



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 20, 2015

Ms. Maria Miller
Legal Assistant
Dallas County Community College District
1601 South Lamar Street, Suite 208
Dallas, Texas 75215

OR2015-07622

Dear Ms. Miller:

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# 560482.

The Dallas County Community College District (the "district") received a request for (1) statements of all students, staff, and faculty interviewed during a specified investigation; (2) copies of all documents exchanged between investigators, campus police, and campus administrators concerning allegations from named individuals; (3) copies of all e-mail attachments memorializing the results of all meetings between officials and any of the specified complaints; (4) records and documents related to specified lawsuits; (5) a settlement agreement between the district and a specified individual; and (6) the district's police incident logs for a specified time period. 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.¹ We have considered your arguments and reviewed the submitted information.

We note you have only submitted documents and emails pertaining to the categories of the request relating to the specified investigation. However, you have not submitted any

¹Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, 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).

information responsive to the remaining categories of the request. To the extent information responsive to the remaining portions of the request exists and was maintained by the district on the date it received the request, we assume the district has released it to the requestor. If the district has not released any such information, it must do so at this time. Gov't Code § 552.301(a), .302; Open Records Decision No. 664 (2000) (noting that if a governmental body concludes that no exceptions apply to the requested information, it must release information as soon as possible under circumstances).

The submitted information is part of a completed investigation that is subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is public information and not excepted from required disclosure unless made confidential under the Act or other law. Gov't Code § 552.022(a)(1). You seek to withhold the submitted information under sections 552.103, 552.107, and 552.111 of the Government Code. However, these sections are discretionary exceptions to disclosure and do not make information confidential under the Act. *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 Gov't Code section 552.103); Open Records Decision Nos. 677 at 10 (2002) (attorney work-product privilege under section 552.111 is not compelling reason to withhold information under section 552.302), 676 at 10-11 (2002) (attorney-client privilege under Gov't Code section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the information may not be withheld under section 552.103, section 552.107, or section 552.111. However, the Texas Supreme Court has held the Texas Rules of Civil Procedure and the Texas Rules of Evidence are "other law" that make information confidential for purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Moreover, section 552.101 makes information confidential under the Act. Therefore, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503, the work product privilege under Texas Rule of Civil Procedure 192.5, and section 552.101 for the submitted information.

Rule 192.5 encompasses the attorney work product privilege. For purposes of section 552.022 of the Government Code, information may be withheld under rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. *See* ORD No. 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 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 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. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

The district claims Exhibit C consists of core attorney work product. You explain this information pertains to an investigation that was conducted by legal counsel in his capacity as an attorney for the district. You provide an affidavit from the attorney stating the documents in Exhibit C contain his notes created during the investigation. Based on your representations and our review, we find Exhibit C consists of an attorney’s mental impressions, opinions, conclusions, or legal theories. Thus, the district may withhold Exhibit C under Texas Rule of Civil Procedure 192.5.²

Rule 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

(A) between the client or the client’s representative and the client’s lawyer or the lawyer’s representative;

(B) between the client’s lawyer and the lawyer’s representative;

(C) by the client, the client’s representative, the client’s lawyer, or the lawyer’s representative to a lawyer representing another party in a pending action or that lawyer’s representative, if the communications concern a matter of common interest in the pending action;

²As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

(D) between the client's representatives or between the client and the client's representative; 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 to further the rendition of professional legal services to the client or reasonably necessary to transmit the communication. *Id.* 503(a)(5).

Accordingly, 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. *See* Open Records Decision No. 676 (2002). Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

You state Exhibit D consists of privileged attorney-client communications. You indicate the communications are between the district's representatives and legal counsel representing the district. You also indicate the communications were not intended to be disclosed to third persons and were made in the furtherance of the rendition of professional legal services to the district. Accordingly, we find Exhibit D consists of privileged attorney-client communications. Thus, the district may withhold Exhibit D pursuant to rule 503 of the Texas Rules of Evidence.³

In summary, the district may withhold Exhibit C under rule 192.5 of the Texas Rules of Civil Procedure. The district may also withhold Exhibit D under rule 503 of the Texas Rules of Evidence.

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.

³As our ruling is dispositive as to this issue, we need not address your remaining argument against disclosure.

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, 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 "Mili Gosar", written in a cursive style.

Mili Gosar
Assistant Attorney General
Open Records Division

MG/akg

Ref: ID# 560482

Enc. Submitted documents

c: Requestor
(w/o enclosures)