



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.  
The ruling and judgment can be viewed in PDF  
format below.



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

June 1, 2016

Ms. Melisa E. Meyler  
Counsel for the Irving Independent School District  
Thompson & Horton, L.L.P.  
3200 Southwest Freeway, Suite 2000  
Houston, Texas 77027-7554

**The ruling you have requested has been amended as a result of litigation and has been attached to this document.**

OR2016-12447

Dear Ms. Meyler:

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# 612713 (ORR# 16-992).

The Irving Independent School District (the "district"), which you represent, received a request for contracts and invoices from any outside companies or persons related to a specified incident and communications received that relate to the incident, including requests for public information related to the incident.<sup>1</sup> You claim some of the submitted information is exempted from disclosure under sections 552.103, 552.107, 552.114, and 552.137 of the Government Code, as well as privileged under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>2</sup>

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<sup>1</sup>You state the district sought and received clarification of the information requested. *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) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

<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 that submitted to this office.

Initially, we note the United States Department of Education Family Policy Compliance Office has informed this office the Family Educational Rights and Privacy Act (“FERPA”), section 1232g of title 20 of the United States Code, 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.<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”). You assert FERPA applies to portions of the submitted documents. 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. *See* 20 U.S.C. § 1232g(a)(1)(A). Such determinations under FERPA must be made by the district. Likewise, we do not address your argument under section 552.114 of the Government Code. *See* Gov’t Code §§ 552.026 (incorporating FERPA into the Act), 552.114 (excepting from disclosure “student records”); Open Records Decision No. 539 (1990) (determining the same analysis applies under section 552.114 of the Government Code and FERPA). However, we will consider your remaining arguments against disclosure of the submitted information.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant 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[.]

Gov’t Code § 552.022(a)(3), (16). The submitted information contains information in an account, contract, or voucher relating to the receipt or expenditure of funds by the district

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<sup>3</sup>A copy of this letter may be found on the Office of the Attorney General’s website at <https://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>.

that is subject to section 552.022(a)(3). The submitted information also contains attorney fee bills that are subject to section 552.022(a)(16). This information must be released unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(3), (16). You seek to withhold the information at issue under sections 552.103 and 552.107(1) of the Government Code. However, these exceptions are discretionary 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 10-11 (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, the district may not withhold any portion of the information subject to section 552.022 of the Government Code under section 552.103 or section 552.107(1). 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 claims of the attorney-client privilege under rule 503 of the Texas Rules of Evidence and the attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure for the information at issue.

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 assert the attorney fee bills submitted as Tab A must be withheld in their entirety under rule 503. However, section 552.022(a)(16) of the Government Code provides information “that is *in* a bill for attorney’s fees” is not excepted from required disclosure unless it is confidential under other law or privileged under the attorney-client privilege. *See Gov’t Code* § 552.022(a)(16) (emphasis added). This provision, by its express language, does not permit the entirety of an attorney fee bill to be withheld. *See also* Open Records Decisions Nos. 676 (attorney fee bill cannot be withheld in 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 excepted only to extent information reveals client confidences or attorney’s legal advice). Accordingly, the district may not withhold the entirety of the submitted fee bills under Texas Rule of Evidence 503.

You also assert the portions of the submitted fee bills you have marked and the information submitted as Tab G should be withheld under rule 503. You assert the submitted fee bills include privileged attorney-client communications between the district’s attorneys and district officials and staff in their capacities as clients. You state the communications at issue were made for the purpose of the rendition of legal services to the district. You indicate the communications at issue have not been, and were not intended to be, disclosed to third parties. You also state the information submitted as Tab G was communicated between the district’s attorneys and district officials and staff in their capacities as clients for the purpose of the rendition of legal services to the district and you state the information was intended to be confidential. Based on your representations and our review of the information at issue, we find the district has established the information submitted as Tab G and the information we have marked within Tab A constitutes attorney-client communications under rule 503. Thus, the district may withhold Tab G and the information we have marked within the submitted attorney fee bills pursuant to rule 503 of the Texas Rules of Evidence.

However, we find you have failed to demonstrate the remaining information you marked 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. We also note a governmental body does not share a privilege with a third party when the governmental body and the third party are involved in contract negotiations, as the parties’ interests are adverse. Thus, we find you have 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 at issue may be withheld under rule 503.

