

The ruling you have requested has been modified pursuant to a court order. The court judgment has been attached to this document.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 4, 2007

Ms. Kelli H. Karczewski
Feldman & Rogers, L.L.P.
222 North Mound, Suite 2
Nacogdoches, Texas 75961

OR2007-12966

Dear Ms. Karczewski:

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 #289594 (ID #289595 was consolidated into this file).

The Temple Independent School District (the "district"), which you represent, received two requests from three requestors for a copy of a specified Texas Workforce Commission ("TWC") complaint, information pertaining to any other TWC complaints filed against the district in the past two years, copies of current district administrative charts, copies of any proposed reorganization of district administration, and documents pertaining to the district's policies regarding public information. You state that you are releasing a portion of the requested information to the requestor. You also state that there are no documents responsive to portions of this request, such as documents outlining action taken by the district as a result of the specified complaint and documents pertaining to the district's policies regarding public information.¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

Initially, we note that some of the responsive information, contained within Exhibit I, was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2007-12290 (2007) (ruling that a portion of the attorney fee bills at issue may be withheld under Texas Rule of Evidence 503). With regard to information in the current request that is identical to the information previously requested and ruled upon by this office, we conclude that, as we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, the district may continue to rely on this ruling as a previous determination. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). We note that a small portion of Exhibit I, the fee bill entry dated June 29, 2007, was not ruled upon in Open Records Letter No. 2007-12290. Accordingly, we will address your exceptions to disclosure regarding this information.

We note, and you acknowledge, that the fee bill at issue 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:

...

(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). Under section 552.022(a)(16), the district must release the attorney's fee bill at issue, unless it is expressly confidential under other law. The Texas Supreme Court has held that the Texas Rules of Evidence and Texas Rules of Civil Procedure 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). The attorney-client privilege is found at Texas Rule of Evidence 503, and the attorney work product privilege 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.

You claim that the attorney's fee bill at issue is excepted from disclosure under Texas Rule of Evidence 503, which 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).

You state that the submitted attorney fee bill consists of confidential communications between the district's attorneys and the district that were made for the purpose of facilitating the rendition of professional legal services to the district. Based on your representations and our review of the submitted information, we find that the district has established that the information involving an identified client is protected by the attorney-client privilege. Thus, the district may withhold the information we have marked pursuant to rule 503 of the Texas Rules of Evidence. Since you did not identify the other individuals involved in the communications, the district has failed to demonstrate that these communications are between privileged parties. Therefore, the district may only withhold the information we have marked within the fee bill dated June 29, 2007 under rule 503.

Rule 192.5 of the Texas Rules of Civil Procedure encompasses the attorney work product privilege. For the 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 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 at 427.

Having considered your arguments and reviewed the fee bill at issue, we conclude that you have not established that the remaining information consists of privileged core work product; therefore, the district may not withhold any of this information under rule 192.5. We now address your arguments for the other submitted exhibits.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information protected by other statutes, such as section 21.355 of the Education Code. Section 21.355 provides that "a document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. This office has interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or

administrator. Open Records Decision No. 643 (1996). In Open Records Decision No. 643, we determined that a “teacher” for purposes of section 21.355 means a person who (1) is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055 and (2) is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id.* at 4. This office has determined that an administrator is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is serving as an administrator at the time of the evaluation. *Id.*

You contend that Exhibit D contains information that is confidential under section 21.355 of the Education Code. You assert that the submitted evaluation forms were created to evaluate the performance of a district teacher and a district administrator, both of whom held the appropriate certificates and were serving as teachers or administrators at the time of the evaluations. You state that the submitted power-point presentation is a “self-evaluation instrument” used by the district’s superintendent to evaluate “progress toward effective district management.” Upon review of your arguments and the documents at issue, we agree that most of the information contained within Exhibit D is confidential under section 21.355 of the Education Code and must be withheld under section 552.101 of the Government Code. However, the power point presentation pertains to the reorganization of the superintendency; it contains no information regarding the actual job performance of the superintendent or any other teacher or administrator. Accordingly, you have failed to demonstrate that the presentation is confidential under section 21.355. As you raise no further arguments regarding this presentation, it must be released to the requestors. Furthermore, we note, and you acknowledge, that some information within Exhibit D was provided for informational purposes only and is not responsive to the present requests for information. Information that is not responsive, which we have marked, need not be released. Moreover, we do not address such information in this ruling.

You claim that Exhibit E is confidential under section 154.073 of the Civil Practice and Remedies Code, which is also encompassed by section 552.101 of the Government Code. Section 154.073 provides in relevant part:

(a) Except as provided by Subsections (c), (d), (e), and (f) a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

Civ. Prac. & Rem. Code § 154.073(a). In this instance, the original complaint was filed with the TWC, and a TWC attorney conducted a mediation of this dispute. Therefore, you argue that Exhibit E contains communications related to a mediation between a district employee and the district that are subject to the Alternative Dispute Resolution (“ADR”) procedures

contained within section 154.073. Although Exhibit E does pertain to ADR, Chapter 154 was written to encourage the early resolution of pending litigation through voluntary settlement procedures, thereby decreasing the caseload of an overworked court system. *See* Civ. Prac. & Rem. Code § 154.002 (explaining state policy to encourage early settlement of pending civil litigation). We note that Exhibit E does not pertain to traditional litigation involving the Texas court system; instead, it pertains to an administrative proceeding conducted by a TWC mediator. TWC has its own administrative rules regarding the informal resolution of TWC disputes through conference, conciliation, and persuasion. *See* Labor Code § 21.207(b) (outlining TWC's policy in favor of resolution of TWC complaints by informal methods and establishing specific rules, applicable only to the TWC, regarding the release of information pertaining to the resolution of these complaints). We find that you have failed to demonstrate how section 154.073 applies to information pertaining to the conciliation of TWC disputes. Accordingly, none of Exhibit E may be withheld on this basis. However, Exhibit E contains teacher evaluations, which we have marked, that are confidential under section 21.355 of the Education Code and must be withheld under section 552.101 of the Government Code.

