ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 3, 2006

Ms. Jennifer L. Hall
Escamilla & Poneck, Inc.
P. O. Box 200
San Antonio, Texas 78291-0200

OR2006-04514

Dear Ms. Hall:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 247938.

The San Antonio Independent School District (the "district"), which you represent, received a request for information pertaining to legal fees, expert witness fees, pre-trial and post-trial expenses, and district staff time and expenses "as it relates to the lawsuit between San Antonio Water System (SAWS) and [the district] regarding the sale of land by SAWS to the Sunshine Cottage School for Deaf Children."[1] You claim that the requested information is excepted from disclosure on the basis of sections 552.101, 552.103, 552.107, and 552.111 of the Government Code as well as Texas Rule of Civil Procedure 192.5 and Texas Rule of Evidence 503.[2] We have considered your arguments and reviewed the submitted information.

We initially note that the requestor is a Texas State Representative. Section 552.008 of the Government Code grants access to requested information, including confidential information,

[1]We note that the district sought and received clarification from the requestor of the information requested. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

[2]Although you also cite sections 552.102, 552.105, and 552.137 of the Government Code in the district's initial brief to this office, you have not submitted any arguments explaining how these sections apply to the submitted information. We therefore assume the district is no longer claiming these exceptions. *See* Gov't Code §§ 552.301, .302; *see also* Open Records Decision No. 564 (1990) (statutory predecessor to section 552.105 subject to waiver).

to individual members, agencies, or committees of the Texas Legislature. Section 552.008 provides as follows:

> (a) Th[e Act] does not grant authority to withhold information from individual members, agencies, or committees of the legislature to use for legislative purposes.
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> (b) A governmental body on request by an individual member, agency, or committee of the legislature shall provide public information, including confidential information, to the requesting member, agency, or committee for inspection or duplication in accordance with th[e Act] if the requesting member, agency or committee states that the public information is requested under th[e Act] for legislative purposes. A governmental body, by providing public information under this section that is confidential or otherwise excepted from required disclosure under law, does not waive or affect the confidentiality of the information for purposes of state or federal law or waive the right to assert exceptions to required disclosure of the information in the future. The governmental body may require the requesting individual member of the legislature, the requesting legislative agency or committee, or the members or employees of the requesting entity who will view or handle information that is received under this section and that is confidential under law to sign a confidentiality agreement that covers the information and requires that:
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> > (1) the information not be disclosed outside the requesting entity, or within the requesting entity for purposes other than the purpose for which it was received;
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> > (2) the information be labeled as confidential;
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> > (3) the information be kept securely; or
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> > (4) the number of copies made of the information or the notes taken from the information that implicate the confidential nature of the information be controlled, with all copies or notes that are not destroyed or returned to the governmental body remaining confidential and subject to the confidentiality agreement.
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> (c) This section does not affect:
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> > (1) the right of an individual member, agency, or committee of the legislature to obtain information from a governmental body under other law, including under the rules of either house of the legislature;

> (2) the procedures under which the information is obtained under other law; or
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> (3) the use that may be made of the information obtained under other law.

Gov't Code § 552.008. In this instance, the requestor is a Texas State Representative who has informed the district that he is making this request under the Act as well as pursuant to section 552.008(b). The requestor has further asked the district to "indicate which materials were produced pursuant to [the Act] and which were produced pursuant to Section 552.008(b) of the Government Code[.]" You contend that, although the written request invokes section 552.008 of the Government Code, "there is no statement therein which establishes that the information is requested for legislative purposes." You also believe that "[t]he District is restricted in inquiring further . . . under § 552.222" to determine whether this information is being sought for legislative purposes.

We disagree with your statement regarding section 552.222. Although section 552.222 of the Government Code generally prohibits a governmental body from inquiring into the purpose for which the requested information will be used, this section does not prohibit the district from communicating with the requestor to clarify whether, or the extent to which, he is seeking this information pursuant to section 552.008(b) of the Government Code. Here, the requestor's statement that he is making this request, or a part of this request, pursuant to section 552.008(b) is a statement that he is requesting this information, or a portion thereof, for legislative purposes. However, because the district has not clarified with the requestor which information is requested pursuant to section 552.008, our office must rule conditionally on the matter. In this respect, to the extent the submitted information is being requested under section 552.008(b), the district must make such information available to the requestor in accordance with that section. *See id.* § 552.008(b).[3] However, to the extent the requestor is not seeking such information pursuant to section 552.008, but rather under the Act generally, we will address your claimed exceptions against disclosure as discussed below.

We begin by noting that Exhibit C constitutes attorney fee bills that are subject to section 552.022 of the Government Code. This section provides that "information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege" is public and may not be withheld unless it is expressly confidential under other law. *Id.* § 552.022(a)(16). Thus, information contained in attorney fee bills must be released under section 552.022(a)(16) unless it is expressly confidential under other law.

