



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 14, 2014

Mr. Darin Darby
Counsel for Fort Worth Independent School District
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P.O. Box 200
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OR2014-02902

Dear Mr. Darby:

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# 514531.

The Fort Worth Independent School District (the "district"), which you represent, received a request for seven categories of information pertaining to contracts, payments, and correspondence involving the district, two named individuals, Newby Davis PLLC, Cantey Hanger LLP, and Davis Consults LLC. You state the district will release some of the requested information to the requestor. You further state the district will redact any student record information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1323g of title 20 of the United States Code.¹ We understand you to claim the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. You state you have also notified Cantey Hanger LLP of the request for information and of their right to submit arguments stating why their information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to

¹The 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>

attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have received comments from Cantey Hanger. We have considered the submitted arguments and the submitted representative sample information.²

We note the submitted attorney fee bills fall within the scope of section 552.022 of the Government Code. Section 552.022(a)(16) provides for required public disclosure of "information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege," unless the information is confidential under the Act or other law. *See* Gov't Code § 552.022(a)(16). Although you seek to withhold the submitted attorney fee bills under sections 552.107(1) and 552.111 of the Government Code, sections 552.107(1) and 552.111 are discretionary exceptions to disclosure and do not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 6 (2002) (Gov't Code § 552.107(1) is not other law for purposes of Gov't Code § 552.022), 677 (2002) (governmental body may waive attorney work product privilege under section 552.111), 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the district may not withhold any of the information in the attorney fee bills under section 552.107(1) or section 552.111 of the Government Code. The Texas Supreme Court has held, however, that the Texas Rules of Evidence and Texas Rules of Civil Procedure are "other law" that makes information expressly confidential for purposes 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 rule 192.5 of the Texas Rules of Civil Procedure for the submitted fee bills. We will also consider your arguments under section 552.107 and section 552.111 of the Government Code for the information that is not subject to section 552.022.

Texas Rule of Evidence 503 encompasses 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;

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 that those records contain substantially different types of information than that submitted to this office.

(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 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 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You assert the submitted attorney fee bills must be withheld in their entirety under rule 503. However, 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 Decisions Nos. 676 (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). Accordingly, the district may not withhold the entirety of Exhibit B under Texas Rule of Evidence 503.

You indicate the attorney fee bills contain confidential communications between the district's counsel and district employees. You state these communications were made for the purpose of facilitating the rendition of professional legal services to the district. Further, we understand these communications have remained confidential. Accordingly, 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 at issue does not document a communication or consists of communications with parties whom you have not established are privileged parties for purposes of Texas Rule of Evidence 503. Therefore, none of the remaining information at issue may be withheld under Texas Rule of Evidence 503.

We next address Texas Rule of Civil Procedure 192.5 for the remaining information in the submitted 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* 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 there was a substantial chance litigation would ensue, and (2) the party resisting discovery believed in good faith there was a substantial chance 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 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.

We understand you to assert the remaining information in the attorney fee bills contain attorney core work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. Upon review, we find you have not demonstrated any of the remaining information at issue 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. We therefore conclude the district may not withhold any of the remaining information in the submitted attorney fee bills under rule 192.5 of the Texas Rules of Civil Procedure.

Next, we address the information not subject to section 552.022. You claim Exhibit A is protected by section 552.107(1) of the Government Code. Section 552.107(1) protects information that comes within the attorney-client privilege. *See* Gov't Code § 552.107(1). The elements of the privilege under section 552.107(1) are the same as those discussed for rule 503 above. 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* ORD 676 at 6-7.

You state Exhibit A consists of a communication involving an employee of the district and counsel for the district. You state the communication was made in confidence for the purpose of facilitating the rendition of professional legal services to the district and that this communication has remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the communication at issue. Accordingly, the district may withhold Exhibit A under section 552.107(1) of the Government Code.³

In summary, the district may withhold the information we have marked in Exhibit B under Texas Rule of Evidence 503, but must release the remainder of Exhibit B in accordance with section 552.022(a)(16) of the Government Code. The district may withhold Exhibit A under section 552.107(1) 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for

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

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Megan G. Holloway
Assistant Attorney General
Open Records Division

MGH/akg

Ref: ID# 514531

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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