



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

December 20, 2002

Mr. Jeff Avant
The Avant Law Firm
1301 Nueces, Suite 200
Austin, Texas 78701

OR2002-7359

Dear Mr. Avant:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 173275.

The Kendall County Appraisal District (the "district"), which you represent, received a request for "records of amounts paid [in connection with four specified lawsuits] in attorney's fees, costs, expenses and/or other charges from the inception of each matter through the date [of the district's response to the request]." The request further states that it encompasses information from any one of four named private attorneys and any law firm with which they are or have been associated, as well as information "from the taxing units of" Kendall County, Boerne Independent School District, and Comfort Independent School District. You requested clarification of this request. The information provided indicates that the requestor responded by reasserting the request as written, by stating that he is specifically seeking "text descriptions of work performed by attorneys[,]" and by stating that the requested information does not encompass confidential attorney-client communications.¹ Among other arguments, you assert that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.104, and 552.107 of the Government Code. The requestor has also submitted comments to this office. See Gov't Code § 552.304. We have considered the submitted comments and arguments and reviewed the submitted information.

Before addressing the claimed exceptions, we consider certain procedural matters. We first note that the request is framed as encompassing information from the inception of each lawsuit through the date of the district's response to the request. The request thus purports to encompass any responsive information held by the district that was created or acquired

¹The requestor's comments to this office reference two letters sent by the requestor in response to the request for clarification, but only one such letter was submitted to this office.

between the time the district received the request and the time of the district's response to the request. This office has noted, however, that it is implicit in several provisions of the Public Information Act ("PIA") that the PIA applies only to information already in existence. *See Gov't Code §§ 552.002, .021, .227, .351.* Consequently, a governmental body is not required by the PIA to comply with a continuing request to supply information on a periodic basis as such information is prepared in the future. Open Records Decision No. 452 at 3 (1986). We therefore conclude that to the extent information responsive to the present request was created or acquired by the district after this request was received by the district, the district is not required by the PIA to produce that information.

Next, as noted above, the request is framed as encompassing information from any one of four named private attorneys and any law firm with which they are or have been associated, as well as information "from the taxing units of" three named governmental bodies other than the district. To the extent responsive information is contained only in the files of the private attorneys but pertains to services those attorneys performed for the district as client, such records would be considered to be in the constructive possession of the district for purposes of the PIA, and the district is accordingly responsible for complying with the PIA with regard to that information. *See Gov't Code § 552.002(a)(2); see also* Open Records Decision Nos. 499 (1988), 462 (1987), 437 (1986). We also note, however, that it is the governmental body by or for which information is "collected, assembled, or maintained" pursuant to section 552.002(a) of the Government Code that retains the ultimate responsibility for complying with the PIA in regard to that information. *See, e.g.,* Open Records Decision No. 576 (1990). Thus, to the extent responsive information is held by the named attorneys solely in connection with services performed for one or more of the named governmental bodies other than the district, we conclude that the district is not required by the PIA to produce any such information.

Next, we address your argument that the request is "defectively vague." We note that a written communication that reasonably can be judged to be a request for public information is a request under the PIA. Open Records Decision Nos. 497 at 3 (1988), 44 at 2 (1974). It is well-established that a governmental body may not disregard a request under the PIA merely because a requestor does not specify the exact documents desired. Rather, a governmental body must make a good faith effort to relate a request to information held by it. Open Records Decision No. 561 at 8-9 (1990), 87 (1975). If a governmental body is unable to determine the nature of the records being sought, it may ask the requestor to clarify the request so that the desired records may be identified. Open Records Decision No. 663 (1999); *see also* Gov't Code § 552.222(b). When a requestor makes a vague or broad request, the governmental body should make a good faith effort to advise the requestor of the types of records available that may be responsive to the request, so that the requestor may then narrow or clarify the request. *See id.* at 5. In this regard, although you requested clarification, it does not appear that the district actually advised the requestor of the specific types of records available that may be responsive to his request so that the requestor could then advise the district whether his request encompasses such records. However, it also

appears that you have made a good faith effort to relate the request to potentially responsive records of the district, and in compliance with section 552.301(e)(1)(D) of the Government Code, you have submitted examples of such records for our review.²

Next, we address your argument that the request is "overly broad." You appear to essentially argue that the district is not required to comply with the request because of the administrative difficulty of locating and producing the information that is being requested. In this regard, we advise that the difficulty or cost of complying with a public information request does not determine whether the information is available to the public. *See* Attorney General Opinion JM-672 (1987). Rather, in order to be withheld, the information must fall within an exception to disclosure under the PIA. *See* Gov't Code § 552.006.

Next, we note that you refer to certain certified agendas or tapes of closed meetings of the district board as containing information that may be responsive to the request. Section 552.101 of the Government Code exempts from disclosure information that is confidential by statute. *See* Gov't Code § 552.101. Section 551.104(c) of the Government Code provides that "[t]he certified agenda or tape of a closed meeting is available for public inspection and copying *only under a court order issued under Subsection (b)(3).*" (Emphasis added.) Thus, such information cannot be released to a member of the public in response to an open records request. *See* Open Records Decision No. 495 (1988). The district must accordingly withhold any responsive certified agendas or tapes of a closed meeting of the district board pursuant to section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code.

