



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 25, 2007

Ms. Erica Escobar
Bracewell & Giuliani LLP
800 One Alamo Center
106 South. St. Mary's Street
San Antonio, Texas 78205-3603

OR2007-13951

Dear Ms. Escobar:

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# 292809.

The Lake Travis Independent School District (the "district"), which you represent, received six requests from the same requestor, in part seeking all business records maintained by the district relating to four specified docket numbers, 03-06-00742-CV, A-07-CA-626-SS, A-06-CA-046-SS, and 277-SE-0507. You state that you have made available some responsive information. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.111, 552.117, 552.136, and 552.137 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the submitted information.

Recently, the United States Department of Education Family Policy Compliance Office (the "DOE") informed this office that the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(a), 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 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”). Determinations under FERPA must be made by the educational authority in possession of the education records.² You have submitted, among other things, education records that you state you have redacted pursuant to FERPA for our review. However, some of the submitted records still contain student information. Because our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records. However, we will consider the applicability of your claimed exceptions to disclosure of the submitted information.

We note that the information submitted at Tab 2 contains a decision and order issued by a special education hearing officer, as well as documents filed with the court. Section 552.022 of the Government Code provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, 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:

...

(12) final opinions, including concurring and dissenting opinions, and orders issued in the adjudication of cases;

...

(17) information that is also contained in the public court record[.]

Gov’t Code § 552.022(a)(12), (17). Section 552.022(a) makes these types of information expressly public unless it contains information that is expressly confidential under other law. Although you assert that these documents, which we have marked, are excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code, these exceptions are discretionary exceptions that protect a governmental body’s interests and are

¹A copy of this letter may be found on the Office of the Attorney General’s website: http://www.oag.state.tx.us/opinopen/og_resources.shtml.

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.

therefore not “other law” for purposes of section 552.022(a)(17). 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 10-11 (2002) (attorney work-product privilege under section 552.111 may be waived), 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), 663 (1999) (governmental body may waive section 552.103). Furthermore, although Rule 503 of the Texas Rules of Evidence, which protects information within the attorney-client privilege, constitutes “other law” for purposes of section 552.022, see *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001), the privilege would be waived to the extent the otherwise privileged information is contained in a court filed document. See TEX. R. EVID. 511.

The Texas Supreme Court also has held that the Texas Rules of Civil Procedure are “other law” within the meaning of section 552.022. For the purpose 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. ORD 677 at 9-10. 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 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). Upon review, we conclude that the handwritten notes on some of the court-filed documents at issue reflect the mental processes, conclusions, strategies, or legal theories of the district’s attorneys regarding anticipated litigation. The

district may withhold the information we have marked pursuant to rule 192.5. However, no remaining parts of the court filed documents constitute core work product, and thus, may not be withheld on this basis.

We note that the submitted decision and order contain information subject to the federal Individuals with Disabilities Education Act (“IDEA”). *See* 20 U.S.C. §§ 1400 et seq. Section 552.101 excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”³ Gov’t Code § 552.101. Section 552.101 encompasses statutes that make information confidential. Personally identifiable data of special education students is protected under section 1417 of IDEA, which provides as follows:

The Secretary [of Education] shall take appropriate action, in accordance with [the Family Educational Rights and Privacy Act of 1974 (“FERPA”)], to ensure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by the Secretary and by State educational agencies and local educational agencies pursuant to this subchapter.

20 U.S.C. § 1417(c); *see* 34 C.F.R. § 99.3 (defining “personally identifiable information”). Upon review, we determine that the district must withhold the information we have marked under section 552.101 in conjunction with section 1417(c) of title 20 of the United States Code. The remaining information in the decision and order must be released.

We now turn to your arguments for the submitted information that is not subject to section 552.022. Section 552.103 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.

...

(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

³The Office of the Attorney General will raise a mandatory exception like section 552.101 of the Government Code on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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).

The district asserts that the remaining information submitted at Tab 2 is excepted under section 552.103. You state, and provide documentation showing, that Cause No. 03-06-00742-CV is pending before the Third Court of Appeals, and that Civil Action No. A-07-CA-626-SS has been consolidated with Civil Action No. A-06-CA-046-SS and is pending before the United States District Court for the Western District of Texas, Austin Division. You explain that Docket No. 277-SE-0507 represents a special education due process hearing that is currently pending at the administrative level. Further, you state that this type of hearing is subject to the Administrative Procedure Act. *See* 19 T.A.C. § 89.1180(f) (discovery methods for these disputes shall be limited to those specified in the Administrative Procedure Act (“APA”)); *see also* Open Records Decision No. 588 at 7 (1991) (ruling that, for purposes of the Act, litigation includes a contested case under the predecessor to the APA). Each of these cases were pending on the date the district received the current request. Further, you explain, and we agree, that the information in sections 2-A, 2-B, 2-C, and 2-D each relates to the particular litigation identified by the district. Upon review, we determine that the district may generally withhold the information contained at Tab 2 pursuant to section 552.103.

