



October 31, 2002

Mr. Robert W. Wilson
Gale, Wilson & Sanchez
115 East Travis, Suite 618
San Antonio, Texas 78205

OR2002-6215

Dear Mr. Wilson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 171488.

The Alamo Community College District (the "district"), which you represent, received a request for information relating to (1) legal expenses billed to the district by the Gale, Wilson & Sanchez and Shelton & Valadez law firms dating to June 10, 2000; (2) contracts or contract renewals between the district and the law firms dating to June 10, 2000; (3) a named individual's cell phone records, expense reports, credit card receipts, and appointment calendars dating to June 1, 1996; and (4) search warrants or subpoenas served on the district or its law firms since September 1, 2001 that pertain to a criminal investigation. You inform us that the district has released some of the requested attorney fee and expense report information. You indicate that there are no responsive appointment calendars or search warrants. You claim that other requested information is excepted from disclosure under sections 552.101, 552.107, 552.108, 552.117, and 552.136 of the Government Code, Texas Rule of Evidence 503, Texas Rule of Civil Procedure 192.5, and chapter 20 of the Code of Criminal Procedure. We have considered your arguments and have reviewed the information you submitted.¹ We assume that the district has released any other responsive information that existed on the date of the district's receipt of this request for information. If not, then the district must release such information at this time. *See* Gov't Code §§ 552.301, .302; Open Records Decision No. 664 (2000). We note that chapter 552 of the Government Code does not require the district to release information that did not exist when it received this request or to create responsive information. *See* Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

¹You also raised section 552.103, but have submitted no comments stating how this exception applies to any of the requested information. Therefore, we do not address section 552.103. *See* Gov't Code § 552.301(e)(1)(A).

We begin with your argument that some of the requested information is not subject to chapter 552 of the Government Code. Chapter 552 applies only to "public information." *See Gov't Code § 552.021.* "Public information" is defined as

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.002(a). Thus, virtually all information in the physical possession of a governmental body is public information that is subject to chapter 552. *See Open Records Decision No. 549 at 4 (1990), 514 at 1-2 (1988).* Chapter 552 also is applicable to information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for a governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see also Open Records Decision No. 462 at 4 (1987)* (chapter 552 applies to information collected or maintained by consultant if the information relates to governmental body's official duties or business, consultant acts as agent of governmental body in collecting information, and governmental body has or is entitled to access to the information). However, chapter 552 does not require a governmental body to release information if the governmental body that receives the request has neither possession of the information nor a right of access to it. *See Open Records Decision Nos. 534 at 2-3 (1989), 518 at 2-3 (1989).*

In this instance, you argue that the requested grand jury summonses do not constitute public information under section 552.002. You assert that a summons directed to an attorney in your law firm is not collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official district business. You state that this summons was served on and is maintained by the private attorney at his place of business. You also state that the district does not own or have a right of access to the summons. Based on your representations and our review of the information in question, we find that the summons that was served on the attorney in your firm does not constitute public information under section 552.002. Thus, that summons is not subject to disclosure under chapter 552 of the Government Code. *See also Open Records Decision Nos. 558 at 2 (1990)* (chapter 552 not applicable if governmental body does not have right of access to or ownership of information prepared for it by an outside entity), *445 at 2 (1986)* (chapter 552 not applicable to information that governmental body never possessed or was entitled to receive).

You also argue that the other requested summonses are not subject to chapter 552 because they were served on administrators and employees of the district in their individual capacities. We disagree. Information is not beyond the scope of chapter 552 simply because it is in the possession of a particular official or employee of a governmental body, rather than

the governmental body as a whole. *See* Open Records Decision No. 635 at 3 (1995). Rather, information that clearly relates to official business is subject to chapter 552 regardless of whether it is held by a particular official or employee, the governmental body's administrative offices, or the custodian of records. *Id.*; *see also* Open Records Decision No. 425 at 2 (1985) (overruled on other grounds by Open Records Decision No. 439 (1986)). In Open Records Decision No. 635, we stated that certain factors are relevant, but not exhaustive, in determining whether a document is essentially governmental or personal information: who prepared the document; the nature of its contents; its purpose or use; who possessed it; who had access to it; whether the governmental body required its preparation; and whether its existence was necessary to or in furtherance of official business. *Id.* at 5. In this instance, we find that the remaining summonses are directed to officials or employees of the district in their official capacities. Moreover, these summonses clearly involve the official business of the district. Therefore, we conclude that the rest of the requested summonses are public information under section 552.002 of the Government Code. Thus, those summonses must be released unless they come within an exception to public disclosure. *See* Gov't Code § 552.006, .021.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that another statute makes confidential. Article 20.02(a) of the Code of Criminal Procedure provides that "[t]he proceedings of the grand jury shall be secret." You state that the summonses relate to an ongoing criminal investigation by the Bexar County Grand Jury. You assert that release of the summonses would interfere with the investigation. Having considered your representations and reviewed the summonses, we conclude that they must be withheld from disclosure under section 552.101 of the Government Code in conjunction with article 20.02(a) of the Code of Criminal Procedure. *See also* Open Records Decision No. 513 at 4 (1988) (information should be withheld if release would reveal grand jury's deliberations).²

