



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 29, 2010

Ms. Andrea Sheehan  
Ms. Elisabeth A. Donley  
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Dallas, Texas 75205

Ms. Heather R. Rutland  
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OR2010-06166

Dear Ms. Sheehan, Ms. Donley, and Ms. Rutland:

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# 377478.

The Carrollton-Farmers Branch Independent School District (the "district"), which you represent, received a request for (1) contracts and job descriptions for the district superintendent and assistant district superintendents, (2) district school board minutes or communications from the district regarding claims to ACE American Insurance Company ("ACE") from May 2009 to the present, and (3) all communications between ACE and the district, the district's attorneys, consultants or representatives from May 2009 to the present. You indicate that information responsive to the first two categories of the request has been released. You also state the district is redacting some of the responsive information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.<sup>1</sup> You claim that the submitted information is not subject to the Act

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<sup>1</sup>We note the United States Department of Education Family Policy Compliance Office (the "DOE") informed this office that FERPA, 20 U.S.C. § 1232g(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. 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>.

or, alternatively, is excepted from disclosure under sections 552.103, 552.107, 552.111, 552.136 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5.<sup>2</sup> We have considered your arguments and reviewed the submitted representative sample of information.<sup>3</sup>

Initially, we note you have marked certain information as non-responsive. We note, and you acknowledge, that the requestor specifically excluded from his request legal fee bills. Upon review, we agree that the information you have marked, as well as the information we have marked, is non-responsive because it is outside the scope of the request or was created after the date the district received the request. This ruling does not address the public availability of any non-responsive information, and the district is not required to release that information in response to the request.

You also assert that portions of the submitted information are created and maintained by ACE, a third party, and that the district does not have a right of access to information maintained by ACE. Thus, you argue that such information is not public information as defined by the Act. Section 552.021 of the Government Code provides for public access to "public information," which is defined by section 552.002 of the Government Code as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." Gov't Code § 552.002(a). Thus, information that is collected, assembled, or maintained by a third party may be subject to disclosure under the Act if a governmental body owns or has a right of access to the information. *See* Open Records Decision No. 462 (1987); *cf.* Open Records Decision No. 499 (1988).

However, you do not indicate, and we are unable to determine, which, if any, portions of the submitted information are maintained by ACE. We note that the request is for, and the submitted information consists of, e-mail communications between ACE and the district, its

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<sup>2</sup>Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Thus, we will not address your claim that the submitted information is confidential under section 552.101 in conjunction with either of these rules. We note the proper exceptions to raise when asserting the attorney-client privilege and the attorney work product privilege in this instance are sections 552.107 and 552.111 of the Government Code, respectively. *See* Open Records Decision Nos. 677 (2002), 676 at 6. Further, although you raise section 552.022 of the Government Code, that provision is not an exception to disclosure. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are expressly confidential under other law. *See* Gov't Code § 552.022.

<sup>3</sup>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.

attorneys or its consultants. We conclude that any information responsive to the request would be maintained by the district or its attorneys. Further, this information relates to the procurement or provision of legal services to the district. Therefore, we find that the communications pertain to the transaction of official district business. Consequently, the submitted information constitutes "public information" as defined by section 552.002(a) and is subject to the Act. *See* ORD 499 at 4 (1988) (records held by private attorney that are related to legal services performed by attorney at the request of a governmental body are subject to Act).

Next, we note, and you acknowledge, that a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(3) provides that:

(a) 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:

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code. § 552.022(a)(3). In this instance, the submitted information includes information in an account, voucher, or contract relating to the expenditure of public funds. Although you assert this information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code, these sections are discretionary exceptions within the Act and not "other law" that makes information confidential. *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 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to section 552.103 subject to waiver), 470 at 7 (1987) (statutory predecessor to section 552.111 may be waived). Thus, information subject to section 552.022 may not be withheld under any of these exceptions. However, the Texas Supreme Court has held that the Texas Rules of Civil Procedure and Texas Rules of Evidence are "other law" 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 also found under rule 503 of the Texas Rules of Evidence and the attorney work product privilege is also found under rule 192.5 of the Texas Rules of Civil Procedure. Accordingly, we will consider your assertion of these privileges under rule 503 and rule 192.5 for the submitted information. We will also consider your argument under section 552.136 of the Government Code, as this exception is "other law" for section 552.022 purposes.

Texas Rule of Evidence 503(b)(1) 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).

You claim that the information at issue constitutes confidential communications. Upon review, we find that the information at issue does not document communications. Thus, we find that you have failed to demonstrate that the information at issue documents confidential communications that were made between privileged parties. Therefore, we conclude that Texas Rule of Evidence 503 is not applicable to the information at issue. Accordingly, none of the information subject to section 552.022(a)(3) may be withheld on that basis. However, as you also claim that the information subject to section 552.022(a)(3) contains attorney work

product under Texas Rule of Civil Procedure 192.5, we will address this argument for the information subject to section 552.022(a)(3).

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.

In this instance, we find none of the information subject to section 552.022(a)(3) consists of mental impressions, opinions, conclusions, or legal theories of the district's attorneys or an attorney's representative that were created for trial or in anticipation of litigation. We therefore conclude the district may not withhold any of the information at issue under Texas Rule of Civil Procedure 192.5.

You also raise section 552.136 of the Government Code for the information subject to section 552.022(a)(3). Section 552.136 provides 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. Accordingly, district must withhold the account numbers we have marked

under section 552.136 of the Government Code. As you claim no further exceptions to disclosure of the remaining information subject to section 552.022, that information must be released to the requestor.

We now turn to the arguments regarding information which is not subject to section 552.022. Section 552.103 of the Government Code provides in part:

(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 state or a political subdivision, as a consequence 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 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 that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, a governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

You inform us, and provide documentation showing that, on the date the request for information was received, the district was a party to litigation in the United States District Court for the Northern District of Texas, the Fifth District Court of Appeals of Dallas, Texas, the 134<sup>th</sup> Judicial District Court of Dallas County, Texas, and the 298<sup>th</sup> Judicial District Court of Dallas, County Texas. You also explain that the requested information relates to the pending litigation. Based on your representations and our review, we find you have demonstrated litigation was pending when the district received this request for information. Further, we find the remaining responsive information relates to the pending litigation. Thus,

we conclude the district may withhold the remaining responsive information under section 552.103 of the Government Code.<sup>4</sup>

However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the district must withhold the account numbers we have marked under section 552.136 of the Government Code.<sup>5</sup> The district must release the information we have marked pursuant to section 552.022(a)(3). The district may withhold the remaining responsive information under section 552.103 of the Government Code.

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.

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](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,



Jennifer Burnett  
Assistant Attorney General  
Open Records Division

JB/dls

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<sup>4</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure.

<sup>5</sup>We 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 a bank account number under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

Ref: ID# 377478

Enc. Submitted documents

c: Requestor  
(w/o enclosures)