



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 28, 2022

Mr. Joseph E. Hoffer
Attorney for IDEA Public Schools
Schulman, Lopez, Hoffer & Adelstein, LLP
845 Proton Road
San Antonio, Texas 78258

OR2022-05991

Dear Mr. Hoffer:

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# 932697.

IDEA Public Schools ("IDEA"), which you represent, received a request for three categories of information pertaining to IDEA and a named entity. You state you do not have information responsive to a portion of the request.¹ You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5.² We have considered the submitted arguments and reviewed the submitted information.

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

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

¹ The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

² We note, although you also raise section 552.022 of the Government Code, section 552.022 is not an exception to disclosure. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are made confidential under the Act or other law. *See Gov't Code* § 552.022.

...

(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). Exhibit 2 consists of information in an account, contract, or voucher relating to the receipt or expenditure of funds by IDEA that is subject to section 552.022(a)(3), and Exhibit 3 consists of 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.* You seek to withhold Exhibit 2 under section 552.107 of the Government Code. However, section 552.107 is discretionary in nature and does not make information confidential under the Act. *See 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), 663 at 5 (1999) (waiver of discretionary exceptions).* Therefore, IDEA may not withhold any portion of Exhibit 2 under section 552.107 of the Government Code. 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 arguments under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure for the submitted information.

Rule 192.5 of the Texas Rules of Civil Procedure encompasses the attorney work product privilege. Rule 192.5 defines work product as

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). 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. *Id.* 192.5; Open Records Decision No. 677 at 6-8 (2002). In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied that

a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. 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; ORD 677 at 7.

You claim the information you have marked in Exhibit 3 consists of attorney work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. You state the information at issue was created in anticipation of litigation by outside counsel and a privileged consultant for IDEA. You further state this information reflects the mental impressions, conclusions, or legal theories of IDEA’s outside counsel and consultant. Upon review, we find the information we have marked constitutes attorney work product. Therefore, IDEA may withhold the information we have marked pursuant to Texas Rule of Civil Procedure 192.5.³ However, we find you have not demonstrated the remaining 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. Therefore, we conclude IDEA may not withhold any portion of the remaining information at issue under Texas Rule of Civil Procedure 192.5.

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

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

(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). *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).

You state the remaining information consists of privileged attorney-client communications between outside counsel for IDEA, IDEA employees, and a privileged consultant in their capacities as clients. You explain the communications at issue were made for the purpose of the rendition of legal services to IDEA. You state 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 you have established Exhibit 2 constitutes a privileged attorney-client communication under rule 503. Therefore, IDEA may withhold Exhibit 2 pursuant to rule 503 of the Texas Rules of Evidence. However, we find you have failed to demonstrate the remaining information consists of privileged attorney client communications. Accordingly, IDEA may not withhold any portion of the remaining information under rule 503 of the Texas Rules of Evidence.

In summary, IDEA may withhold the information we have marked pursuant to Texas Rule of Civil Procedure 192.5. IDEA may withhold Exhibit 2 pursuant to rule 503 of the Texas Rules of Evidence. IDEA 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Meredith L. Coffman
Assistant Attorney General
Open Records Division

MLC/jm

Ref: ID# 932697

Enc. Submitted documents

c: Requestor
(w/o enclosures)
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