



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 24, 2017

Ms. Rebecca Bailey Weimer
Counsel for Beaumont Independent School District
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Houston, Texas 77027-7528

OR2017-01516

Dear Ms. Weimer:

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# 642548.

The Beaumont Independent School District (the "district"), which you represent, received a request for information pertaining to legal expenses incurred on behalf of the district's special education programs during a specified time. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.111, 552.114, 552.117, 552.136, and 552.148 of the Government Code and is privileged under rule 503 of the Texas Rules of Evidence, rule 192.5 of the Texas Rules of Civil Procedure, rules 501 and 502 of the Federal Rules of Evidence, and rule 26(b)(3) of the Federal Rules of Civil Procedure.¹ We have considered the submitted arguments and reviewed the submitted information.

¹Although you also raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, Texas Rule of Civil Procedure 192.5, Federal Rules of Evidence 501 and 502, and Federal Rule of Civil Procedure 26(b)(3), 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). Further, although you also raise section 552.026 of the Government Code as an exception to disclosure, this section is not an exception to public disclosure under the Act. Rather, section 552.026 provides the Act does not require the release of information contained in education records except in conformity with the Family Educational Rights and Privacy Act of 1974. Gov't Code § 552.026.

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.² 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”); *see also* Open Records Decision No. 224 (1979) (student’s handwritten comments protected under FERPA because they would make identity of student easily traceable through handwriting, style of expression, or particular incidents related in the comments). Your state 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 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). You seek to withhold the submitted information under sections 552.103, 552.107, and 552.111 of the Government Code. However, sections 552.103, 552.107, and 552.111 are discretionary in nature 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. 677 (2002) (governmental body may waive attorney work product privilege under section 552.111), 676 at 10-11 (attorney-client privilege under Gov’t Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). In addition, the courts have not found the Federal Rules of Evidence and the Federal Rules of Civil Procedure to be “other law” for the purposes of section 552.022. Therefore, the information at issue may not be withheld under section 552.103,

²A 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>.

section 552.107, or section 552.111 of the Government Code, rules 501 and 502 of the Federal Rules of Evidence, or rule 26(b)(3) of the Federal Rules of Civil Procedure. However, the Texas Supreme Court has held the Texas Rules of Evidence and 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). Therefore, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503 and the attorney work-product privilege under Texas Rule of Civil Procedure 192.5 for the submitted information. Furthermore, as sections 552.117, 552.136, and 552.148 of the Government Code apply to confidential information, we will address your arguments under these sections for the submitted information.

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 submitted attorney fee bills 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 should be withheld under rule 503. You assert the submitted fee bills consist of communications involving attorneys for the district, district employees and officials in their capacities as clients, and the district’s contracted education consultants, with whom you indicate the district shares a privileged relationship. You state the communications at issue were made for the purpose of the rendition of legal services to the district. You also state the communications at issue have not been, and were not intended to be, disclosed to third parties. Based on your representations and our review of the information at issue, we find the district has established the information we have marked constitutes attorney-client communications under rule 503. Thus, the district may withhold the information we have marked pursuant to rule 503 of the Texas Rules of Evidence.³ However, we find you have failed to demonstrate any portion of the remaining information at issue consists of privileged attorney-client communications. Accordingly, no portion of the remaining information may be withheld under rule 503.

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 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,

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

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 consists of attorney core work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. Upon review, however, we find you have not demonstrated the remaining information contains the mental impressions, opinions, conclusions, or legal theories of an attorney or the attorney's representative that were developed in anticipation of litigation or for trial. We therefore conclude the district may not withhold any of the remaining information under Texas Rule of Civil Procedure 192.5.

Section 552.117(a)(1) of the Government Code exempts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code, except as provided by section 552.024(a-1). *See* Gov't Code §§ 552.117(a)(1), .024. Section 552.024(a-1) of the Government Code provides, "[a] school district may not require an employee or former employee of the district to choose whether to allow public access to the employee's or former employee's social security number." *Id.* § 552.024(a-1). Thus, the district may only withhold under section 552.117 the home address and telephone number, emergency contact information, and family member information of a current or former employee or official of the district who requests this information be kept confidential under section 552.024. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus,

information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Upon review, we find no portion of the remaining information consists of the home address, home telephone number, emergency contact information, or family member information of a current or former employee of the district. Accordingly, the remaining information may not be withheld under section 552.117(a)(1) of the Government Code.

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"). Section 552.136(a) defines "access device" as "a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument." *Id.* § 552.136(a). Upon review, we find you have not demonstrated any portion of the remaining information consists of access device numbers for purposes of section 552.136. Accordingly, the district may not withhold the remaining information under section 552.136 of the Government Code.

Section 552.148 of the Government Code provides the following:

- (a) In this section, "minor" means a person younger than 18 years of age.
- (b) The following information maintained by a municipality for purposes related to the participation by a minor in a recreational program or activity is excepted from [required disclosure]:
 - (1) the name, age, home address, home telephone number, or social security number of the minor;
 - (2) a photograph of the minor; and
 - (3) the name of the minor's parent or legal guardian.

Id. § 552.148. Section 552.148 specifically applies to information maintained by a municipality "for purposes related to the participation by a minor in a recreational program or activity[.]" *Id.* § 552.148(b). Because the remaining information is not related to participation in a recreational program or activity, section 552.148 of the Government Code does not apply, and the district may not withhold the remaining information on this basis.

In summary, the district may withhold the information we have marked pursuant to rule 503 of the Texas Rules of Evidence. 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,



Meagan J. Conway
Assistant Attorney General
Open Records Division

MJC/sb

Ref: ID# 642548

Enc. Submitted documents

c: Requestor
(w/o enclosures)