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[3]We note that the release of this information to the requestor under section 552.008 does not waive or affect the confidentiality of the information for purposes of state or federal law or waive the district's right to assert exceptions to required public disclosure of this information in the future. *See* Gov't Code 552.008(b).

You assert that portions of Exhibit C are protected under sections 552.107 and 552.111 of the Government Code, Texas Rule of Civil Procedure 192.5, and Texas Rule of Evidence 503. Sections 552.107 and 552.111 are discretionary exceptions under the Act and do not constitute "other law" for purposes of section 552.022. Open Records Decision Nos. 677 at 8-9 (2002) (attorney work product privilege may be waived), 676 at 5-6 (2002) (attorney-client privilege under section 552.107(1) may be waived); *see* Open Records Decision Nos. 630 at 4 (1994) (predecessor to section 552.107(1) may be waived), 473 (1987) (governmental body may waive predecessor to section 552.111); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Thus, none of the information in Exhibit C may be withheld under either section 552.107 or 552.111. However, 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). This office has determined that when the attorney-client privilege or work-product privilege is claimed for information that is subject to release under section 552.022, the proper analysis is whether the information at issue is excepted under Texas Rule of Evidence 503 (attorney-client communications) or Texas Rule of Civil Procedure 192.5 (work product). Open Records Decision Nos. 676 at 5-6 (2002), 677 at 8-9. We will therefore consider your arguments under rule 192.5 of the Texas Rules of Civil Procedure and rule 503 of the Texas Rules of Evidence for the information you seek to withhold in Exhibit C.

We begin with rule 503 of the Texas Rules of Evidence, which encompasses the attorney-client privilege and 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:
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> > (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
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> > (B) between the lawyer and the lawyer's representative;
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> > (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;
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> > (D) between representatives of the client or between the client and a representative of the client; or
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> > (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 assert that the submitted fee bills include confidential communications between district personnel and its outside counsel made for the purpose of effectuating legal representation to the district. Based on your representations and our review of the submitted information, we find that the district has established some of the information you seek to withhold on this basis is protected by the attorney-client privilege. We have marked this information, which the district may withhold pursuant to rule 503. However, we find that the district has failed to establish the applicability of rule 503 to any of the remaining information at issue. Therefore, none of the remaining information may be withheld on this basis.

We next address your claim under rule 192.5 of the Texas Rules of Civil Procedure with respect to the remaining information you seek to withhold in Exhibit C. Rule 192.5 encompasses the attorney work product privilege. For the purpose of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent that the information implicates the core work product aspect of the work product privilege. *See* Open Records Decision No. 677 at 9-10 (2002). Rule 192.5 defines core work product as the work product of an attorney or an attorney's representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney's representative. *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 the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *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 Nat'l 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 part of the work product test requires the governmental body to show that the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney's or an attorney's representative. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both parts of the work product test is confidential under rule 192.5, provided that the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). However, upon reviewing your arguments and the remaining information at issue in Exhibit C, we find that none of it consists of core work product. Therefore, none of this information may be withheld under rule 192.5 of the Texas Rules of Civil Procedure.

We next address your claim under section 552.101 of the Government Code for Exhibit E. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information protected by other statutes. 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). Exhibit E consists of three certified agendas of closed executive sessions of the district's Board of Trustees. We agree that the district must withhold this information pursuant to section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code.

Lastly, we address your claim under section 552.103 of the Government Code for the information submitted as Exhibit D. This section provides in relevant part as follows:

> (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the person's office or employment, is or may be a party.
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> . . .
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> (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You explain that Exhibit D "relate[s] to a dispute which has been the subject of adjudication proceedings within the Texas judiciary [that] began on or about April 7, 2003, when SAWS filed a declaratory action against the District[.]" You further explain that "the decision was appealed to the 4th Court of Appeals and is currently pending before the Texas Supreme Court." Based on this information, we find that you have established that litigation was pending on the date the district received the request for information. We also agree that Exhibit D is related to the pending litigation. As such, we conclude the district may withhold Exhibit D under section 552.103 of the Government Code. We note, however, that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, to the extent the submitted information is being requested under section 552.008(b) of the Government Code, the district must make such information available to the requestor in accordance with that section. To the extent the requestor is not seeking the submitted information pursuant to section 552.008, but rather under the Act generally, we conclude as follows: (1) the information we have marked in Exhibit C may be withheld under rule 503 of the Texas Rules of Evidence; (2) Exhibit E must be withheld under section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code; (3) Exhibit D may be withheld under section 552.103 of the Government Code; and (4) the remaining submitted information, consisting of the information we have not marked in Exhibit C, must be released to the requestor.[4]

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.

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[4]As we reach these conclusions, we need not address your remaining arguments against disclosure.

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 ten 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. Dep't of Pub. 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 Office of the Attorney General 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 ten calendar days of the date of this ruling.

Sincerely,

Robert B. Rapfogel
Assistant Attorney General
Open Records Division

RBR/krl

Ref: ID# 247938

Enc. Submitted documents

c: The Honorable Robert R. Puente
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