



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

July 15, 2022

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

OR2022-20446

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# 959486 (ORR #22-027).

The La Joya Independent School District (the "district"), which you represent, received a request for specified contracts and invoices. You state you will release some information. You claim some of the submitted information is privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we note the submitted information consists of an attorney fee bill that is 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). 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 the district's attorney-client privilege claim under rule 503 of the Texas Rules of Evidence and attorney work product privilege claim

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

under rule 192.5 of the Texas Rules of Civil Procedure for the information in the submitted fee bill.

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).

The district asserts the portions of the submitted fee bill you have marked should be withheld under rule 503. The district states the submitted fee bill includes privileged attorney-client communications between attorneys for the district and district officials and staff in their capacities as clients. The district explains the communications at issue were

made for the purpose of the rendition of legal services to the district. The district states the communications at issue have not been, and were not intended to be, disclosed to third parties. Upon review, with the exception of the information we marked for release, the district may withhold the representative sample of information you have marked under Texas Rule of Evidence 503.<sup>2</sup> However, we find the district has failed to demonstrate the information we have marked constitutes privileged attorney-client communications for the purposes of rule 503. Thus, the district may not withhold any portion of the remaining information under rule 503.

We next address Texas Rule of Civil Procedure 192.5 for the remaining information you marked in the submitted attorney fee bill. 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.

*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.

The district claims the remaining information it marked consists of attorney core work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. However, we find the district has not demonstrated the 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. We therefore

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

conclude the district may not withhold the remaining information at issue under Texas Rule of Civil Procedure 192.5.

In summary, with the exception of the information we marked for release, the district may withhold the information you have marked within the submitted attorney fee bill 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 <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,

Colin Henry  
Attorney  
Open Records Division

CEH/jm

Ref: ID# 959486

Enc. Submitted documents

c: Requestor  
(w/o enclosures)