Next, we address your arguments with regard to the requested attorney fee bills. We first note that a governmental body's attorney fee bills are subject to section 552.022 of the Government Code. Section 552.022 provides that

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[.]

²As we conclude that the summonses are excepted from disclosure under section 552.101, we need not address your arguments under section 552.108.

Gov't Code § 552.022(a)(16). Thus, information contained in attorney fee bills must be released under section 552.022 unless it is expressly confidential under other law. The district raises section 552.107 of the Government Code with regard to the requested attorney fee bills. However, section 552.107 is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. As such, it is not "other law" that makes information confidential for purposes of section 552.022. *See* Open Records Decision No. 630 at 4 (1994) (governmental body may waive attorney-client privilege under section 552.107(1)). Therefore, the district may not withhold information contained in the attorney fee bills under section 552.107(1).

The district also asserts that information contained in the attorney fee bills is protected by the attorney-client privilege under Texas Rule of Evidence 503 and the attorney work product privilege under Texas Rule of Civil Procedure 192.5. The Texas Supreme Court has 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). Therefore, we will address your arguments under rules 503 and 192.5.

Texas Rule of Evidence 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(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 have marked portions of the requested attorney fee bills that you claim are privileged attorney-client communications. We note that you have not identified many of the individuals who were involved in communications that you claim are privileged. Therefore, we are unable to conclude that communications involving those individuals come within the scope of rule 503(b)(1). With regard to the remaining information that you claim is protected by the attorney-client privilege, we have marked the communications that the district may withhold under Texas Rule of Evidence 503.

You also contend that information contained in the attorney fee bills is protected by the attorney work product privilege. 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).

You state that the attorney fee bills contain information relating to anticipated or pending litigation involving the district. You assert that information pertaining to the pending or anticipated litigation constitutes privileged attorney work product. Based on your representations and our review of the submitted fee bill information, we have marked the information that the district may withhold under Texas Rule of Civil Procedure 192.5.

Lastly, we address the requested expense account reports. We note that these documents contain a small amount of information that may be excepted from disclosure under section 552.117 of the Government Code. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the district may only withhold information under section 552.117 on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. The district may not withhold information under section 552.117 for a current or former official or employee who did not make a timely election to keep the information confidential. We have marked the information that the district may be required to withhold under section 552.117.

The expense account information also includes a driver’s license number. Section 552.130 of the Government Code is applicable to information that relates to “a motor vehicle operator’s or driver’s license or permit issued by an agency of this state[.]” Gov’t Code § 552.130(a)(1). If the information that we have marked relates to a Texas driver’s license, then it is excepted from disclosure under section 552.130.

The expense account records also contain account numbers that are confidential under section 552.136 of the Government Code. Section 552.136 provides as follows:

(a) In this section, “access device” means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, 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.

Gov't Code § 552.136. We have marked the account numbers that the district must withhold under section 552.136.

In summary, the summons directed to the attorney in your firm is not public information under section 552.002 of the Government Code and thus is not subject to disclosure under chapter 552 of the Government Code. The other requested summonses are excepted from disclosure under section 552.101 of the Government Code in conjunction with article 20.02(a) of the Code of Criminal Procedure. The district may withhold portions of the requested attorney fee bills under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. We have marked information in the expense account records that may be excepted from disclosure under section 552.117 of the Government Code. The marked driver's license information in the expense account records must be withheld under section 552.130 if it relates to a Texas driver's license. The marked account numbers in the expense account records must be withheld under section 552.136. The district must release the rest of the requested 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

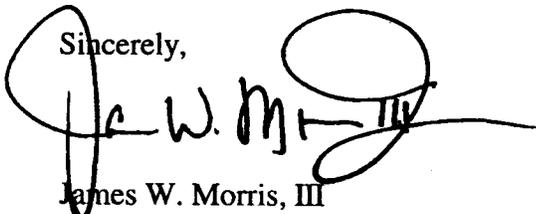
governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The 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,

A handwritten signature in black ink, appearing to read 'J.W. Morris, III', with a large, stylized flourish extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 171488

Enc: Marked documents

c: Mr. John Tedesco
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