



July 16, 2002

Mr. Arturo Michel
Bracewell & Patterson, LLP
711 Louisiana Street, Suite 2900
Houston, Texas 77002-2781

OR2002-3866

Dear Mr. Michel:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 165754.

The Pearland Independent School District (the “district”), which you represent received a request for copies of all of its legal bills incurred since May 1, 2001. You have released the identities of the billing attorneys and the amounts of the fees being billed, but you wish to except the specific details of the legal work being billed. You claim that sections of the requested information that you have marked are excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.114 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We note initially that the submitted documents contain information that is subject to section 552.022 of the Government Code, which makes certain information expressly public and therefore not subject to discretionary exceptions to disclosure. Section 552.022 states in relevant part:

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.

Gov’t Code § 552.022 (emphasis added). One such category of expressly public information under section 552.022 is “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). The submitted

attorney fee bills must be released under section 552.022 unless it is expressly confidential under other law.

In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by the Federal Educational Rights and Privacy Act ("FERPA") and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. The district states that it has withheld FERPA information in accordance with Open Records Decision 634.

The attorney-client privilege presents a second source of "other law" that excepts some of the requested information from release under section 552.022. You state that the sections of the requested information that you have marked are excepted from release by the attorney-client privilege. Section 552.107(1), which excepts information that comes within the attorney-client privilege, is a discretionary exception to disclosure and does not constitute "other law" for purposes of section 552.022. See Open Records Decision No. 630 at 4 (1994) (governmental body may waive section 552.107(1)). Therefore, you may not withhold the information under section 552.107(1).

The attorney-client privilege also is found, however, in rule 503 of the Texas Rules of Evidence. The Texas Supreme Court recently held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." See *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will determine whether the information at issue is confidential under rule 503.

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:

- (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. 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 claim that the attorney-client privilege applies to the portions of the submitted attorney fee bills that you have highlighted. We find that in some cases, you have established that the information contained in the bills reveal communications between attorneys for the district or between attorneys for the district and officers or employees of the district, identified the parties to the communication, and shown that the communications were not intended to be disclosed to third parties and that they were made in furtherance of the rendition of professional legal services to the client. Therefore, we have marked the information on the attorney fee bills that the district may withhold under Rule 503.

The attorney work product privilege, which you assert applies to the portions of the requested information that you have highlighted, presents a third source of “other law” that exempts some of the submitted information from release under section 552.022. Sections 552.103 and 552.111 of the Government Code, which except information within the attorney work product privilege, are discretionary exceptions under the Public Information Act and do not constitute “other law” for purposes of section 552.022. Open Records Decision No. 473 (1987) (governmental body may waive section 552.111). Furthermore, section 552.103 is a discretionary exception under the Public Information Act

and is, therefore, not “other law” for purposes of section 552.022.¹ *See* Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body’s position in litigation and does not itself make information confidential).

However, the attorney work product privilege is also found in Rule 192.5 of the Texas Rules of Civil Procedure. 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*, 53 S.W.3d 328 (Tex. 2001). Thus, we will determine whether the information is confidential under Rule 192.5.

An attorney’s work product is confidential under Rule 192.5. Work product is defined as

- (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
- (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). Accordingly, in order to withhold attorney work product from disclosure under Rule 192.5, a governmental body must demonstrate that the material, communication, or mental impression was created for trial or in anticipation of litigation. *Id.* To show that the information at issue was created in anticipation of litigation, 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. Information that meets 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). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.–Houston [14th Dist.] 1993, no writ). We have

¹ Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision No. 665 at 2 n.5 (2000) (governmental body may waive litigation exception, section 552.103). Discretionary exceptions therefore do not constitute “other law” that makes information confidential.

marked the information on the fee bills that you may withhold under the attorney work product privilege.

In summary, you may withhold the information that we have marked on the submitted fee bills that satisfies the attorney-client privilege as set out by Texas Rule of Evidence 503. You may also withhold the information that we have marked on the submitted fee bills that satisfies the attorney work product privilege. You must release the remaining 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).

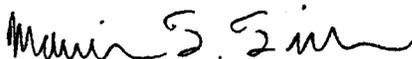
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Maverick F. Fisher
Assistant Attorney General
Open Records Division

MFF/seg

Ref: ID# 165754

Enc. Submitted documents

c: Ms. Susan Manis
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(w/o enclosures)