



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 29, 2010

Ms. Christine Badillo
Walsh, Anderson, Brown, Gallegos and Green, P.C.
P.O. Box 2156
Austin, Texas 78768

OR2010-11419

Dear Ms. Badillo:

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# 388569.

The Killeen Independent School District (the "district"), which you represent, received two requests for employment information pertaining to two named individuals, including personnel files, grievance files, non-renewal files, and attorney invoices. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure.¹ We have considered the submitted arguments and reviewed the submitted information.² We have also received and

¹The first requestor contends the district failed to notify interested parties of the request for information pursuant to section 552.305(d). *See* Gov't Code § 552.305 (permitting third party with proprietary interest to submit to attorney general reasons why requested information should not be released). However, the district does not represent that any third party's proprietary interests would be implicated by the public release of the information at issue; thus we find this is not an instance where the district is required to comply with section 552.305 of the Government Code.

²We 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.

considered comments submitted by the first requestor. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

Initially, we will address the first requestor's comments. The requestor contends, among other things, she originally requested the responsive attorney invoices on August 10, 2009. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b) of the Government Code, the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. *See id.* § 552.301(b). Pursuant to section 552.301(e) of the Government Code, the governmental body is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). In documentation the requestor has submitted to this office, it appears the district considered the August 10th request for information withdrawn by operation of law because the requestor failed to respond to the district's cost estimate. *Id.* § 552.2615 (request for information is withdrawn if requestor does not respond in writing to cost estimate within ten business days after date estimate is sent to requestor). The documentation further demonstrates the district considered subsequent similar requests for attorney invoices repetitious and redundant of previous requests received by the district from this requestor. *See id.* § 552.232 (prescribing procedures for response to repetitious or redundant requests for information). Based upon these documents, we find the district complied with the requirements of section 552.301 with respect to the instant request.

The requestor also contends the district has made some of the requested information previously available to her. Section 552.007 of the Government Code provides that if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold that exact information from further disclosure unless its public release is expressly prohibited by law. *See id.* § 552.007; Open Records Decision No. 518 at 3 (1989). The requestor has provided copies of attorney fee bills from 2009 and 2010 that she received from the district in response to previous requests for information. In this instance, however, the fee bills the requestor has provided are not the same fee bills the district now seeks to withhold. Additionally, based upon the requestor's documentation, it does not appear she has previously requested employment information pertaining to the two named individuals in the current request. Therefore, we will consider the district's arguments against disclosure of the submitted information.

Next, we note portions of the submitted information are subject to section 552.022 of the Government Code, which provides in part:

[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;

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(1), (16). In this instance, the submitted information contains completed evaluations and attorney fee bills. Section 552.022 makes this information expressly public. Therefore, the district may only withhold the information that is subject to section 552.022(a)(1) to the extent it is excepted from disclosure under section 552.108 or confidential under other law. Also, the district may withhold the information that is subject to section 552.022(a)(16) only to the extent it is made confidential under other law. Sections 552.103, 552.107, and 552.111 of the Government Code are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See id.* § 552.007; *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), 663 at 5 (1999) (governmental body may waive section 552.111), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103, 552.107, and 552.111 are not other laws that make information confidential for the purposes of sections 552.022(a)(1) and 552.022(a)(16). Therefore, the district may not withhold any of the information subject to 552.022 under section 552.103, section 552.107, or section 552.111 of the Government Code. You seek to withhold portions of the submitted fee bills under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court has held the Texas Rules of Evidence and Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your assertions of the attorney-client privilege under rule 503 of the Texas Rules of Evidence and the attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure for the submitted fee bills. Additionally, as section 552.101 is other law for purposes of section 552.022, we will consider the applicability of this exception to the submitted evaluations. Moreover, we will consider your claim under sections 552.103, 552.107, and 552.111 for the portions of the submitted information not subject to section 552.022.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 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 it is 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 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 the communication is confidential by explaining it was not intended to be disclosed to third persons and 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You assert portions of the submitted fee bills, which you have marked, include privileged attorney-client communications between district personnel and its outside counsel and staff. You state the communications at issue were made in furtherance of the rendition of legal services, and have not been, and were not intended to be, disclosed to third parties. Based on your representations and our review of the information at issue, we find the district has

established the information we have marked is protected by the attorney-client privilege. Thus, the district may withhold the information we have marked pursuant to rule 503 of the Texas Rules of Evidence. However, the remaining information documents communications with individuals you have not identified or do not document communications. Accordingly, none of the remaining information at issue may be withheld under Texas Rule of Evidence 503.

We next address your arguments under Texas Rule of Civil Procedure 192.5 for portions of the information in the submitted attorney fee bills. Rule 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 the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp.*, 861 S.W.2d at 427.

You contend the submitted attorney fee bills contain attorney core work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. You state the information at issue was created while specified litigation was pending and in the course of preparing for litigation. You further state the information reflects attorneys' mental impressions, conclusions, and legal theories about information and reveals strategy decisions and legal

conclusions. Having considered the submitted arguments and reviewed the information at issue, we conclude you have not demonstrated how any of the remaining information in the submitted fee bills consists of mental impressions, opinions, conclusions, or legal theories of an attorney 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 remaining information at issue under Texas Rule of Civil Procedure 192.5.

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 information protected by other statutes, such as section 21.355 of the Education Code. Section 21.355 provides "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. In addition, the court has concluded a written reprimand constitutes an evaluation for purposes of section 21.355 because "it reflects the principal's judgment regarding [a teacher's] actions, gives corrective direction, and provides for further review." *North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). This office has interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). In that opinion, this office also concluded a teacher is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *Id.*

You represent, and provide documentation showing, the employee whose information is at issue held a teaching certificate under subchapter B of chapter 21 of the Education Code at the times of the evaluation. Upon review, we agree the submitted evaluations constitute teacher evaluations for purposes of section 21.355. Thus, the submitted teacher evaluations, which we have marked, must be withheld under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

We now turn to the information not subject to section 552.022, which you claim is subject to section 552.103 of the Government Code. 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 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 has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation was pending or reasonably anticipated on the date 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).

You state and provide documentation showing that prior to the district's receipt of these requests, a lawsuit styled *Phyllis Nairn v. Killeen I.S.D.*, Cause No. 226628B, was filed in the 146th Judicial District Court of Bell County, Texas, and is currently pending. Further, you explain the submitted information is related to the pending litigation because it pertains to the plaintiff's claim. Based on your representation and our review of the information at issue, we agree you have shown litigation was pending when the district received the request for information. In addition, we find the information at issue is related to the pending litigation for purposes of section 552.103(a). Accordingly, the district may withhold the information not subject to section 552.022 pursuant to section 552.103.³

We note, 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. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties in the pending litigation is not excepted from disclosure under section 552.103(a), and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the district may withhold the information we have marked pursuant to rule 503 of the Texas Rules of Evidence and must release the remaining information in the submitted fee bills pursuant to section 552.022 of the Government Code. The district must withhold the marked evaluations under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The remaining submitted information may be withheld under section 552.103 of the Government Code.

³As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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, 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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/eeg

Ref: ID# 388569

Enc. Submitted documents

cc: Requestor
(w/o enclosures)