ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 14, 2014

Mr. Bryan P. Neal
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OR2014-06169

Dear Mr. Neal:

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# 519495.

The Allen Independent School District (the "district"), which you represent, received a request for information pertaining to an investigation of a specified individual. You claim the submitted information is excepted from disclosure under sections 552.107, 552.108, and 552.135 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 representative sample of information.[2]

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[1]Although you raise section 552.101 of the Government Code in conjunction with section 552.107, Texas Rule of Evidence 503, and Texas Rule of Civil Procedure 192.5, this office has concluded section 552.101 does not encompass discovery privileges or other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Therefore, we do not address your arguments under section 552.101. In addition, although you raise section 552.022 of the Government Code, we note that section 552.022 is not an exception to disclosure. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are made confidential under the Act or other law. *See* Gov't Code § 552.022.

[2]We 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.

Initially, you assert the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2013-19074 (2013). In that ruling, we concluded that with the exception of basic information, the information at issue was excepted from disclosure under section 552.108(a)(1) of the Government Code. However, as you acknowledge, the pending criminal investigation on which the previous ruling was based has now concluded and is no longer pending. Thus, we find that the circumstances have changed, and the district may not continue to rely on Open Records Letter No. 2013-19074 as a previous determination. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). Accordingly, we will address your arguments against the disclosure of the submitted information.

Next, we note the submitted information is subject to section 552.022(a)(1) of the Government Code, which reads as follows:

> Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter 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). The submitted information consists of completed reports that must be released unless they are either excepted under section 552.108 of the Government Code or made confidential under the Act or other law. *See id.* Although you assert the submitted information is excepted from disclosure under section 552.107 of the Government Code, this section is discretionary and does not make information confidential under the Act. *See* Open Records Decision Nos. 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 the submitted information under section 552.107. However, the Texas Supreme Court has held the Texas Rules of Civil Procedure and the Texas Rules of Evidence are "other law" that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). You also raise sections 552.108 and 552.135 for the information that is subject to section 552.022(a)(1). As noted above, information subject to section 552.022(a)(1) may be withheld under section 552.108 of the Government Code. Further, section 552.135 of the Government Code can make information confidential under the Act. Accordingly, we will consider your arguments under sections 552.108 and 552.135 of the Government Code, Texas Rule of Civil Procedure 192.5, and Texas Rule of Evidence 503.

Texas Rule of Evidence 503(b)(1) provides the following:

> 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;
> >
> > (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).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must do the following: (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. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

You state the reports at issue were prepared by a consultant hired by the attorney for the district. You state the reports were communicated for the purpose of facilitating the rendition of professional legal services to the district. We understand the confidentiality of some of

these communications has been maintained. Based on your representations and our review, we find the information we have marked may be withheld under Texas Rule of Evidence 503. However, you also state some of the information at issue was released to a local law enforcement agency. Texas Rule of Evidence 511 states a person waives the discovery privileges if she voluntarily discloses the privileged information unless such disclosure itself is privileged. TEX. R. EVID.511. *See Jordan v. Fourth Supreme Judicial Dist.*, 701 S.W.2d 644, 649 (Tex.1986). In *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 554 (Tex. 1990), the court held that because privileged information was disclosed to the Federal Bureau of Investigation, the Internal Revenue Service, and the Wall Street Journal, the attorney-client and work product privileges were waived. In this case, you have not demonstrated how the law enforcement agency would be a privileged party. Thus, we find this release constitutes a voluntary waiver of the attorney-client privilege for purposes of rule 511. *See id.*; *In re Bexar County Criminal Dist. Attorney's Office,* 224 S.W.3d 182 (Tex. 2007) (district attorney waived work product privilege for case file by disclosing file to private litigant pursuant to subpoena duces tecum without objection); *see also S.E.C. v. Brady*, 238 F.R.D. 429 (N.D.Tex. 2006) (attorney-client privilege waived by disclosure of documents to Federal Securities and Exchange Commission; noting Fifth Circuit has not adopted doctrine of selective waiver). Accordingly, the district may not withhold any of the remaining information on the basis of Texas Rule of Evidence 503.

Rule 192.5 of the Texas Rules of Civil Procedure 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 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 that the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

As noted above, the submitted information was disclosed to a law enforcement agency. We note the attorney work product privilege can be waived if privileged information is voluntarily disclosed in a non-privileged context. *See Axelson,* 798 S.W.2d at 554; *Carmona v. State*, 947 S.W.2d 661, 663 (Tex. App.—Austin 1997, no writ); *Arkla, Inc. v. Harris*, 846 S.W.2d 623, 630 (Tex. App.—Houston [14th Dist.] 1993, no writ); *State v. Peca*, 799 S.W.2d 426, 431 (Tex. App.—El Paso 1990, no writ). Therefore, because you provided this information to the law enforcement agency, the work product privilege has been waived for this information. Accordingly, the district may not withhold the submitted information under Texas Rules of Civil Procedure 192.5.

Section 552.108(a)(1) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 applies to information held by a "law enforcement agency." However, section 552.108 may be invoked by the proper custodian of information relating to a pending investigation or prosecution of criminal conduct. *See* Open Records Decision No. 474 at 4-5 (1987). Where a non-law enforcement agency has custody of information that would otherwise qualify for exception under section 552.108 as information relating to the pending case of a law enforcement agency, the custodian of the records may withhold the information if it provides this office with a demonstration the information relates to the pending case and a representation from the law enforcement agency that it wishes to have the information withheld.

You argue the remaining information is subject to section 552.108(a)(1). In this case, as noted above, you inform us the criminal investigation to which the information at issue pertains has now concluded and is no longer pending. Furthermore, you have not submitted a representation from any other governmental body explaining how release will interfere with that agency's law enforcement or prosecutorial interests. Accordingly, we find you have failed to demonstrate section 552.108(a)(1) is applicable to any of the information at issue. Thus, the district may not withhold any of the remaining information under section 552.108(a)(1) of the Government Code.

Section 552.135 of the Government Code provides in relevant part the following:

> (a) "Informer" means a student or a former student or an employee or former employee of a school district who has furnished a report of another person's possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.
>
> (b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

Gov't Code § 552.135(a)-(b). Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under that exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See id.* § 552.301(e)(1)(A). Additionally, individuals who provide information in the course of an investigation, but do not make the initial report are not informants for purposes of section 552.135 of the Government Code. You claim the remaining information contains personally identifiable information of informers who reported possible violations of criminal law. However, we find no portion of the remaining information contains the identity of an informer for section 552.135 purposes. Therefore, we conclude the district may not withhold any of the remaining information on the basis of section 552.135 of the Government Code.

We note portions of the remaining information are subject to section 552.136 of the Government Code, which states "[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."[3] Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). The district must withhold the partial credit card numbers we have marked under section 552.136 of the Government Code.[4]

In summary, the district may withhold the information we have marked under Texas Rule of Evidence 503. The district must withhold the information we have marked under section 552.136 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.

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[3]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).

[4]We note section 552.136 of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *See* Gov't Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e).

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

Sincerely,

Britni Fabian
Assistant Attorney General
Open Records Division

BF/tch

Ref: ID# 519495

Enc. Submitted documents

c: Requestor
(w/o enclosures)