



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 4, 2016

Mr. Matthew M. Coleman
Counsel for the Mission Consolidated Independent School District
Eichelbaum Wardell Hansen Powell & Mehl, P.C.
4201 West Parmer Lane, Suite A-100
Austin, Texas 78727

OR2015-00123

Dear Mr. Coleman:

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# 592940.

The Mission Consolidated Independent School District (the "district"), which you represent, received two requests from the same requestor for (1) all grievances filed against a named employee; (2) all grievances filed against other specified employees during a specified time period; (3) the check register pertaining to a specified third party and any other vendor used to advertise purchasing bids during a specified time period; and (4) the invoices paid to attorneys for the district during a specified time period. You claim portions of the submitted information are excepted from disclosure under sections 552.107 and 552.136 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence and

rule 192.5 of the Texas Rule of Civil Procedure.¹ We have considered the submitted arguments and reviewed the submitted representative sample of information.²

Initially, you state the district sought clarification with respect to categories one and two of the request for information. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010). You state the district has not received a response from the requestor for these portions of the request. Thus, for the portions of the requested information for which you have sought but have not received clarification, we find the district is not required to release information in response to these portions of the request. However, if the requestor clarifies these portions of the request for information, the district must seek a ruling from this office before withholding any responsive information from the requestor. *See* Gov't Code § 552.222; *City of Dallas*, 304 S.W.3d at 387. We note a governmental body has a duty to make a good-faith effort to relate a request for information to information the governmental body holds. Open Records Decision No. 561 (1990). In this case, as you have submitted information responsive to the request and have made arguments against disclosure of this information, we will address the applicability of your arguments to the submitted information.

We note, and you acknowledge, the information in Exhibit E 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 confidential under the Act or other law. Gov't Code § 552.022(a)(16). Although you raise section 552.107 of the Government Code for the attorney fee bills, this exception is discretionary in nature and does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (attorney-client privilege under 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 district may not withhold the information subject to section 552.022(a)(16) under section 552.107 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence are “other law” that make information expressly confidential for purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will address your claim of the attorney-client privilege under rule 503 of the Texas Rules of Evidence, as well as your

¹Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 677 (2002), 676 at 1-2 (2002), 575 at 2 (1990).

²We 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 that submitted to this office.

claim of the attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure, for the submitted attorney fee bills.

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 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;

(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 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 contend the attorney-client privilege is applicable to the entirety of the attorney fee bills submitted in Exhibit E. However, section 552.022(a)(16) provides information "that is *in*

a bill for attorney's fees" is not excepted from disclosure unless the information is confidential under the Act or other law or protected by the attorney-client privilege. *See* Gov't Code § 552.022(a)(16) (emphasis added). Thus, by its express language, section 552.022(a)(16) does not permit an attorney fee bill to be withheld in its entirety. *See also* Open Records Decisions Nos. 676 (attorney fee bill cannot be withheld in its entirety on basis it contains or is attorney-client communication pursuant to language in section 552.022(a)(16)), 589 (1991) (information in attorney fee bill is excepted only to extent it reveals client confidences or attorney's legal advice). Accordingly, the district may not withhold the entirety of the submitted fee bills under rule 503. However, you assert the submitted fee bills include privileged attorney-client communications. You state the submitted information consists of communications between district attorneys, representatives of district attorneys, and representatives of the district that were made for the purpose of facilitating the rendition of professional legal services to the district. You state the communications were confidential at the time they were made and have remained confidential. Based on your representations and our review, we find the district has established the information we have marked within the submitted attorney fee bills constitutes attorney-client communications under rule 503. Thus, the district may withhold the information we have marked within the submitted attorney fee bills pursuant to rule 503 of the Texas Rules of Evidence.³

However, we find you have failed to demonstrate any of the remaining information at issue consists of privileged attorney client communications. We note an entry stating a memorandum or an e-mail was prepared or drafted does not demonstrate the document was communicated to the client. Further, some of the information reveals communications with individuals whom you have failed to identify or who you have not demonstrated are privileged parties. Thus, we find you have failed to demonstrate the remaining information at issue consists of communications between privileged parties for purposes of the attorney-client privilege. Accordingly, no portion of the remaining information at issue may be withheld under rule 503.

We next address Texas Rule of Civil Procedure 192.5 for the remaining 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 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

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

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. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

You claim the remaining information in Exhibit E consists of attorney core work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. You state this information was created in anticipation of litigation. You further state this information reflects attorneys' mental impressions, conclusions, or legal theories. Upon review, we find you have not demonstrated any of the remaining information at issue contains the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative that were developed in anticipation of litigation or for trial. We therefore conclude the district may not withhold the remaining information at issue under rule 192.5 of the Texas Rules of Civil Procedure.

Section 552.136 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 state the information you marked consists of access device numbers that can be used alone or in conjunction with another device to obtain money or other things of value. Upon review, the district must withhold the information you marked under section 552.136 of the Government Code.

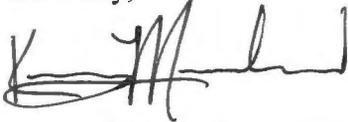
In summary, the district may withhold the information we marked within the submitted attorney fee bills under rule 503 of the Texas Rules of Evidence. The district must withhold

the information you marked under section 552.136 of the Government Code. The district must release the 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, 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,



Kenny Moreland
Assistant Attorney General
Open Records Division

KJM/som

Ref: ID# 592940

Enc. Submitted documents

c: Requestor
(w/o enclosures)