KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 25, 2016

Mr. Christopher B. Gilbert
Counsel for Houston Independent School District
Thompson & Horton, L.L.P.
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Houston, Texas 77027

OR2016-16642

Dear Mr. Gilbert:

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# 619787.

The Houston Independent School District (the "district"), which you represent, received a request for: (1) all communications between district board members and certain companies for a specified time period; (2) all texts and e-mails to or from five named board members during a specified week; (3) all texts and e-mails to or from the district's press secretary for a specified time period; (4) all payments, and supporting documents, made to a named company during a specified time period; and (5) all records pertaining to out-of-state travel by three named board members during a specified time period.[1] You state the district is

[1]We note 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) (if 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). We further note the district subsequently sent the requestor an estimate of charges pursuant to section 552.2615 of the Government Code. *See id.* § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). You inform us the district received the requestor's full payment of the costs on May 3, 2016. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit).

releasing some information. You claim the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5.[2] We have considered your arguments and reviewed the submitted representative sample of information.[3]

Initially, we note the district may have released some of the submitted information in response to a previous request for this information under the Act. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law. *See* Gov't Code 552.007; Open Records Decision Nos. 518 at 3 (1989), 400 at 2 (1983). Although you claim the requested information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, these are discretionary exceptions and privileges that protect a government body's interests. *See* Open Records Decision Nos. 677 at 8-10 (2002) (attorney work product privilege under section 552.111 and rule 192.5 may be waived), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) and rule 503 may be waived), 665 at 5 (2000) (untimely request for decision resulted in waiver of discretionary exceptions), 663 at 5 (1999) (waiver of discretionary exceptions). As such, sections 552.107 and 552.111 and rules 503 and 192.5 do not expressly prohibit the release of the submitted information or make the information confidential. Therefore, to the extent the district previously released any of the submitted information to a member of the public, the district may not now withhold any such information under sections 552.107 and 552.111 or rules 503 and 192.5, but, instead, must release it. To the extent the district did not previously release the submitted information to a member of the public, we will address its arguments against disclosure.

Next, we note portions of the submitted information are 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:

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[2]Although you raise section 552.101 of the Government Code, you have not submitted arguments in support of that exception; therefore, we assume you have withdrawn it. *See* Gov't Code §§ 552.301, .302.

[3]We assume that 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 that those records contain substantially different types of information than that submitted to this office.

> (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]
>
> . . .
>
> (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Id. § 552.022(a)(1), (3). Some of the submitted information consists of a completed report subject to section 552.022(a)(1). The district must release the completed report pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* § 552.022(a)(1). Portions of the submitted information also consist of contracts relating to the expenditure of funds by a governmental body subject to section 552.022(a)(3). The information subject to section 552.022(a)(3) must be released unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(3). Although you assert this information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code, these sections are discretionary and do not make information confidential under the Act. *See* ORD 677 at 10, 676 at 6; *see also* ORD 665 at 2 n.5. Therefore, the district may not withhold the information at issue 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" 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). Therefore, we will consider your arguments under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5 for the information subject to section 552.022 of the Government Code. Further, we will consider your arguments under sections 552.107 and 552.111 against disclosure of the remaining information.

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 explain the information that is subject to section 552.022 consists of attachments to privileged e-mail communications between district attorneys, officials, and staff for the purpose of facilitating the rendition of professional legal services. You state the communications were intended to be confidential and have remained confidential. Upon review, we find the district has established the communications at issue constitute privileged attorney-client communications under rule 503. Thus, the district may generally withhold the information subject to section 552.022, which we have marked, under Texas Rule of Evidence 503. However, if these e-mail attachments are removed from their e-mails and stand alone, they are responsive to the request for information and are not privileged communications. Therefore, if these non-privileged attachments, which we marked, are maintained by the district separate and apart from the otherwise privileged e-mails to which they are attached, then the district may not withhold the attachments under Texas Rule of

Evidence 503. If these attachments we marked do not exist separate and apart from the e-mails to which they are attached, the district may withhold them under rule 503.

You also claim the e-mail attachments subject to section 552.022 of the Government Code are privileged under Texas Rule of Civil Procedure 192.5. 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* 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. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You claim the remaining information subject to section 552.022 consists of attorney core work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. However, upon review, we find you have not demonstrated any of the 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 any remaining information subject to section 552.022 under Texas Rule of Civil Procedure 192.5.

The district claims section 552.107 of the Government Code for the information not subject to section 552.022 of the Government Code. Section 552.107(1) protects information that comes within the attorney-client privilege. *See* Gov't Code § 552.107(1). The elements of the privilege under section 552.107 are the same as those for rule 503. 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. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege. *See Huie*, 922 S.W.2d at 923.

The district states the information at issue consists of communications between attorneys, officials, and staff of the district. The district states the communications were made for the purpose of facilitating the rendition of professional legal services to the district and these communications have remained confidential. Upon review, we find the district has demonstrated the applicability of the attorney-client privilege to the remaining information. Thus, the district may generally withhold the remaining information under section 552.107(1) of the Government Code. We note, however, some of these e-mail strings include e-mails and an attachment received from a party whose interests were adverse to the district at the time of the communications. Accordingly, these communications with a non-privileged party do not consist of privileged attorney-client communications. Furthermore, if the e-mails and attachment received from the non-privileged party are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails and attachment, which we marked, are maintained by the district separate and apart from the otherwise privileged e-mails to which they are attached, then the district may not withhold these non-privileged e-mails and attachment under section 552.107(1).

Section 552.111 of the Government Code also encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); ORD 677 at 4-8. As noted above, rule 192.5 defines work product and a governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. TEX. R. CIV. P. 192.5(a); ORD 677 at 6-8. The test to determine whether information was created or developed in anticipation of litigation is the same as that discussed above concerning rule 192.5.

You assert the remaining information is attorney work product that pertains to anticipated litigation. Upon review, we find you have failed to establish the applicability of the attorney work product privilege to the information at issue. Therefore, the district may not withhold any of the remaining information as attorney work product under section 552.111 of the Government Code.

In summary, to the extent the district previously released any of the submitted information to a member of the public, the district must release it. If the attachments subject to section 552.022 of the Government Code, which we marked, do not exist separate and apart from the e-mails to which they are attached, the district may withhold them under Texas Rule of Evidence 503; however, if these attachments are maintained by the district separate and apart from the otherwise privileged e-mails to which they are attached, the district must release the marked attachments. The district may generally withhold the information not subject to section 552.022 of the Government Code under section 552.107(1) of the Government Code; however, if the e-mails and attachment we marked are maintained by the district separate and apart from the otherwise privileged e-mail strings, the district must release these marked e-mails and attachment.

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,

Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/dls

Ref: ID# 619787

Enc. Submitted documents

c: Requestor
(w/o enclosures)