



June 5, 2001

Mr. Clay T. Grover  
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OR2001-2349

Dear Mr. Grover:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 148004.

The Clear Creek Independent School District (the "district"), which you represent, received a request for nine categories of information related to a student enrolled in the district. You state that the district does not have information responsive to request numbers 6 and 8 and that you have released to the requestor copies of the information responsive to request numbers 4, 5 and 7. You also state that you have released partial information responsive to request numbers 1, 2, 3 and 9. You assert that the remainder of the information responsive to requests numbers 1, 2, 3 and 9 is excepted from public disclosure under the attorney-client and work-product privileges. We have considered your claims and have reviewed the submitted documents.

The Federal Educational and Privacy Rights Act (FERPA) protects a student's privacy interests in "education records." *See* 20 U.S.C. § 1232g. "Education records" are defined as those records which contain information that is directly related to a student and which are maintained by an educational agency or institution or by a party acting for such agency or institution. Under FERPA an educational agency or institution is generally required to provide parents of minor students access to the student's education records. However, an educational institution may deny a parent's request to inspect an education record based on attorney client privilege or work product privilege grounds. *See* letter from LeRoy S. Rooker, Director, Family Policy Compliance Office, United States Department of Education, to Loretta R. DeHay, Assistant Attorney General, Office of the Attorney General (Dec. 15, 1994)(on file with the General Records Division, Office of the Attorney General).

We first note that you have redacted what you state is personally identifying student information in the submitted attorney invoices. *See* Open Records Decision No. 634 (1994) (allowing an educational agency or institution to withhold from public disclosure information that is protected by FERPA without the necessity of requesting an attorney general decision). If the redacted information in the attorney invoices is about a student who is not a child of the requestor, then the information may not be released without parental consent. *See* 20 U.S.C. § 1232g. However, if the information relates to the requestor's child, FERPA gives the requestors a right of access to information that identifies their child, but the district may assert privileges for the remaining information.

Attorney fee bills, such as those at issue here, are subject to section 552.022(a) of the Government Code, which provides in pertinent part as follows:

(a) 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 under this chapter unless they are expressly confidential under other law:

....

(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)(16). Under section 552.022, fee bills must be released unless they are expressly confidential under other law. Recently, the Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, No. 00-0453, 2001 WL 123933, at \*8 (Tex. Feb. 15, 2001). You claim the invoices are protected under the attorney-client privilege as found in Rule 503 of the Texas Rules of Evidence. You also argue that the invoices are protected under the work product privilege found in Rule 192.5 of the Texas Rules of Civil Procedure.

We first address whether the submitted invoices are protected under Rule 503(b)(1). Rule 503(b)(1) provides:

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 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. *See* Tex. R. Evid. 503(a)(5).

Accordingly, 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 document containing privileged information is 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); *see also* Tex. R. Evid. 511 (waiver of privilege by voluntary disclosure).

After reviewing your arguments and the attorney fee bills submitted to this office as Exhibit B, we conclude that you have demonstrated that some of the attorney invoices contain entries that are confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. We have marked those invoices which may be withheld under Rule 503.

You also claim that the invoices are protected by the work product privilege. An attorney's core work product is confidential under Rule 192.5. Core work product is defined as the work product of an attorney or an attorney's representative developed in anticipation of litigation or for trial that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *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 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 National 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. *See* 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*, 861 S.W.2d at 427. After reviewing the attorney invoices submitted as exhibit "B," we believe that you have demonstrated that some of the invoices contain an attorney's mental impressions, opinions, conclusions, or legal theories. We have marked those invoices which may be withheld under Rule 192.5

In summary, you may withhold those attorney invoices we have marked as containing attorney-client communications under Rule 503, Texas Rules of Civil Evidence. You may withhold those invoices we have marked as containing work product under Rule 192.5, Texas Rules of Civil Procedure. In addition, if the redacted information in the attorney invoices is about a student who is not the requestor's child, then we agree that this information must be withheld. However, if the information relates to the requestor's child, FERPA grants the requestor a right of access to this information.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

*Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kay H. Hastings  
Assistant Attorney General  
Open Records Division

KHH/DKB/seg

Ref: ID# 148004

Encl. Marked documents

cc: Mr. Mark Saad  
Dr. Mary Saad  
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(w/o enclosure)