



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

March 12, 2015

Ms. Ellen H. Spalding  
Counsel for the Santa Fe Independent School District  
Rogers Morris & Grover  
5718 Westheimer Road, Suite 1200  
Houston, Texas 77057

OR2015-04729

Dear Ms. Spalding:

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# 555997.

The Santa Fe Independent School District (the "district"), which you represent, received two requests from separate requestors for certain invoices and attorneys' fees paid during a specified period. You state the district will release some of the information. You claim portions of the submitted information are excepted from disclosure under sections 552.107, 552.111, 552.136, and 552.137 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.<sup>1</sup> We have considered your arguments and reviewed the submitted representative

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<sup>1</sup>We understand you to raise sections 552.136 and 552.137 of the Government Code based on the content of your markings. Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded that section 552.101 does not encompass discovery privileges. See Open Records Decision No. 676 at 1-2 (2002). Accordingly, we will not consider your assertion of section 552.101 of the Government Code.

sample of information.<sup>2</sup> We have also considered comments submitted by one of the requestors. *See* Gov't Code § 552.304 (interested party may submit comments to this office stating why the information at issue should or should not be released).

Initially, you state the district has redacted some of the information at issue pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g. The 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.<sup>3</sup> 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"). Because our office is prohibited from reviewing these 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, except to note that an individual has a right of access under FERPA to his own educational records. The DOE has informed us, however, that an individual's right of access under FERPA to information about himself does not prevail over an educational institution's right to assert the attorney-client and attorney work-product privileges. Therefore, we will consider the district's assertions of these privileges under sections 552.107 and 552.111 of the Government Code and rules 503 and 192.5.

As you acknowledge, the submitted information consists of attorney fee bills subject to section 552.022(a)(16) of the Government Code. Section 552.022(a)(16) provides for 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). You seek to withhold some of the information at issue under section 552.107 or section 552.111 of the Government Code. However, those exceptions to public disclosure do not make information confidential. *See* Open Records Decision Nos. 677 at 8 (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). Accordingly, the district may not withhold any of the submitted information

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<sup>2</sup>We assume 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 those records contain substantially different types of information than those submitted to this office.

<sup>3</sup>A copy of this letter may be found on the Office of the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

under section 552.107 or 552.111 of the Government Code. Nonetheless, the Texas Supreme Court has held the Texas Rules of Evidence and Texas Rules of Civil Procedure are “other law” that make information confidential under section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider your assertion of rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure. Additionally, section 552.136 and section 552.137 make information confidential; so we will also consider the applicability of those exceptions.

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, orig. proceeding). You state the information you have marked within the submitted fee bills reflects communications between the district's attorneys and representatives of the district. You state these communication were made in order to provide legal services to the district; these communications were intended to be confidential; and these communications have remained confidential. Based on these representations and our review, we conclude the information we marked falls within the protection of the attorney-client privilege, and the district may withhold that information under rule 503 of the Texas Rules of Evidence. However, the district has not demonstrated any of the remaining information it marked falls within the attorney-client privilege, and the district may not withhold that information on that basis.

Rule 192.5 of the Texas Rules of Civil Procedure 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 it implicates the core work-product aspect of the work-product privilege. *See* ORD 677 at 9–10. 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 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 the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation there was a substantial chance litigation would ensue, and (2) the party resisting discovery believed in good faith there was a substantial chance 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 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 assert the remaining information you marked consists of work product protected by rule 192.5 of the Texas Rules of Civil Procedure. Upon review, we find you have not demonstrated the remaining information 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. Accordingly, the district may not withhold the remaining information you marked under Texas Rule of Civil Procedure 192.5.

Section 552.136(b) of the Government Code provides, "[n]otwithstanding any other provision of [the Act], 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(b); *see id.* § 552.136(a) (defining "access device"). You have redacted information under section 552.136 of the Government Code that appears to consist of information other than a credit card, debit card, charge card, or access device number. Because this information is redacted, we are unable to discern the exact nature of this information and we must rule in the alternative. If the information you redacted consists of credit card, debit card, charge card, or access device numbers, the district must withhold that information under section 552.136 of the Government Code. If the information you redacted consists of information other than a credit card, debit card, charge card, or access device number, the district may not withhold that information under section 552.136 of the Government Code.

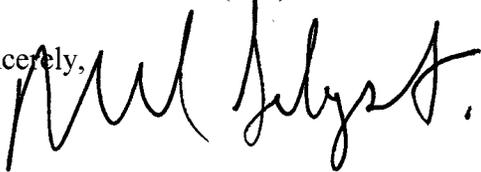
Section 552.137 of the Government Code provides, "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). Gov't Code § 552.137(a)–(c). Subsection (c) provides that the confidentiality provided by section 552.137(a) does not apply to an e-mail address "provided to a governmental body by a person who has a contractual relationship with the governmental body[.]" *Id.* § 552.137(c)(1). You have marked an e-mail address of an individual whose law firm has a contractual relationship with the district. The district may not withhold that information under section 552.137 of the Government Code, and as you raise no other exceptions for that information, the district must release it.

In summary, the district may withhold the information we marked under rule 503 of the Texas Rules of Evidence. If the information you redacted consists of credit card, debit card, charge card, or access device numbers, the district must withhold that information under section 552.136 of the Government Code. The district must release any remaining 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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Neal Falgoust". The signature is written in a cursive, flowing style.

Neal Falgoust  
Assistant Attorney General  
Open Records Division

NF/bhf

Ref: ID# 555997

Enc. Submitted documents

c: Requestors  
(w/o enclosures)