



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 27, 2007

Ms. Ann Greenberg
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
Counsel for El Paso Independent School District
P.O. Box 2156
Austin, Texas 78768

OR2007-03362

Dear Ms. Greenberg:

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# 274431.

The El Paso Independent School District (the "district"), which you represent, received a request for information related to the employment of Walsh, Anderson, Brown, Schulze & Aldridge, P.C. (the "firm"); bills submitted by the firm; and authorizations for payment to the firm. You inform us that the district has released some of the requested information. You have submitted information that the district seeks to withhold under sections 552.103, 552.107, and 552.111 of the Government Code, Texas Rule of Evidence 503, and Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the submitted information.

We first note that the submitted information includes education records. The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.¹ Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not

¹A copy of this letter may be found on the attorney general's website, http://www.oag.state.tx.us/opinopen/og_resources.shtml.

submit education records to this office in unredacted form, that is, in a form in which “personally identifiable information” is disclosed. *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”). You have submitted, among other things, redacted education records for our review. Because our office is prohibited from reviewing these education records to determine the applicability of FERPA, we will not address FERPA with respect to these records, other than to note that parents have a right of access to their own child’s education records. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3. Such determinations under FERPA must be made by the educational authority in possession of the education records.² The DOE also has informed this office, however, that a parent’s right of access under FERPA to information about that parent’s child does not prevail over an educational institution’s right to assert the attorney-client and attorney work product privileges.³ Therefore, to the extent that the requestor has a right of access under FERPA to any of the information for which you claim the attorney-client and work product privileges, we will address your claims. We also will consider your arguments with respect to the rest of the submitted information.

We next note that the submitted information consists of attorney fee bills that are subject to section 552.022 of the Government Code. Section 552.022(a) provides for the required public disclosure of “information that is in a bill for attorney’s fees and that is not privileged under the attorney-client privilege,” unless the information is expressly confidential under other law. Gov’t Code § 552.022(a)(16). Although you seek to withhold information contained in the attorney fee bills under sections 552.103, 552.107, and 552.111 of the Government Code, those sections are discretionary exceptions to disclosure that protect a governmental body’s interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov’t Code § 552.103); Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under Gov’t Code § 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under Gov’t Code § 552.107(1) may be waived), 665 at 2 n.5 (discretionary exceptions generally). As such, sections 552.103, 552.107, and 552.111 are not other law that makes information confidential for the purposes of section 552.022(a)(16). Therefore, the district may not withhold any of the information under section 552.103, section 552.107, or section 552.111.

The Texas Supreme Court has held, however, that the Texas Rules of Evidence and the Texas Rules of Civil Procedure are “other law” within the meaning of section 552.022. *See*

²In the future, if the district does obtain parental consent to submit unredacted education records, and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

³Ordinarily, FERPA prevails over an inconsistent provision of state law. *See Equal Employment Opportunity Comm’n v. City of Orange, Tex.*, 905 F.Supp. 381, 382 (E.D. Tex. 1995); Open Records Decision No. 431 at 3 (1985).

In re City of Georgetown, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege also is found at Texas Rule of Evidence 503, and the attorney work product privilege also is found at Texas Rule of Civil Procedure 192.5. Accordingly, we will consider your assertion of these privileges under rule 503 and rule 192.5 with respect to the information in the attorney fee bills.

Texas Rule of Evidence 503 enacts the attorney-client privilege. 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(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 state that the submitted attorney fee bills document communications between the district's attorneys and their client that were made in connection with the rendition of professional legal services to the district. You also state that the communications were intended to be confidential. Based on your representations and our review of the information at issue, we have marked the information that the district may withhold on the basis of the attorney-client privilege under Texas Rule of Evidence 503.

Texas Rule of Civil Procedure 192.5 encompasses the attorney work product privilege. For purposes 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).

You also contend that the attorney fee bills contain core attorney work product that is protected by rule 192.5. You assert that the documents contain information that was developed by attorneys or attorney representatives in connection with pending or anticipated litigation. You state that the attorney work product privilege has not been waived. Based on

your representations and our review of the remaining information, we have marked the information that the district may withhold as core attorney work product under Texas Rule of Civil Procedure 192.5.

In summary, the district may withhold the information we have marked under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. The remaining information must be released to the requestor. This ruling does not address the applicability of FERPA to the submitted information. Should the district determine that all or portions of the submitted information consists of “education records” that must be withheld under FERPA, the district must dispose of that information in accordance with FERPA, rather than the Act.

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, 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); *Texas 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 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "L. Joseph James".

L. Joseph James
Assistant Attorney General
Open Records Division

LJJ/eb

Ref: ID# 274431

Enc. Submitted documents

c: Mr. Gary Gonzalez
7715-A Mount Latona Drive
El Paso, Texas 79904
(w/o enclosures)