We next address Texas Rule of Civil Procedure 192.5 for the remaining information you marked 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 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 claim the remaining information you marked 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. However, we find you have not demonstrated the information at issue contains the mental impressions, opinions, conclusions, or legal theories of an attorney or the attorney's representative that was developed in anticipation of litigation or for trial. We therefore conclude the district may not withhold the information at issue under Texas Rule of Civil Procedure 192.5.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with

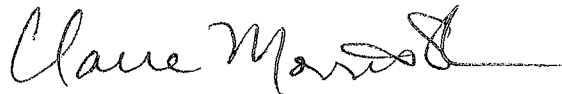
a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). See Gov’t Code § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the district must withhold the personal e-mail addresses you have marked within the information submitted as Tab B under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

In summary, the district may withhold Tab G and the information we have marked within the submitted attorney fee bills pursuant to rule 503 of the Texas Rules of Evidence. The district must withhold the personal e-mail addresses you have marked within the information submitted as Tab B under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. 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](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,



Claire V. Morris Sloan  
Assistant Attorney General  
Open Records Division

CVMS/som

Ref: ID# 612713

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

JUN 11 2019

At 9:49 P.M.  
Velva L. Price, District Clerk

Cause No. D-1-GN-16-002588

IRVING INDEPENDENT SCHOOL DISTRICT, <i>Plaintiff,</i>	§	IN THE DISTRICT COURT
	§	
	§	
v.	§	250 <sup>th</sup> JUDICIAL DISTRICT
	§	
KEN PAXTON, ATTORNEY GENERAL OF TEXAS, <i>Defendant.</i>	§	TRAVIS COUNTY, TEXAS
	§	
	§	

**AGREED FINAL JUDGMENT**

This cause is an action under the Public Information Act (PIA), Tex. Gov't Code ch. 552, in which the Irving Independent School District (Irving ISD) sought to withhold certain information. All matters in controversy between Plaintiff, Irving ISD, and Defendant, Ken Paxton, Attorney General of Texas (Attorney General), have been resolved by settlement, a copy of which is attached hereto as Exhibit A, and the parties agree to the entry and filing of an Agreed Final Judgment.

Texas Government Code section 552.325(d) requires the Court to allow a requestor a reasonable period of time to intervene after notice is attempted by the Attorney General. The Attorney General represents to the Court that, in compliance with Texas Government Code section 552.325(c), the Attorney General sent a certified letter to the requestor, Mr. Avi Selk, on April 16, 2019, informing him of the setting of this matter on the uncontested docket on or after May 1, 2019. The requestor was informed of the parties' agreement that Irving ISD will have the right to withhold the information at issue. The requestor was also informed of his right to intervene in the suit to contest the withholding of this information. Verification of the certified mailing of this notification is attached as Exhibit B to this Agreed Final Judgment.

The requestor has not filed a motion to intervene.

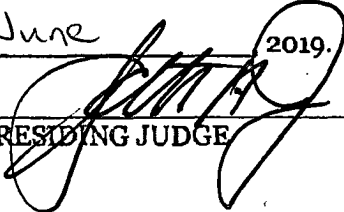


After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

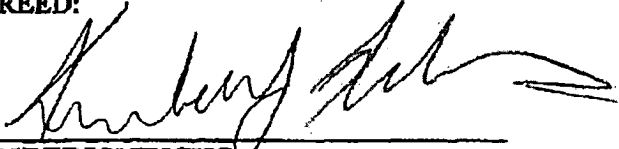
IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED THAT:

1. Irving ISD and the Attorney General have agreed that in accordance with the PIA and under the facts presented, Tex. R. Civ. P. 192.5 and Tex. R. Evid. 503 in conjunction with *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001), the attorney fee bills may be redacted in accordance with the markings reflected in the document transmitted to the Attorney General's Office by Irving ISD on October 23, 2018;
2. All court cost and attorney fees are taxed against the parties incurring the same;
3. All relief not expressly granted is denied; and
4. This Agreed Final Judgment finally disposes of all claims that are the subject of this lawsuit between Irving ISD and the Attorney General and is a final judgment.

SIGNED the 11<sup>th</sup> day of June 2019.

