



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 8, 2008

CORRECTED COPY

Ms. Erica Escobar
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OR2007-13677A

Dear Ms. Escobar:

This office issued Open Records Letter No. 2007-13677 (2007) on October 18, 2007. We have examined this ruling and determined that we made an error. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on October 18, 2007. *See generally* Gov't Code 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of the Public Information Act (the "Act"))).

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 298942.

The Lake Travis Independent School District (the "district"), which you represent, received requests for the campaign finance reports of three named individuals, information regarding candidates for the positions of Director of Special Services and Behavior Specialist, and information regarding a specified claim. You seek to withhold portions of the requested information from disclosure under sections 552.102, 552.103, 552.107, 552.111, 552.117, 552.136, and 552.137 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.

Initially, we note that the information at Tabs 3 and 4 consists entirely of attorney fee bills that are subject to section 552.022 of the Government Code. Section 552.022(a)(16) provides that information in a bill for attorney fees that is not protected under the attorney-client privilege is not excepted from required disclosure unless it is expressly

confidential under other law; therefore, information within these fee bills may only be withheld if it is confidential under other law. Gov't Code § 552.022(a)(16). Sections 552.103, 552.107, and 552.111 are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived. *See 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 section 552.103); Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 676 at 6 (2002) (section 552.107 is not other law for purposes of section 552.022), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). As such, sections 552.103, 552.107, and 552.111 are not other laws that make information confidential for the purposes of section 552.022; therefore, the district may not withhold the fee bills under these sections. However, the Texas Supreme Court has held that the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" that makes information expressly confidential for the purposes of section 552.022. We will therefore consider your arguments under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. We will also consider your argument under section 552.136 of the Government Code, which is also "other law" for purposes of section 552.022.

Rule 503(b)(1) provides the following:

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).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must do the following: (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. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 4527 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (privilege attaches to complete communication, including factual information).

Having considered your representations and reviewed the information at issue, we find you have established that some of the information at Tabs 3 and 4 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 consists of privileged attorney-client communications; therefore, the district may not withhold the remaining information under rule 503.

For purposes of section 552.022, information is confidential under rule 192.5 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 contain 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 not established that the remaining information consists of core work product; therefore, the district may not withhold any of the remaining information at Tab 3 or Tab 4 under rule 192.5.

You note that the remaining information at Tab 4 includes a credit card number. Section 552.136(b) of the Government Code 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.” We agree that the district must withhold the credit card number you have marked under section 552.136.

We turn next to your arguments regarding the information at Tab 1 and portions of Tab 6. Section 552.102(b) of the Government Code exempts from disclosure “a transcript from an institution of higher education maintained in the personnel file of a professional public school employee.” Gov’t Code § 552.102(b). This section further provides, however, that “the degree obtained or the curriculum on a transcript in the personnel file of the employee” are not excepted from disclosure. *Id.* Thus, except for the information that reveals the degree obtained and the courses taken, the district must withhold the transcripts submitted at Tab 1 under section 552.102(b). However, the information at issue in Tab 6 does not consist of transcripts from an institution of higher learning, and it may not be withheld under section 552.102(b).

We turn next to your argument under section 552.107(1) of the Government Code for the information at Tab 2. Section 552.107(1) protects information that comes 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. *See* ORD 676 at 6-7. 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. *See* 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. *See 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, and lawyer representatives. *See* 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. *See 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 the information at Tab 2 consists of communications between attorneys for the district and district representatives that were made in connection with the rendition of professional legal services. You also state that the communications were intended to be confidential. Based on your representations and our review of the information at issue, we agree that the information at Tab 2 is excepted from disclosure under section 552.107(1).

We next address your argument that portions of the submitted campaign finance reports and campaign expenditure reports, which are found at Tab 5, are excepted from disclosure under section 552.117(a)(1) of the Government Code.¹ Section 552.117(a)(1) excepts from disclosure the current and former home addresses and telephone numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). We note that section 552.117 only applies to records that the governmental body holds in its capacity as an employer. *See id.* § 552.117

¹We note that the reports at Tab 5 are election records required to be filed with the district under section 254.031 of the Election Code. *See* Elec. Code § 254.031; *see also id.* § 1.012(d) (“election record” includes report issued or received under Election Code). Under section 1.012(c), election records are public information and may only be withheld if an exception under the Act is applicable. *Id.* § 1.012(c).

(providing that employees of governmental entities may protect certain personal information in the hands of their employer). Some of the information you have marked in Tab 5 is not held by the district in its capacity as an employer. This information, which we have marked, may not be withheld under section 552.117(a)(1). Based on your representation that the remaining information pertains to employees of the district who timely elected confidentiality, we agree that the remaining information that you have marked must be withheld under section 552.117(a)(1).

Next, the district contends the e-mail addresses found in the information at Tab 6 are excepted from disclosure under section 552.137 of the Government Code. Under section 552.137, a governmental body must withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See id.* § 552.137(b). Section 552.137 does not except from disclosure the general e-mail address of a business or the work address of a government employee. We note that some of the e-mail addresses that you have marked are the work addresses of government employees. These e-mail addresses, which we have marked, may not be withheld under section 552.137. You do not inform us that any of the individuals to whom the remaining e-mail addresses belong have consented to their release. Accordingly, the district must withhold the remaining e-mail addresses under section 552.137.

In summary, the district may withhold the portions of the information we have marked at Tabs 3 and 4 in accordance with rule 503 of the Texas Rules of Evidence. The district must withhold the credit card number that you have marked under section 552.136 of the Government Code. Except for the information that reveals the degree obtained and the courses taken, the district must withhold the transcripts submitted at Tab 1 under section 552.102(b) of the Government Code. The district may withhold Tab 2 in its entirety under section 552.107 of the Government Code. Other than information we have marked, the district must withhold the information you have marked at Tab 5 pursuant to section 552.117(a)(1) of the Government Code. Other than the work e-mail addresses of government employees, which we have marked, the district must withhold e-mail addresses that you have marked under section 552.137 of the Government Code.² The remaining information must be released to the requestor.

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 file suit in

²As our ruling is dispositive, we do not reach your remaining arguments.

Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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).

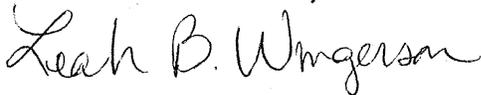
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



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Open Records Division

LBW/mcf

Ref: ID#298942

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