



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 16, 2022

Ms. Melissa Kates
General Counsel
Grand Prairie Independent School District
2602 South Belt Line Road
Grand Prairie, Texas 75052

OR2022-17346

Dear Ms. Kates:

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# 952297.

The Grand Prairie Independent School District (the "district") received a request for information pertaining to a specified lawsuit. You indicate the district will release some information. You claim the remaining requested information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes, such as section 551.104 of the Open Meetings Act (the "OMA"), chapter 551 of the Government Code. Section 551.104 of the Government Code provides, in part, "[t]he certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3)." *Id.* § 551.104(c). We note the district is not required

¹ 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 that those records contain substantially different types of information than that submitted to this office.

to submit a certified agenda of a closed meeting to this office for review. *See* Open Records Decision No. 495 at 4 (1988) (attorney general lacks authority to review certified agendas or tapes of executive sessions to determine whether a governmental body may withhold such information from disclosure under statutory predecessor to section 552.101). Such information cannot be released to a member of the public in response to an open records request. *See* Attorney General Opinion JM-995 at 5-6 (1988) (public disclosure of certified agenda of closed meeting may be accomplished only under procedures provided in Open Meetings Act). Section 551.146 of the OMA makes it a criminal offense to disclose a certified agenda or tape recording of a lawfully closed meeting to a member of the public. *See* Gov't Code § 551.146(a)-(b); *see also* Open Records Decision No. 495 at 4 (1988). Likewise, this office has determined minutes of a closed meeting are confidential. *See* Open Records Decision No. 60 (1974) (closed meeting minutes are confidential under predecessor to section 551.104); *see also* Open Records Decision Nos. 563 (1990) (minutes of properly held executive session are confidential under Open Meetings Act), 495 (information protected under predecessor to section 551.104 cannot be released to member of public in response to open records request). You state the requested information includes certified agendas of closed meetings. Based on your representations, we agree the district must withhold the requested agendas under section 552.101 of the Government Code in conjunction with section 551.104 of the Government Code.

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:

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(17). The submitted information includes court-filed documents subject to section 552.022(a)(17). The district must release this information pursuant to section 552.022(a)(17) unless the information is made confidential under the Act or other law. *See id.* Although you raise sections 552.107 and 552.111 of the Government Code for this information, these sections are discretionary exceptions to disclosure 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 section 552.107(1) may be waived), 665 at 2 n.5 (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, none of the information subject to section 552.022, which we marked, may be withheld under section 552.107 or section 552.111. However, the Texas Supreme Court has held the Texas Rules of Evidence and 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). Thus, 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 information subject to

section 552.022. We will also address your arguments against disclosure of the submitted information not subject to section 552.022.

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 state the information subject to section 552.022 of the Government Code is attached to privileged attorney-client communications between attorneys for the district and district employees and officials in their capacities as clients. You explain the information was communicated for the purpose of the rendition of legal services to the district and that these

communications have remained confidential. Based on these representations and our review, we find you have established the attorney-client privilege is generally applicable to the information subject to section 552.022.² However, we note the information at issue consists of attachments seen by non-privileged parties. Furthermore, if these attachments are removed from the e-mails to which they are attached and stand alone, they are responsive to the request for information. Therefore, if the non-privileged attachments subject to section 552.022, which we have 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 attachments under rule 503. Conversely, if the non-privileged attachments subject to section 552.022 of the Government Code, which we have 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.

We next address your argument under Texas Rule of Civil Procedure 192.5 for the information subject to section 552.022 of the Government Code, to the extent it is maintained by the district separate and apart from the otherwise privileged e-mail communications to which it is attached. Rule 192.5 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.

² As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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; ORR 677 at 7.

Although you assert the attorney work product privilege for the information at issue, we note this information was received from or disclosed to non-privileged parties. Thus, we find you have failed to demonstrate the applicability of the attorney work product privilege to the information at issue. Therefore, the district may not withhold the information subject to section 552.022 of the Government Code on the basis of the work product privilege in Texas Rule of Civil Procedure 192.5.

The district claims section 552.107 of the Government Code for the remaining information. 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.

You state the remaining information consists of communications between attorneys for the district and district employees and officials. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the district. You indicate the communications were intended to be and have remained confidential. Based on your representations and our review, we find the remaining information consists of privileged attorney-client communications. Accordingly, the district may withhold the remaining information under section 552.107(1) of the Government Code.

In summary, the district must withhold the requested agendas under section 552.101 of the Government Code in conjunction with section 551.104 of the Government Code. The district may generally withhold the information subject to section 552.022 under Texas Rule of Evidence 503; however, if the non-privileged attachments subject to section 552.022 of the Government Code, 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 attachments under Texas Rule of Evidence 503. In that instance, the district must release these non-privileged attachments pursuant to section 552.022 of the Government Code. The district may withhold the remaining information under section 552.107(1) of the Government Code.

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,

Jennifer Copeland
Assistant Attorney General
Open Records Division

JC/jm

Ref: ID# 952297

Enc. Submitted documents

c: Requestor
(w/o enclosures)