstrated are privileged parties, does not reveal the content of a communication, or reveals the creation of a document but does not reflect whether the document was communicated. Thus, you have failed to provide this office with the necessary facts to demonstrate the elements of the attorney-client privilege with respect to the remaining information you seek to withhold. Consequently, the district may not withhold any of the remaining information at issue under Texas Rule of Evidence 503.

Texas Rule of Civil Procedure 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 that 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 when the governmental body received the request for information and (2) consists of an attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *Id.*

The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that (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 prong of the work product test requires the governmental body to show that the documents at issue contain the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. Tex. R. Civ. P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test is confidential under rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp.*, 861 S.W.2d at 427.

We understand you to assert the remaining information at issue in the attorney fee bills is related to a litigation matter to which the city is a party. However, we find you have failed to demonstrate that any of the remaining information at issue in the submitted fee bills consists of mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative that were created for trial or in anticipation of litigation. Thus, the city may not withhold any of the remaining information at issue in the submitted attorney fee bills under rule 192.5.

Section 552.136(b) of the Government Code states that "[n]otwithstanding any other provision of [the Act], 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."[5] Gov't Code § 552.136(b). Therefore, the district must withhold the bank account numbers we have marked in the information subject to section 552.022 pursuant to section 552.136 of the Government Code.

Next, we turn to the information not subject to section 552.022. You claim section 552.111 of the Government Code for the information not subject to section 552.022 of the Government Code. Section 552.111, which excepts from disclosure "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency," encompasses the attorney work product privilege in rule 192.5. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); ORD 677 at 4-8. Section 552.111 protects work product as defined in rule 192.5(a) as:

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[5]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).

> (1) material 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
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> (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.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under the work product aspect of section 552.111 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. The test to determine whether information was created or developed in anticipation of litigation is the same as that discussed above concerning rule 192.5. Furthermore, if a requestor seeks a governmental body's entire litigation file, the governmental body may assert the file is excepted from disclosure in its entirety because such a request implicates the core work product aspect of the privilege. *See* ORD 677 at 5-6. Thus, in such a situation, if the governmental body demonstrates the file was created for trial or in anticipation of litigation, this office will presume the entire file is within the scope of the privilege. Open Records Decision No. 647 at 5 (1996) (citing *Nat'l Union Fire Ins. Co. v. Valdez*, 863 S.W.2d 458, 461 (Tex. 1993)) (organization of attorney's litigation file necessarily reflects attorney's thought processes); *see also Curry v. Walker*, 873 S.W.2d 379, 380 (Tex. 1994) (holding "the decision as to what to include in [the file] necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case").

You inform us the information not subject to section 552.022 consists of the remainder of the entire litigation file created by attorneys for the district and outside counsel for the district in the course of preparing for anticipated litigation. You further note the requestor seeks the district's entire litigation file regarding the incident at issue. You state this information necessarily consists of mental impressions, opinions, conclusions and legal theories of attorneys for the district, including the district's outside counsel. Upon review, we find the district has demonstrated the applicability of the attorney work product privilege to the information not subject to section 552.022. Thus, the district may withhold the information not subject to section 552.022 under section 552.111 of the Government Code.[6]

In summary, the district may withhold the information we have marked in the submitted attorney fee bills under rule 503 of the Texas Rules of Evidence. The district must withhold the bank account numbers we have marked in the information subject to section 552.022 under section 552.136 of the Government Code. The district may withhold the information

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[6]As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

not subject to section 552.022 under section 552.111 of the Government Code. 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,

Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID# 474174

Enc. Submitted documents

c: Requestor
(w/o enclosures)