



July 8, 1999

Ms. Delores L. Alspaugh
Executive Director
Texas Cosmetology Commission
5717 Balcones Drive
Austin, Texas 78755-0700

OR99-1897

Dear Ms. Alspaugh:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 125508.

The Cosmetology Commission (the "commission") received a request for a letter prepared for the commission by an Assistant Attorney General. You have supplied the responsive information to our office for our review, claiming that it is excepted from disclosure under section 552.101 of the Government Code as an attorney-client privileged communication. We have considered your arguments and reviewed the submitted information¹.

A state agency may invoke the attorney-client privilege to protect the legal correspondence it receives from the assistant attorney general who represents it. Open Records Decision No. 412 (1984). Section 552.107(1) excepts information from disclosure if it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct. This exception excepts from public disclosure only "privileged information," i.e., communications made to the attorney in confidence and in furtherance of rendering professional services or that reveal the attorney's legal opinion or advice. Open Records Decision No. 589 at 1

¹Although you raise the attorney-client privilege under section 552.101 of the Government Code, that privilege is more properly raised under section 552.107 and shall be so treated.

(1991). Information gathered by an attorney as a fact-finder, purely factual information, and the factual recounting of events including the documentation of calls made, meetings attended, and memos sent, are generally not excepted from disclosure by section 552.107(1). Open Records Decision No. 574 (1990). However, where other information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make separation impractical, that information may also be withheld. Open Records Decision No. 313 (1982).

In the present case, the body of the letter clearly reflects the advice and opinion of counsel. Further, we conclude that the factual information contained therein is so inextricably intertwined with material involving advice, opinion, or recommendation as to make separation impractical. The body of the letter may therefore be withheld under section 552.107(1). As regards "Attachment A" of that letter, we find that the recommendations contained therein are legal advice, excepted from disclosure by section 552.107(1). The remainder of the attachment is comprised of a neutral recitation of facts, not excepted from disclosure by section 552.107. We have marked the information that may be withheld under section 552.107(1).

We note that "Attachment A" also contains information which may be subject to 20 U.S.C. section 1232(g), the Family Educational Rights and Privacy Act ("FERPA"), as "education records." "Education records" are records that

- (i) contain information directly related to a student; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

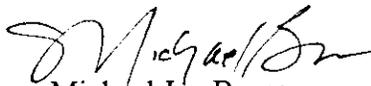
20 U.S.C. § 1232g(a)(4)(A). *See also* Open Records Decision Nos. 462 (1987), 447 (1986).

Records of an institution are considered to be subject to FERPA if funds are provided under certain federal programs, including the Pell Grant Program and the Guaranteed Student Loan Program, to students attending that institution, and those funds may be paid to the institution. 34 C.F.R. § 99.1(c)(2). The information provided indicates that the subject institution has been suspended from participation in the Pell Grant Program. If the identified students attended this institution when it received funds from either of the above identified programs, their records are subject to FERPA. Information must be withheld from required public disclosure under FERPA to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision Nos. 332 (1982), 206 (1978). Such records are confidential and may not be released. Open Records Decision No. 634 (1995). We have marked the documents to indicate the identifying information that may be subject to FERPA. If you have further questions as to the applicability of FERPA to information that is the subject of an open records request, you may consult with the United States

Department of Education's Family Policy Compliance Office. *See* 20 U.S.C. § 1232g(a)(5)(B).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Michael Jay Burns
Assistant Attorney General
Open Records Division

MJB/ch

Ref: ID# 125508

Encl. Submitted documents

cc: Mr. Charles Oman
4309 Jacksboro Highway
Wichita Falls, Texas 76302
(w/o enclosures)