ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 28, 2008

Ms. Meridith Hayes
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OR2008-11862

Dear Ms. Hayes:

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# 318721.

The Plano Independent School District (the "district"), which you represent, received a request for information pertaining to attorney's fees the district paid since Fall 2004, including fees paid for services pertaining to the requestor. The district seeks to withhold the information under sections 552.103 and 552.107 of the Government Code, Texas Rule of Evidence 503, and Texas Rule of Civil Procedure 192.5. In addition, the district states and provides documentation showing it notified the district's other seven law firms of the request for information and of their right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered your arguments and reviewed the submitted representative sample of information.[1]

[1]We 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 the submitted information consists of attorney fee bills that are subject to section 552.022 of the Government Code. Section 552.022(a) provides for the required public disclosure of "information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege," unless the information is expressly confidential under other law. Gov't Code § 552.022(a)(16). Although you seek to withhold information contained in the attorney fee bills under sections 552.103 and 552.107 of the Government Code, these sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (discretionary exceptions generally). As such, sections 552.103 and 552.107 are not other laws that make information confidential for purposes of section 552.022(a)(16). Therefore, the district may not withhold the information under section 552.103 or 552.107. In addition, Walsh, Anderson, Brown, Schulze & Aldridge, P.C. ("Walsh") asserts its fees are excepted under sections 552.104 and 552.110 of the Government Code.[2] Section 552.104(b) states section 552.022 does not apply to information that is excepted from disclosure under section 552.104. Gov't Code § 552.104(b). Thus, we will consider the applicability of section 552.104 and section 552.110 as the latter is other law that makes information confidential for purposes of section 552.022(a).

First, Walsh states it and the district assert its fee bills are excepted from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from disclosure information that, if released, would give an advantage to a competitor or bidder. Gov't Code § 552.104. Section 552.104 is a discretionary exception that protects only the interests of a governmental body as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitted information to the government), 522 (1989) (discretionary exceptions in general). Contrary to Walsh's assertion, the district did not assert section 552.104. Moreover, Walsh's arguments are that its competitive interest would be harmed if the fees were released, but the interest is the district's and Walsh failed to explain the district's interest in withholding the information. Thus, the district may not withhold fee bills submitted by Walsh pursuant to section 552.104. *See* ORD 592 (governmental body may waive section 552.104).

Next, we consider Walsh's section 552.110 assertion. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: 1) trade secrets and 2) commercial or financial information the release of

[2]This decision does not address documents Walsh submitted because the district has the responsibility to submit the responsive information, and Walsh does not represent the district in responding to the request for information in this instance. *See* Gov't Code § 552.301(e).

which would cause a third party substantial competitive harm. Gov't Code § 552.110. Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

> any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business . . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Huffines*, 314 S.W.2d at 776. In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.[3] RESTATEMENT OF TORTS § 757 cmt. b (1939). This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception, and no argument is submitted that rebuts the claim as a matter of law. Open

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[3]The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

> (1) the extent to which the information is known outside of [the company];
> (2) the extent to which it is known by employees and other involved in [the company's] business;
> (3) the extent of measures taken by [the company] to guard the secrecy of the information;
> (4) the value of the information to [the company] and [its] competitors;
> (5) the amount of effort or money expended by [the company] in developing the information;
> (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS, § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Records Decision No. 552 at 5-6 (1990). However, we cannot conclude that section 552.110(a) applies unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

After review of the information, we conclude Walsh made no arguments to establish a prima facie case that the fees are excepted under section 552.110(a) as trade secrets. *See* Open Records Decision No. 319 at 3 (1982) (information relating to pricing is not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Thus, the district may not withhold the information under section 552.110(a).

Section 552.110(b) protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov't Code § 552.110(b); *see also* Open Records Decision No. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm). Because Walsh has a contractual relationship with the district for legal services, its fees are not excepted from disclosure under section 552.110(b). The pricing information of a government contractor is generally not excepted under section 552.110(b) because we believe the public has a strong interest in the release of prices charged by a government contractor. *See* Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors), 319 at 3 (1982) (information relating to pricing is not ordinarily excepted from disclosure under statutory predecessor to section 552.110); *see also* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government).

Next, we consider whether the district's assertions under the attorney-client and work product privileges apply to the fee bills, which are subject to section 552.022(a)(16). The Texas Supreme Court has held the Texas Rules of Evidence and the Texas Rules of Civil Procedure are other laws within the meaning of section 552.022. *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 the district's assertion of these privileges for the information in the attorney fee bills.

Texas Rule of Evidence 503 provides as follows:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
>
> (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
>
> (B) between the lawyer and the lawyer's representative;
>
> (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
>
> (D) between representatives of the client or between the client and a representative of the client; or
>
> (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

The district states the attorney fee bills document communications between the district and its attorneys that were made in connection with the rendition of professional legal services to the district. The district also states the communications were intended to be confidential. Based on these representations and our review of the information, we have marked the information the district may withhold under rule 503. However, the remaining information either does not document privileged communications or the district failed to identify the

parties to the communications. Thus, we were unable to determine whether the unidentified parties are privileged parties.

Next, we consider the district's rule 192.5 assertion. Texas Rule of Civil Procedure 192.5 encompasses the attorney work product privilege. For purposes of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent that the information implicates the core work product aspect of the work product privilege. *See* Open Records Decision No. 677 at 9-10 (2002). Rule 192.5 defines core work product as the work product of an attorney or an attorney's representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney's representative. *See* TEX. R. CIV. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate that the material was (1) created for trial or in anticipation of litigation and (2) consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *Id.*

The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and (2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See Nat'l Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204. The second part of the work product test requires the governmental body to show that the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney's or an attorney's representative. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both parts of the work product test is confidential under rule 192.5, provided that the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

Having considered the district's argument and reviewed the remaining information, we conclude the remaining information does not consist of core attorney work product. Accordingly, the district may not withhold the remaining information under rule 192.5.

We note a portion of the remaining information is private information under common-law privacy. 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. Section 552.101 encompasses common-law privacy, which protects information if it is highly intimate or embarrassing such that its release would be highly objectionable to a reasonable person, and it is of no legitimate concern to the public. *Indust. Found. v. Tex.*

Indus. Accident Bd., 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of the test must be satisfied. *Id.* at 681-82. The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. We have marked the information the district must withhold under section 552.101 in conjunction with common-law privacy.

In summary, the district may withhold the information we have marked under Texas Rule of Evidence 503. The district must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. 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 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). If the governmental body does not file suit over 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).

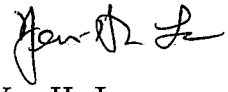
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 challenge 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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Assistant Attorney General
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Ref: ID# 318721

Enc. Marked documents

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