Next, we address the asserted exceptions to disclosure in relation to the submitted examples of potentially responsive records. Section 552.104 of the Government Code exempts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). In support of this exception, you state only that "the request relates to retainer agreements and expenditures that would give advantage to a competitor or bidder for legal services." Because you do not demonstrate any actual or specific harm to the district in a particular competitive situation due to the release of the requested information, we conclude that none of the requested information may be withheld on the basis of section 552.104 of the Government Code.

²We assume that 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.

We note that the information contained in the submitted Exhibit D consists of copies of minutes of open meetings of the district board. Section 551.022 of the Government Code states in relevant part that “[t]he minutes and tape recordings of an open meeting are public records and shall be available for public inspection and copying on request[.]” You have highlighted for withholding portions of the information contained in Exhibit D. However, the exceptions to disclosure under the PIA do not generally apply to information that another statute specifically makes public. Moreover, it is apparent that the information at issue was previously publicly disclosed in the open meeting. We conclude that the entirety of the information in Exhibit D must be released.

We next observe that Exhibits A, C, and E are subject to section 552.022 of the Government Code. This provision states in pertinent 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;

...

(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)(3), (16). We find that Exhibit A, a “Cash Disbursements Journal,” is subject to section 552.022(a)(3). Similarly, the copies of district checks contained in Exhibit C is information subject to section 552.022(a)(3). Exhibit E consists of attorney fee bills and therefore comprises information subject to section 552.022(a)(16).

Section 552.022 thus provides that the information in Exhibits A, C, and E must be released unless it is confidential under other law. Sections 552.103 and 552.107(1) of the Government Code are discretionary exceptions to disclosure under the PIA and not other law that makes information confidential for purposes of section 552.022. *See, e.g.*, Open Records Decision Nos. 677 (2002), 676 (2002). Accordingly, the information in Exhibits A, C, and E may not be withheld on the basis of section 552.103 or section 552.107(1).

You advise that a protective order was issued by the court on July 27, 2000 and that it pertains to the present request, including the section 552.022(a) information in Exhibits A, C, and E. We note, however, the section 552.022(b) states that “[a] court in this state may

not order a governmental body or an officer for public information to withhold from public inspection any category of public information described by [section 552.022(a)] . . . unless the category of information is expressly made confidential under other law.” Thus, to the extent information responsive to the present request is subject to section 552.022(a), the protective order does not alone provide a basis for withholding that information. Rather, as noted above, it must be released unless it is confidential under other law.

The Texas Supreme Court has determined 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). In regard to the attorney fee bills that are responsive to the request, the language of section 552.022(a)(16) limits its disclosure requirement to information “that is not privileged under the attorney-client privilege.” Thus, responsive information that is subject to section 552.022, but that is confidential under Rule 503 of the Texas Rules of Evidence, may be withheld on that basis. Rule 503 is “other law” that makes section 552.022(a) information confidential for purposes of that section. Open Records Decision No. 676 (2002).

Here, the requestor has narrowed his request to exclude confidential attorney-client communications. Because such information is not responsive to the request, this decision does not address the extent to which the submitted information is confidential under Rule 503. *See* Gov’t Code § 552.301(a) (procedure for open records ruling from this office applies to *requested* information that a governmental body seeks to withhold). You may redact from any responsive records that this decision concludes are subject to release any particular information that you, in good faith, determine is confidential by virtue of the attorney-client privilege. *See* Open Records Decision No. 676 (2002) (discussing the elements of the Texas attorney-client privilege). We emphasize, however, that the responsive attorney fee bills may not be withheld in their entirety on the basis that the fee bill contains or is an attorney-client communication. *See id.* Rather, you may only redact particular information in the fee bill entries, as not responsive to the request, to the extent that information actually consists of or documents an attorney-client privileged communication.³

³In regard to the submitted section 552.022(a) information, you have highlighted in yellow a significant amount of information that you state would be “prudent” to withhold. You have also highlighted in orange a much smaller amount of information, the withholding of which you state “is considered absolutely necessary.” In requesting our ruling, you do not claim the attorney-client privilege for any of the yellow-highlighted information. Rather, you claim the attorney-client privilege only with respect to the orange-highlighted information. As explained above, this decision does not rule on the extent to which the submitted information is protected by the attorney-client privilege because such information is not responsive to the request. We nevertheless note, however, that the information highlighted in yellow does not generally appear to meet the elements of the attorney-client privilege, and that information that does not meet the elements of the attorney-client privilege could not be withheld as non-responsive under a *good faith* evaluation by the district.

