



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 9, 2016

Mr. Alexander S. Berk
Counsel for the Bonham Independent School District
Walsh, Gallegos, Treviño, Russo & Kyle, P.C.
P.O. Box 168046
Irving, Texas 75016-8046

OR2016-13244

Dear Mr. Berk:

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# 613677.

The Bonham Independent School District (the "district"), which you represent, received a request for specified attorney fee bills.¹ You state you will redact information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g(a).² You claim portions of the submitted information are excepted from disclosure under sections 552.107, 552.111, and 552.136 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5.³ We have considered the

¹You state the district sought and received clarification of the request for information. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

²The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental or an adult student's 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 FERPA determinations must be made by the educational authority in possession of the educational records. We have posted a copy of the letter from the DOE on the Attorney General's website at <https://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>.

³Although 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).

arguments you raise and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we understand you to argue portions of the submitted information are not responsive to the present request for information. You explain the requestor agreed "to redaction of the documents of information protected by attorney-client privilege." However, you state there is a concern the requestor has rescinded this agreement. We note a governmental body must make a good-faith effort to relate a request to information held by the governmental body. *See* Open Records Decision No. 561 at 8 (1990). You have submitted information for our review and have submitted arguments against disclosure of the information at issue. Thus, we find the district has made a good-faith effort to submit information that is responsive to the request. Accordingly, we will consider your arguments against disclosure of the information at issue. We will also consider your arguments against release of the remaining information.

Next, we note the submitted information consists of attorney fee bills that are 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 sections 552.107 and 552.111 of the Government Code, these exceptions are discretionary in nature and do not make information confidential under the Act. *See* Open Records Decision Nos. 677 at 8-10 (2002) (governmental body may waive attorney work product privilege under section 552.111), 676 at 10-11 (2002) (governmental body may waive attorney-client privilege under section 552.107(1)), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the district may not withhold any of the submitted information under section 552.107 or section 552.111. However, the Texas Supreme Court has held the Texas Rules of Evidence and the 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). Accordingly, we will address your attorney-client privilege claim under rule 503 of the Texas Rules of Evidence and attorney work product privilege claim under rule 192.5 of the Texas Rules of Civil Procedure for the submitted fee bills. Further, as section 552.136 of the Government Code can make information confidential under the Act, we will address the applicability of this section to the information at issue.

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 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).

When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* ORD 676 at 6-7. 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 assert the submitted fee bills include privileged attorney-client communications between or among the district's attorneys, district officials, and other individuals you have identified as privileged parties. You state the communications at issue were made for the purpose of the rendition of legal services to the district and were not intended to be disclosed to third parties. Based on your representations and our review of the information at issue, we find you have established some of the information you have marked constitutes attorney-client communications under rule 503. However, the remaining information you have marked either reveals a communication with an individual you have not identified as privileged or is not a communication. 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. Accordingly, we find you have failed to demonstrate the applicability of the attorney-client privilege to the remaining information at issue, which we have marked for release. Thus, except for the information we have marked for release, the district may withhold the information you marked within the submitted attorney fee bills pursuant to rule 503 of the Texas Rules of Evidence.⁴

Texas Rule of Civil Procedure 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 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 when the governmental body received the request for information, and (2) consists of an attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *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 prong of the work product test requires the governmental body to show the documents at issue contain the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test may be withheld under rule 192.5, provided the information does not fall within the purview of the exceptions to the privilege enumerated in rule 192.5(c). *See Caldwell*, 861 S.W.2d at 427.

You contend portions of the remaining information constitute attorney work product protected by rule 192.5 of the Texas Rules of Civil Procedure. Upon review, we find you have not demonstrated any of the remaining information at issue consists of mental impressions, opinions, conclusion, or legal theories of an attorney or an attorney's

⁴As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

representative that were created for trial or in anticipation of trial. Therefore, the district may not withhold any of the remaining information at issue under rule 192.5 of the Texas Rules of Civil Procedure.

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”). Upon review, we find the district must withhold the partial credit card numbers we have marked under section 552.136 of the Government Code. However, you have not explained, and we cannot discern, how the claim numbers you have marked in the remaining information are access device numbers for purposes of section 552.136. Therefore, district may not withhold the remaining information you have marked under section 552.136 of the Government Code.

In summary, except for the information we have marked for release, the district may withhold the information you marked pursuant to rule 503 of the Texas Rules of Evidence. The district must withhold the partial credit card numbers we have 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,



Matthew Taylor
Assistant Attorney General
Open Records Division

MHT/dls

Ref: ID# 613677

Enc. Submitted documents

c: Requestor
(w/o enclosures)