



ATTORNEY GENERAL OF TEXAS
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June 27, 2007

Ms. Ann Greenberg
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OR2007-08138

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# 282347.

The Hitchcock Independent School District (the "district"), which you represent, received a request for six categories of information related to the district's legal services and insurance policies for the 1997-1998 through 2006-2007 [school] years.¹ You state that the district has released some responsive information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.136 of the Government Code and privileged under Texas Rule of Civil Procedure 192.5 and Texas Rule of Evidence 503.² We have considered the exceptions you claim and reviewed the submitted information.³

¹The district informs us that it sought and received a clarification of the information requested. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed).

²Although you also raise section 552.117 of the Government Code as an exception to disclosure of the requested information, you have provided no arguments regarding the applicability of this exception; we therefore assume that you no longer assert this exception. *See* Gov't Code §§ 552.301(b), (e); .302.

³We 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.

Initially, we note that the some of the submitted information is subject to section 552.022 of the Government Code. This section provides in part 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:

(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). The submitted information includes district checks, insurance policies, and attorney fee bills which must be released unless they are expressly confidential under other law. The district claims that the information subject to section 552.022 is excepted from disclosure under sections 552.107 and 552.136 of the Government Code, and privileged under Texas Rule of Evidence 503. We note, however, that section 552.107 is a discretionary exception to public disclosure that protects the governmental body's interests and may be waived. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.107 does not qualify as other law that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold any portion of the information subject to section 552.022 under section 552.107.

However, the Texas Supreme Court has held that the Texas Rules of Evidence are "other law" within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will address your attorney-client privilege argument under rule 503 of the Texas Rules of Evidence. We will also address your claim under section 552.136 of the Government Code, because it constitutes "other law" for purposes of section 552.022.

Rule 503 of the Texas Rules of Evidence encompasses the attorney-client privilege and provides:

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). Having considered your representations and reviewed the information at issue, we find you have established that some of the information at issue constitutes privileged attorney-client communications. Therefore, the district may withhold this information, which we have marked, under rule 503. However, we conclude you have not established that the remaining information that is subject to section 522.022 consists of privileged attorney-client communications; therefore, the district may not withhold any of the remaining information under rule 503.

For the purpose of section 552.022, information is confidential under rule 192.5 of the Texas Rules of Civil Procedure only to the extent the information implicates the core work product aspect of the work product privilege. Open Records Decision No. 677 at 9-10 (2002). 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 when the governmental body received the

request for information and (2) consists of an attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *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 prong of the work product test requires the governmental body to show that the documents at issue contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. Tex. R. Civ. P. 192.5(b)(1). A document containing core work product information that meets both prongs of 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).

Having considered your representations and reviewed the information at issue, we find you have established that some of the information that is subject to section 552.022, which we have marked, constitutes privileged attorney work product that may be withheld under rule 192.5. However, we conclude you have not established that the remaining information consists of privileged attorney work product; therefore, the district may not withhold this information under rule 192.5.

We next address your argument that some of the information subject to section 552.022 is protected by section 552.136 of the Government Code. Section 552.136 states that "[n]otwithstanding 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. Further, this section constitutes other law for purposes of section 552.022. Thus, the district must withhold the insurance policy numbers you have marked and bank account numbers we have marked under section 552.136 of the Government Code.

We now address your argument under section 552.103 of the Government Code for some of the remaining information that is not subject to section 552.022. Section 552.103 provides 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 state or a

political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(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.

The 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 is pending or reasonably anticipated on the date 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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform us and provide documentation showing that, prior to the district's receipt of the request for information, the district was named as a defendant in a lawsuit. We therefore agree that litigation was pending on the date the district received the request. Furthermore, having reviewed your arguments and representations, we find that some of the remaining information is related to the pending proceedings for purposes of section 552.103. Therefore, the district may generally withhold this information, which we have marked, pursuant to section 552.103.

We note, however, that once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

Lastly, we address your argument that a portion of the remaining information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 101.104 of the Civil Practice and Remedies Code. We note that section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. However, section 101.104 is a civil discovery privilege and does not make insurance information expressly confidential for purposes of section 552.101. See Open Records Decision No. 551 at 3 (1990) (provisions of section 101.104 "are not relevant to the availability of the information to the public"); see also Attorney General Opinion JM-1048 (1989); Open Records Decision Nos. 647 at 2 (1996) (information that may be privileged in the civil discovery context may not be

withheld from disclosure pursuant to section 552.101 of the Government Code), 575 at 2 (1990) (stating explicitly that discovery privileges are not covered under statutory predecessor to section 552.101). Thus, we determine that the remaining information may not be withheld from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 101.104 of the Civil Practice and Remedies Code.

In summary, the submitted documents that we have marked as subject to section 552.022 must be released except (1) the district may withhold the information we have marked pursuant to Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, and (2) the district must withhold the insurance policy numbers you have marked and the bank account numbers that we have marked under section 552.136 of the Government Code. With regard to the submitted information that is not subject to section 552.022, the district may withhold the information we have marked under section 552.103. The remaining submitted information must be released.

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, 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,



Heather Pendleton Ross
Assistant Attorney General
Open Records Division

HPR/mcf

Ref: ID# 282347

Enc: Submitted documents

c: Ms. Latasha Derouen
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(w/o enclosures)