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ATTORNEY GENERAL OF TEXAS

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Ms. Lauren Wood
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P.O. Box 1210
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OR2015-16011

Dear Ms. Wood:

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# 574463.

The Plano Independent School District (the "district"), which you represent, received a request for information pertaining to legal fees during a specified time period; regularly distributed publications written by law firms retained or consulted by the district during a specified time period; seminars, training sessions, or presentations attended by any district employee where any of several specified topics were discussed during a specified time period; and all documents prepared for or by the district concerning specified topics during a specified time period.¹ The district claims the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code and privileged under

¹The district states it sought and received clarification of the request. See Gov't Code § 552.222(b) (providing that if request for information is unclear, governmental body may ask requestor to clarify the request); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5.² We have received comments from a representative of the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted representative sample of information.³

Initially, the district states it has redacted student-identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code. The 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 purposes of our review in the open records ruling process under the Act.⁴ 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"). The district has submitted redacted education records for our review. Because our office is prohibited from reviewing these education 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, other than to note parents and their legal representatives have a right of access to their child's education records and their right of access prevails over a claim under section 552.103 of the Government Code. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3 ("Parent means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or guardian."); Open Records Decision No. 431 (1985) (information subject to right of access under FERPA may not be withheld pursuant to statutory predecessor to Gov't Code § 552.103); *see also Equal Employment Opportunity Comm'n v. City of Orange, Tex.*, 905 F. Supp. 381, 382 (E.D. Tex. 1995) (holding FERPA prevails over inconsistent provision of state law). Such determinations under FERPA must be made by the educational authority in possession of the

²Although the district also raises section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503 and Texas Rule of Procedure 192.5, 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).

³We 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.

⁴A 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>.

education records.⁵ The DOE also has informed our office, however, a parent's or legal representative's right of access under FERPA to information about the child does not prevail over an educational institution's right to assert the attorney-client and attorney work product privileges. Therefore, to the extent the requestor's clients have a right of access under FERPA to any of the information for which the district claims the attorney-client and work product privileges, we will consider the district's claims. Furthermore, to the extent the requestor's clients do not have a right of access to the submitted information under FERPA, we will address the district's argument under section 552.103 of the Government Code.

Next, we note the submitted information contains the minutes of public meetings held by the district's Board of Trustees. The minutes of a governmental body's public meetings are specifically made public under provisions of the Open Meetings Act (the "OMA"), chapter 551 of the Government Code. *See* Gov't Code § 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying on request to governmental body's chief administrative officer or officer's designee). Although the district seeks to withhold this information under sections 552.103 and 552.107 of the Government Code, as a general rule, the exceptions to disclosure found in the Act do not apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Accordingly, the district must release the meeting minutes, which we have marked, pursuant to the OMA.

Next, we note some of the remaining information is subject to section 552.022 of the Government Code. This section provides, in pertinent part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body; [and]

...

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

⁵In the future, if the district does obtain parental or an adult student's consent to submit unredacted education records and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

Gov't Code § 552.022(a)(3), (16). The information we have marked is subject to section 552.022 of the Government Code. The district must release this information unless it is made confidential under the Act or other law. *See id.* § 552.022(a). Although the district seeks to withhold this information under sections 552.103 and 552.107, 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 § 552.103); *see also* Open Records Decision Nos. 676 at 6 (2002) (Gov't Code § 552.107(1) is not other law for purposes of Gov't Code § 552.022), 665 at 2 n. 5 (2000) (discretionary exceptions generally). Therefore, the district may not withhold any of the information subject to section 552.022 under section 552.103 or section 552.107 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence and Texas Rules of Civil Procedure are “other law” that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will consider the district's assertions of the attorney-client privilege and the attorney work product privilege under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, respectively. We will also consider the district's arguments against disclosure for the information not subject to section 552.022 of the Government Code.

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).

Accordingly, 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). *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).

The district asserts the information subject to section 552.022 should be withheld under rule 503. The district asserts the information at issue includes privileged attorney-client communications between the district’s outside counsel and district officials and staff in their capacities as clients. The district states the communications at issue were made for the purpose of the rendition of legal services to the district. The district further states the communications at issue have not been, and were not intended to be, disclosed to third parties. Based on these representations and our review of the information at issue, we find the information we have marked under rule 503 constitutes attorney-client communications. Thus, the district may withhold the information we have marked pursuant to rule 503 of the Texas Rules of Evidence.⁶ However, we find the district has failed to demonstrate the remaining information 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. Thus, we find the district has failed to demonstrate the remaining information at issue was communicated and it does not reveal a client confidence. Accordingly, no portion of the remaining information may be withheld under rule 503, and it must be released.

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

⁶As our ruling is dispositive, we need not address the district’s remaining arguments against disclosure of this information.

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.

The district asserts the remaining information at issue contains attorney core work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. Upon review, we find the district has not demonstrated any of the remaining information at issue 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 rule 192.5 of the Texas Rules of Civil Procedure.

Next, we address the district's claim under section 552.103 of the Government Code for the information not subject to section 552.022 of the Government Code. Section 552.103 provides, in relevant part:

- (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 section 552.103(a) applies in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the requested information is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *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). *See* ORD 551 at 4.

The district informs us, and provides documentation showing, prior to the district's receipt of the instant request, a former district student and his parents requested a due process hearing involving the district before the Texas Education Agency. We understand the due process hearing is a contested case hearing, which is governed by the Administrative Procedures Act (the "APA"), chapter 2001 of the Government Code. This office has concluded a contested case under the APA constitutes litigation for purposes of the statutory predecessor to section 552.103. Open Records Decision No. 588 (1991). Based on these representations and our review, we determine litigation involving the district was pending on the date the district received the request for information. Furthermore, we find the information at issue relates to the pending litigation because it pertains to the basis of the litigation. Accordingly, the district may withhold the information not subject to section 552.022 of the Government Code under section 552.103 of the Government Code.⁷

However, once the information has been obtained by all parties to the anticipated litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

In summary, the district must release the meeting minutes, which we have marked, pursuant to the OMA. The district may withhold the information we have marked pursuant to rule 503 of the Texas Rules of Evidence. The district may withhold the information not subject to

⁷As our ruling is dispositive, we need not address the district's remaining argument against disclosure.

section 552.022 of the Government Code under section 552.103 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,



Rahat Huq
Assistant Attorney General
Open Records Division

RSH/som

Ref: ID# 574463

Enc. Submitted documents

c: Requestor
(w/o enclosures)