



November 25, 2002

Mr. Philip Fraissinet  
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OR2002-6753

Dear Mr. Fraissinet:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID#172699.

The Santa Fe Independent School District (the "district"), which you represent, received two requests for attorney fee bills, faxes, telephone bills, and other documents pertaining to a pending lawsuit that concerns the district's guidelines regarding student speech during pre-game ceremonies at varsity football games. The requests also seek salary information for various employees and you state that the district has provided that information to the requestor. You claim that portions of the information submitted behind Tabs 1, 2, and 3 are excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code, Rule 503 of the Texas Rules of Evidence, Rule 501 of the Federal Rules of Evidence, Rule 192.5 of the Texas Rules of Civil Procedure, Rule 26 of the Federal Rules of Civil Procedure, and Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See Gov't Code § 552.304* (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note that the fee bill submitted behind Tab 1 dated February 14, 2000, does not include pages 3 - 5. Further, you have not indicated that such information does not exist or that you wish to withhold any such information from disclosure. Therefore, to the extent pages 3 - 5 of the February 14, 2000, fee bill exist, we assume that you have released them to the requestor. If you have not released any such information, you must release it to the requestor at this time. *See Gov't Code §§ 552.301(a), .302.*

We also note that the fee bills submitted behind Tab 1 are subject to section 552.022 of the Government Code, which provides in pertinent part as follows:

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). Thus, information contained in attorney fee bills must be released under section 552.022 unless it is expressly confidential under other law. Although the district raises sections 552.107 and 552.111 of the Government Code with regard to the requested attorney fee bills, sections 552.107 and 552.111 are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived. As such, they are not "other law" that makes information confidential for purposes of section 552.022. *See* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege under section 552.107(1)), 473 (1987) (governmental body may waive section 552.111); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). However, the attorney-client privilege and work product privilege are also found in Rule 503 of the Texas Rules of Evidence and Rule 192.5 of the Texas Rules of Civil Procedure, respectively. 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). We note that the supreme court did not hold that the Texas Disciplinary Rules of Professional Conduct, Federal Rules of Evidence, or Federal Rules of Civil Procedure are "other law" within the meaning of section 552.022. Thus, we will determine only whether the attorney fee bills are confidential under Rule 503 or Rule 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. After reviewing your arguments and the attorney billing statements submitted to this office, we believe that you have demonstrated that some of the entries contained therein constitute confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. We have marked the information behind Tab 1 that the district may withhold under Rule 503. We also note that the entries you marked in purple are not responsive to the request and may be withheld on that basis.

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.* 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 pending litigation involving the district. You also assert that information pertaining to the pending litigation constitutes privileged attorney work product because the information reveals the attorneys' mental impressions, opinions, conclusions, or legal theories. Based on your representations and our review of the submitted fee bill information, we have marked the information behind Tab 1 that the district may withhold under Texas Rule of Civil Procedure 192.5. All remaining unmarked information behind Tab 1 that is responsive to the requests must be released to the requestor.

We now turn to your argument under section 552.107 of the Government Code for the information behind Tab 2. Section 552.107(1) of the Government Code excepts information that an attorney cannot disclose because of a duty to its client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). The submitted information was prepared by a private attorney engaged by the district and contains this attorney's legal advice to the district regarding the matter at issue. Based on your arguments and our review of the submitted information, we agree that the information may be withheld under section 552.107(1). As section 552.107 is dispositive with respect to the documents behind Tab 2, we need not address your remaining arguments regarding those documents.

We now turn to your argument under section 552.103 of the Government Code for the information behind Tab 3. First, we note that the information behind Tab 3 is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part

(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:

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

The document behind Tab 3 is information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body and is expressly public under section 552.022(a)(3) unless it is confidential under other law. Although you claim that the submitted information is excepted under section 552.103, this section is a discretionary exception to disclosure and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). Open Records Decision 473 (1987) (section 552.103 is a discretionary exception that may be waived). Therefore, the district must release the public information behind Tab 3 under section 552.022(a)(3) of the Government Code.

In summary, the district must release the fee bills submitted behind Tab 1 with the exception of the non-responsive information marked in purple and the information we have marked that the district may withhold under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. The district may withhold the information behind Tab 2 under section 552.107 of the Government Code. The district must release the information behind Tab 3.

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,



Heather Pendleton Ross  
Assistant Attorney General  
Open Records Division

HPR/sdk

Ref: ID# 172699

Enc: Marked documents

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(w/o enclosures)