We note, however, that the requestor and his representatives, who are the opposing party, have previously had access to some of the information in question. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that is related to litigation through discovery procedures. *See* ORD 551 at 4-5. If the opposing party has seen or had access to information that is related to pending litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We note that the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). Thus, to the extent that the requestor or his representatives have already

seen or had access to the submitted information, the district may not now withhold any such information under section 552.103.

We now turn to your claim under section 552.107 for information to which the opposing party has already seen or had access. Section 552.107 of the Government Code protects information within the attorney-client privilege. Gov't Code § 552.107. 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. 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. 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, and lawyer representatives. 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).

In this case, you state that the “e-mail communications, letters and/or memos” at issue constitute privileged attorney-client communications between the district’s legal counsel and district officials. You further state that the communications were made for the purpose of facilitating the rendition of professional legal services. Upon review, we determine that the

district may withhold the information we have marked pursuant to section 552.107 because it is part of privileged attorney-client communications. However, we find that you have failed to demonstrate how the remaining information at issue constitutes privileged attorney-client communications. Accordingly, no part of the remaining information at issue may be withheld on this basis.

We now address your claim under section 552.111 for the remaining information to which the opposing party has already seen or had access. Section 552.111 of the Government Code encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); ORD 677 at 4-8. Rule 192.5 defines work product as:

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. TEX. R. CIV. P. 192.5; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied 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 created or obtained the information for the purpose of preparing for such litigation. *Nat'l Tank Co. 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; ORD 677 at 7.

As we previously stated, the information at Tab 2 is related to litigation that was pending on the date the district received the current requests for information. You state that the remaining information at issue at Tab 2 was prepared by the district's attorneys and contains their mental impressions, conclusions, opinions, or legal theories. You further state that the information at issue at Tab 2 was created in anticipation of litigation. Based upon your representations and our review of the information at issue, we conclude that the district may withhold the handwritten notes we have marked on documents seen by the opposing party

as attorney work product under section 552.111. However, no part of the remaining information at issue may be withheld on this basis.

Section 552.117 of the Government Code excepts from disclosure the home address, personal telephone number, social security number, and family member information of current or former 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). Section 552.117 also encompasses a personal cell telephone number, provided that a governmental body does not pay for the cell phone service. *See* Open Records Decision No. 506 at 5-6 (1988) (Gov't Code § 552.117 not applicable to cellular mobile phone numbers paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The district may only withhold information under section 552.117(a)(1) on behalf of current or former employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. You state that the employees in question timely elected under section 552.024 to keep their personal information confidential. Based on your representations and our review, we find that, with the exception of the information we have marked for release, the district must withhold the information you have marked in Tab 5 under section 552.117.

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. The district must withhold the bank account and routing numbers, and insurance policy numbers, we have marked pursuant to section 552.136.

Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). This section does not protect the work e-mail addresses of the employees of an entity with which a governmental body has a contractual relationship. *Id.* § 552.137(c)(1). The marked e-mail addresses are not of the type specifically excluded by section 552.137(c). Therefore, in accordance with section 552.137 of the Government Code, the district must withhold the e-mail addresses we have marked unless the district receives consent to release them.

In summary, this ruling does not address the applicability of FERPA to the submitted information. Should the district determine that all or portions of those documents consist of “education records” that must be withheld under FERPA, the district must dispose of that information in accordance with FERPA, rather than the Act. The district may withhold the information we have marked under Texas Rule of Evidence 192.5. The district must withhold the information we have marked under section 552.101 of the Government Code

in conjunction with section 1417(c) of title 20 of the United States Code. The district may withhold the information we have marked under sections 552.103, 552.107, and 552.111. With the exception of the information we have marked for release, the department must withhold the district employees' personal information it has marked pursuant to section 552.117. The department must withhold the information we have marked pursuant to sections 552.136 and 552.137. The remaining 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,

A handwritten signature in black ink that reads "Kara A. Batey". The signature is written in a cursive style with a large, looped "y" at the end.

Kara A. Batey
Assistant Attorney General
Open Records Division

KAB/jh

Ref: ID# 292809

Enc. Submitted documents

c: Mr. David Lovelace
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(w/o enclosures)