



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 22, 2017

Ms. Kristi Godden
Counsel for the South San Antonio Independent School District
O'Hanlon, Demerath, & Castillo
808 West Avenue
Austin, Texas 78701

OR2017-19168

Dear Ms. Godden:

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# 672255 (PIR# SSISD-004).

The South San Antonio Independent School District (the "district"), which you represent, received a request for all contracts and bills for legal services received by the district during a certain time period. We understand the district has redacted certain information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g(a).¹ You state the district has allowed some of the requested information to be inspected by the requestor. The district claims some of the submitted information is privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. Additionally, you provide documentation showing you notified Escamilla & Poneck, LLP; Mark Frazier; Schulman, Lopez, Hoffer & Adelstein, LLP; and Walsh, Anderson, Gallegos & Trevino of their rights to submit comments to this office why the submitted information should not be released. See Gov't Code § 552.304 (interested party may submit comments stating why information

¹The 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>.

should or should not be released.) We have considered your arguments and reviewed the submitted information. We have also received and considered comments from Escamilla & Poneck, LLP; and Schulman, Lopez, Hoffer & Adelstein, LLP.²

We note, and you acknowledge, the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part, the following:

(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:

...

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

Id. § 552.022(a)(16). The submitted information consists of attorney fee bills subject to section 552.022(a)(16). Thus, the submitted information must be released unless it is made confidential under the Act or other law. *See id.* Escamilla & Poneck, LLP seeks to withhold the submitted information under sections 552.107 and 552.111 of the Government Code. However, these sections are discretionary exceptions and do not make information confidential under the Act. *See* Open Records Decision Nos. 677 at 8 (2002) (attorney work product privilege under section 552.111 may be waived), 676 at 10-11 (2002) (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). Therefore, the submitted information may not be withheld under these exceptions. The Texas Supreme Court has held, however, 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 the attorney-client privilege claims under rule 503 of the Texas Rules of Evidence and attorney work product privilege claims under rule 192.5 of the Texas Rules of Civil Procedure for the submitted fee bills.

Texas Rule of Evidence 503(b)(1) provides the following:

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:

²As of the date of this ruling, we have not received comments from Mark Frazier or Walsh, Anderson, Gallegos & Trevino.

- (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. *Id.* Upon a demonstration of all three factors, the entire communication 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 extends to entire communication, including factual information).

The district asserts the submitted fee bills include privileged attorney-client communications between district attorneys, attorney representatives, and district officials 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. Further, the district informs us the communications at issue were not disclosed to third parties and have remained confidential. Based on the district's representations and our review of the information at issue, we find the district has

established some of the information at issue constitutes attorney-client communications under rule 503. Thus, the district may withhold this information, a representative sample of which we marked, pursuant to rule 503 of the Texas Rules of Evidence.³ However, the remaining information at issue either consists of communications with parties whom the district has not established are privileged parties for purposes of rule 503 or is not a communication. Therefore, we find the district has failed to demonstrate the remaining information at issue consists of privileged communications for purposes of rule 503. Accordingly, no portion of the remaining information at issue may be withheld under rule 503 of the Texas Rules of Evidence.

We next address the district's argument 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.*, 861 S.W.2d at 427.

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

The district claims the remaining information at issue consists of 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 the information at issue consists of mental impressions, opinions, conclusion, or legal theories of an attorney or an attorney's representative that were created for trial or in anticipation of trial. Thus, the district may not withhold the information at issue under rule 192.5 of the Texas Rules of Civil Procedure.

In summary, the district may withhold the information we marked under 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,



Emily Kunst
Attorney
Open Records Division

EK/eb

Ref: ID# 672255

Enc. Submitted documents

c: Requestor
(w/o enclosures)

5 Third Parties
(w/o enclosures)