



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 21, 2010

Ms. Julie Fort
Strasburger & Price, LLP
2801 Network Boulevard Suite 600
Frisco, Texas 75034

OR2010-00977

Dear Ms. Fort:

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# 367622.

The Rockwall Independent School District (the "district"), which you represent, received a request for a copy of the entire investigation file and any other documents pertaining to a specified bus accident, any documents pertaining to the reason for the requestor's termination, and a copy of the requestor's personnel file. You state that the personnel file has been provided to the requestor. You state the district has redacted student-identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20

U.S.C. § 1232(a).¹ The district has also redacted license plate numbers.² You claim that portions of the remaining requested information are excepted from disclosure under sections 552.101, 552.107, and 552.137 of the Government Code and privileged under Texas Rule of Civil Procedure 192.5. We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

We note that some of the submitted information consists of a completed investigation. Thus, this information is subject to section 552.022(a)(1) of the Government Code, which provides:

[T]he following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). Accordingly, the district may withhold the information at issue only if it is expressly confidential under other law or excepted from disclosure under section 552.108. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code. However, this section is a discretionary exception to disclosure that protects 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.); *see* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived). The Texas Supreme Court, however, has held that the Texas Rules of Civil Procedure are "other law" that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328,

¹The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA 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. The DOE has determined that FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

²This office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas license plate numbers under section 552.130 without requesting a ruling from this office.

³We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and thus 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.

336 (Tex. 2001). We will therefore consider your argument under Texas Rule of Civil Procedure 192.5 for the information that is subject to section 552.022.

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 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 at 427 (Tex. App. -Houston [14th Dist.] 1993, no writ); *see also* TEX. R. EVID. 511 (waiver of privilege by voluntary disclosure).

Having considered your arguments and reviewed the information at issue, we conclude that the district may withhold the information we have marked in Exhibit B-1, as it was developed in anticipation of litigation and 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). We now address your arguments for the information not subject to section 552.022.

You assert that the information in Exhibit B-1 that is not subject to section 552.022 of the Government Code is excepted from disclosure under the attorney-client privilege. Section 552.107(1) of the Government Code 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). 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)-(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 pet.). 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 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).

The remaining information in Exhibit B-1 consists of communications between the district’s attorneys and district employees. Based on your representations, we find that the district has demonstrated that the letters were communications made for the purpose of rendering professional legal services, among lawyers and clients, and intended to remain confidential for purposes of section 552.107. Thus, the remaining information in B-1 may be withheld under section 552.107(1).

Section 552.101 of the Government Code 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 section 550.065 of the Transportation Code. You state that the information in Exhibit B-3 is confidential pursuant to chapter 550 of

the Transportation Code. *See* Transp. Code. § 550.064 (officer's accident report). Section 550.065(b) states that except as provided by subsection (c) or (e), accident reports are privileged and confidential. *Id.* § 550.065(b). Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *Id.* § 550.065(c)(4). Under this provision, the Texas Department of Transportation or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute. *Id.* The requestor has not provided the district with two of the three pieces of information; thus, you must withhold the CR-3 and CR-3C accident report forms in Exhibit B-3 under section 552.101 in conjunction with section 550.065(b) of the Transportation Code. We note that Exhibit B-3 also contains information that does not constitute a Texas peace officer's accident report form for purposes of section 550.065(b) of the Transportation Code. Accordingly, this information, which we have marked, may not be withheld under section 550.065(b) of the Transportation Code.

Section 552.137 of the Government Code 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* Gov't Code § 552.137(a)-(c). You claim that e-mail addresses in Exhibit B-4 are subject to section 552.137(a). You do not state whether you have received consent to release these e-mail addresses. Unless the district receives consent for release of these email addresses, the district must withhold the e-mail addresses we have marked pursuant to section 552.137 of the Government Code.⁴

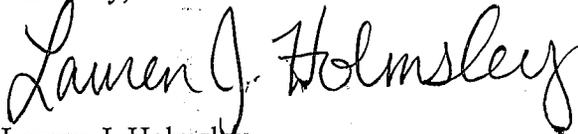
In summary, the district may withhold the information we have marked in Exhibit B-1 under Texas Rule of Civil Procedure 192.5. The district may withhold the information we have marked in Exhibit B-1 under section 552.107(1) of the Government Code. The district must withhold the CR-3 and CR-3C accident report forms in Exhibit B-3 under section 552.101 of the Government Code in conjunction with section 550.065(b) of the Transportation Code. Unless the district receives consent from the owners of the marked e-mail addresses to release this information, the district must withhold e-mail addresses we have marked in Exhibit B-4 under section 552.137. The remaining information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

⁴We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Lauren J. Holmsley
Assistant Attorney General
Open Records Division

LJH/eeg

Ref: ID# 367622

Enc. Submitted documents

c: Requestor
(w/o enclosures)