  
\_\_\_\_\_  
PRESIDING JUDGE

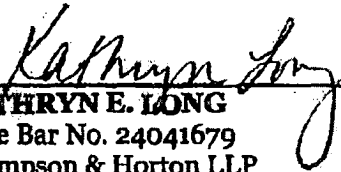
AGREED:



**KIMBERLY FUCHS**

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Administrative Law Division  
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**ATTORNEY FOR DEFENDANT, KEN PAXTON**



**KATHRYN E. LONG**

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Telephone: (972) 853-5115  
Facsimile: (972) 534-1645  
klong@thompsonhorton.com

**ATTORNEY FOR PLAINTIFF IRVING ISD**

**A**

Cause No. D-1-GN-16-002548

IRVING INDEPENDENT SCHOOL DISTRICT, <i>Plaintiff,</i>	§	IN THE DISTRICT COURT
	§	
	§	
v.	§	250 <sup>th</sup> JUDICIAL DISTRICT
	§	
KEN PAXTON, ATTORNEY GENERAL OF TEXAS, <i>Defendant.</i>	§	
	§	
	§	TRAVIS COUNTY, TEXAS

**SETTLEMENT AGREEMENT**

This Settlement Agreement (Agreement) is made by and between the Irving Independent School District (Irving ISD) and Ken Paxton, Attorney General of Texas (the Attorney General). This Agreement is made on the terms set forth below.

**Background**

This case was filed under the Public Information Act (PIA), and challenges Open Records Letter Ruling OR2016-12447, in which the Open Records Division of the Attorney General (ORD) required the release of some of the information at issue in this lawsuit.

After this lawsuit was filed, Irving ISD submitted information and briefing to the Attorney General establishing that Tex. R. Civ. P. 192.5 and Tex. R. Evid. 503 in conjunction with *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001), apply to some additional information contained in attorney fee bills, permitting Irving ISD to withhold it from disclosure.

Texas Government Code section 552.325(c) allows the Attorney General to enter into settlement under which the information at issue in this lawsuit may be withheld. The parties wish to resolve this matter without further litigation.

### **Terms**

For good and sufficient consideration, the receipt of which is acknowledged, the parties to this Agreement agree and stipulate that:

1. Irving ISD and the Attorney General have agreed that in accordance with the PIA and under the facts presented, Tex. R. Civ. P. 192.5 and Tex. R. Evid. 503 in conjunction with *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001), the attorney fee bills may be redacted in accordance with the markings reflected in the document transmitted to the Attorney General's Office by Irving ISD on October 23, 2018.
2. The Attorney General agrees that he will also notify the requestor, as required by Texas Government Code section 552.325(c), of the proposed settlement and of his right to intervene to contest Irving ISD's right to withhold the information.
3. A final judgment entered in this lawsuit after a requestor intervenes prevails over this Agreement to the extent of any conflict.
4. Each party to this Agreement will bear their own costs, including attorney fees relating to this litigation.
5. The terms of this Agreement are contractual and not mere recitals, and the agreements contained herein and the mutual consideration transferred is to compromise disputed claims fully, and nothing in this Agreement shall be construed as an admission of fault or liability, all fault and liability being expressly denied by all parties to this Agreement.
6. Irving ISD warrants that its undersigned representative is duly authorized to execute this Agreement on its behalf and that its representative has read

this Agreement and fully understands it to be a compromise and settlement and release of all claims that Irving ISD has against the Attorney General arising out of the matters described in this Agreement.

7. The Attorney General warrants that his undersigned representative is duly authorized to execute this Agreement on behalf of the Attorney General and his representative has read this Agreement and fully understands it to be a compromise and settlement and release of all claims that the Attorney General has against Irving ISD arising out of the matters described in this Agreement.
8. This Agreement shall become effective, and be deemed to have been executed, on the date on which the last of the undersigned parties sign this Agreement.

IRVING INDEPENDENT SCHOOL  
DISTRICT

KEN PAXTON, ATTORNEY GENERAL  
OF TEXAS

By: Magda Hernandez  
name: Magda Hernandez  
title: Superintendent of Schools,  
Irving ISD

By: Kimberly Fuchs  
name: Kimberly Fuchs  
title: Assistant Attorney General,  
Administrative Law Division

Date: 03/20/19

Date: 3/25/19

AGREED AS TO FORM:

By: Kathryn Long  
name: Kathryn E. Long, Thompson & Horton LLP  
title: Counsel for Irving ISD

Date: 3/19/19