You claim that the information contained within Exhibits F, G, and H is excepted from disclosure under section 552.107(1) of the Government Code. Section 552.107(1) protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and lawyers representing another party in a pending action concerning a matter of common interest therein. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “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).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state that Exhibits F and G contain communications between district employees and district attorneys. You inform us that these communications were made in the furtherance of the rendition of legal services and advice for the district; specifically, they pertain to the district’s settlement negotiations and defensive strategies pertaining to TWC complaints filed by district employees against the district. You state that Exhibit H contains communications between district attorneys and district insurance adjusters regarding TWC complaints filed by district employees against the district, also made in furtherance of the rendition of legal services. You state that all of these communications were made in confidence, intended for the sole use of the district, district attorneys, and the district’s insurance carriers, and that they have not been shared or distributed to others. Based on our review of your representations and the submitted information, we find that you have demonstrated the applicability of the attorney-client privilege to the requested communications. Accordingly, we conclude that the district may withhold Exhibits F, G, and H pursuant to section 552.107(1) of the Government Code. As our ruling on this issue is dispositive, we need not address your remaining arguments against the disclosure of these exhibits.

In summary, the district may rely on Open Records Letter No. 2007-12290 with regards to most of Exhibit I. The district may withhold the information we marked within Exhibit I under Texas Rule of Evidence 503. The district must withhold the teacher evaluations we marked within Exhibits D and E under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district may withhold Exhibits F, G, and H under section 552.107 of the Government Code. The remaining information must be released to the requestors.

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,



Reg Hargrove
Assistant Attorney General
Open Records Division

RJH/eeg

Ref: ID# 289594

Enc. Submitted documents

c: Ms. Jill K. Frankel & Ms. Laura C. Rublee
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(w/o enclosures)

Mr. Kevin Chandler
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(w/o enclosures)

AUG 24 2007

At 8:59A. M.
Amalia Rodriguez-Mendoza, Clerk

CAUSE NO. D-1-GN-07-001107

UNITEDHEALTH GROUP
INCORPORATED, PACIFICARE OF
TEXAS, INC., PACIFICARE LIFE
ASSURANCE CO.,
Plaintiffs,

§ IN THE DISTRICT COURT OF
§
§
§
§ TRAVIS COUNTY, TEXAS

V.

GREG ABBOTT, ATTORNEY GENERAL
FOR THE STATE OF TEXAS,
Defendant.

§
§
§
§ 201st JUDICIAL DISTRICT

AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for agreed final judgment. Plaintiffs UnitedHealth Group Incorporated, PacifiCare of Texas, Inc., and PacifiCare Life Assurance Co. collectively referred to as "UnitedHealth") and Defendant Greg Abbott, Attorney General of Texas, appeared, by and through their respective attorneys, and announced to the Court that all matters of fact and things in controversy between them had been fully and finally compromised and settled. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code Ann. ch. 552. The Office of the Attorney General represents to the Court that, in compliance with Tex. Gov't Code Ann. § 552.325(c), the requestor, David Weber, was sent reasonable notice of this setting and of the parties' agreement that the Texas Department of Insurance must withhold the information at issue; that the requestor was also informed of his right to intervene in the suit to contest the withholding of this information; and that the requestor has not informed the parties of his intention to intervene. Neither has the requestor filed a motion to intervene or appeared today. After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. The information at issue, UnitedHealth's Process Improvement Plan, dated 9/21/2005, is excepted from disclosure by Tex. Gov't Code Ann. § 552.110(b).

2. The TDI must withhold from the requestor the information described in Paragraph 1 of this Agreement.

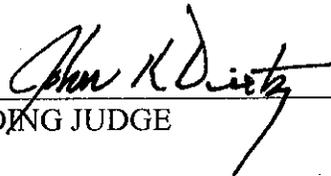
3. UnitedHealth no longer contests the disclosure of the remaining information that the Attorney General ruled open in OR2007-03555. TDI must release to the requestor all information that is responsive to the request for information and that was not held excepted from disclosure in Letter Ruling 2007-03555 or by Paragraph 1 of this Judgment, which is limited to the letter dated August 18, 2005, from Cindy Thurman with TDI to B. Senterfitt regarding the Acquisition of Control of PacifiCare of Texas, Inc., (HMO) and PacifiCare Life Assurance Company (PLAC) by UnitedHealth Group Incorporated (Applicant).

4. All costs of court are taxed against the parties incurring the same;

5. All relief not expressly granted is denied; and

6. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendants and is a final judgment.

SIGNED this the 24th day of August, 2007.

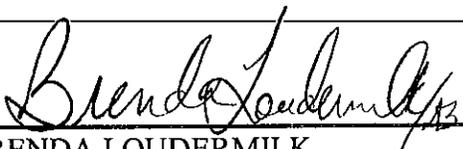


PRESIDING JUDGE

APPROVED AS TO FORM AND CONTENT:



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