In regard to the orange-highlighted information you have marked in Exhibit E, you also assert the consulting expert and work product privileges contained in the Texas Rules of Civil Procedure. *See* Tex. R. Civ. P. 192.3(e), 192.5. As noted above, the Texas Supreme Court has determined that these privileges comprise “other law” that may make information confidential for purposes of section 552.022. Accordingly, we next address these assertions.⁴

With respect to the assertion of the work product privilege contained in Rule 192.5 of the Texas Rules of Civil Procedure, we note that the rule sets forth two types of work product: “core work product,” and “other work product.” *See* Tex. R. Civ. P. 192.5(b)(1), (2). This office recently determined that information subject to section 552.022 is “expressly confidential” for purposes of that section under Rule 192.5 only to the extent the information implicates the “core work product” aspect of the privilege. Open Records Decision No. 677 (2002). Information that is purely “other work product” and subject to section 552.022 may not be withheld on the basis of Rule 192.5. *Id.* Thus, in regard to your assertion of work product for the orange-highlighted information that is at issue, we consider only the extent to which you have demonstrated this information to be protected by the core work product aspect of the privilege.

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. 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.* In this instance, you have shown the information at issue to have been created for trial, thus you have met the first prong of this test. You have not, however, shown most of the information at issue to consist of an attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. We have marked the information at issue to indicate the extent to which you have demonstrated it to be protected as core work product. You may withhold the information we have marked on the basis of Rule 192.5, but none of the remaining information at issue is protected on that basis.

Rule 192.3(e) states in pertinent part that “[t]he identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert are not discoverable[.]” As noted, you assert this privilege for a small portion of the section 552.022 information, which you have highlighted in orange. Based on your representations and our review of the information at issue, we conclude that you have demonstrated this privilege for a portion of the information at issue, which we have marked.

⁴As we have already noted, if the district in good faith determines that any of this information is confidential under Rule 503 of the Texas Rules of Evidence, such information may be withheld because it has not been requested.

You may withhold the information we have marked on the basis of Rule 192.3(e), but none of the remaining section 552.022 information may be withheld on that basis.

In regard to Exhibit C, we note that these copies of district checks contain bank account numbers, which you have marked. Section 552.136 of the Government Code states that “[n]otwithstanding any other provision of [chapter 552], 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. The district must, therefore, withhold the marked bank account numbers under section 552.136.

With respect to the remaining submitted samples — Exhibits B and F — we find that this information is not subject to section 552.022. You represent that this information is the subject of a protective order that was issued by the court in the underlying litigation, which is pending. On the basis of this representation, we conclude that this information must be withheld in accordance with section 552.107(2) of the Government Code. This exception provides that information is excepted from required public disclosure if “a court by order has prohibited disclosure of the information.” *See also* Open Records Decision No. 143 (1976) (information the subject of a protective order by federal district court in pending case excepted by predecessor provision to section 552.107(2)).

In summary, the district’s obligations under the PIA apply to public information as defined in section 552.002 of the Government Code, held by the district, that existed at the time the district received the present request. This includes information, under the standards discussed herein, that is in the actual possession of private attorneys but is considered for purposes of the PIA to be in the constructive possession of the district. To the extent the district is unable to determine in good faith whether particular types of records are being requested, the district should inform the requestor of the types of records that may be responsive so that the requestor may then clarify or narrow the request. The district may withhold as not responsive to the request information that the district in good faith concludes is protected by the attorney-client privilege as defined in Rule 503 of the Texas Rules of Evidence, but the entirety of attorney fee bills may not be withheld on this basis. Rather, specific entries in the fee bills may be redacted to the extent they actually comprise or document protected Rule 503 communications. Any responsive certified agendas or tapes of a closed meeting of the district board must be withheld pursuant to section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code. None of the requested information may be withheld on the basis of section 552.104 of the Government Code. In regard to the submitted representative samples, Exhibit D is subject to required public release in its entirety as required by section 551.022 of the Government Code. Notwithstanding a protective order of a state court, the responsive information in Exhibits A, C, and E is also subject to required public release in its entirety as required by section 552.022 of the Government Code, except that the district may withhold the information we have marked in Exhibit E on the basis of the core work product and consulting expert privileges, and the district must withhold the marked account numbers in

Exhibit C in accordance with section 552.136 of the Government Code. Exhibits B and F must be withheld in their entirety in accordance with section 552.107(2) of the Government Code.

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).

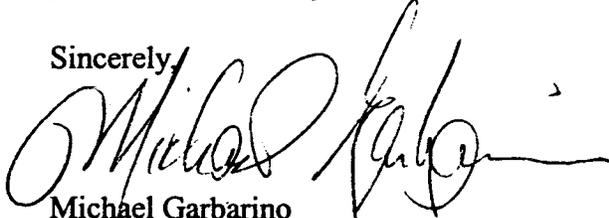
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 "Michael Garbarino". The signature is fluid and cursive, with a long horizontal stroke at the end.

Michael Garbarino
Assistant Attorney General
Open Records Division

MG/seg

Ref: ID# 173275

Enc. Submitted documents

c: Mr. Joseph M. Harrison IV
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