



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

January 22, 2003

Ms. Carol Longoria
The University of Texas System
Office of General Counsel
201 West Seventh Street
Austin, Texas 78701-2902

OR2003-0440

Dear Ms. Longoria:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 175321.

The University of Texas at San Antonio (the "university") received a request for information "about faculty members [sic] grievances at UTSA in the past." Responding to your request for clarification, the requestor specified that he sought documents relating to grievances occurring in the past ten years. The requestor clarified his request a second time, narrowing its focus to formal grievances, or "grievances filed with the UTSA Grievance Committee and not with the Departments or Colleges." You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code, and under Rule 503 of the Texas Rules of Evidence. We have considered the exceptions you claim and reviewed the representative sample of submitted information.¹ We have also considered the comments submitted by the requestor. *See* Gov't Code § 552.304 (providing for submission of public comments).

We first note that the university requested and received clarification from the requestor on October 25, 2002, one day after the university received the request for information. *See* Gov't Code § 552.222 (providing that a governmental body may ask the requestor to clarify the request if what information is requested is unclear to the governmental body). Thus, the ten business day time period to request a decision under section 552.301(b) was tolled on

¹We assume that 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.

October 25, 2002, for one day. *See* Gov't Code § 552.301(b); Open Records Decision No. 663 at 5 (1999) (providing that ten-day period is tolled during the clarification process). Consequently, the ten business day period resumed again on October 26, 2002. You submitted your request for a decision from this office on November 8, 2002. Accordingly, we conclude that the university has complied with section 552.301(b) in requesting our decision. *See* Gov't Code § 552.301(b).

You next assert that the submitted information constitutes attorney work product. A governmental body may withhold attorney work product from disclosure under section 552.111 if it demonstrates that the material was (1) created for trial or in anticipation of civil litigation, and (2) consists of or tends to reveal an attorney's mental processes, conclusions, and legal theories. Open Records Decision No. 647 (1996). However, we note that although you claim that section 552.111 applies to the submitted information, you do not explain how or why. Conclusory assertions that a particular exception applies to requested information will not suffice. As you have not provided specific arguments in support of your section 552.111 claim, the university may not withhold any of the submitted information under section 552.111. Open Records Decision No. 363 (1983), *see* Gov't Code § 552.301(e)(1)(A) (requiring a government body to submit to the attorney general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld.)

Next, you contend that the some of the submitted information contains confidential attorney-client communications that are excepted from disclosure under section 552.101 of the Government Code in conjunction with Rule 503 of the Texas Rules of Evidence. This office has found that discovery and evidentiary rules are not confidentiality provisions for the purposes of section 552.101. *See* Open Records Decision Nos. 575 (1990), 416 (1984). We acknowledge that the Texas Supreme Court recently held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). The submitted documents, however, do not fall into the categories of information in section 552.022. Because the submitted information does not fall into a section 552.022 category, we conclude that the submitted information may not be withheld on the basis of Rule 503 of the Texas Rules of Evidence. Moreover, this office has determined that "if in the open records ruling process the attorney-client privilege is asserted under section 552.101, this office shall consider it an assertion of the more specific section 552.107(1) exception." Open Records Decision No. 676 at 2-3 (2002).

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See generally* Open Records Decision No. 574 (1990). In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and confidential attorney-client communications. *Id.* This office recently refined this position and determined that when a governmental body demonstrates that a communication is protected by the attorney-client privilege as defined by rule 503 of

the Texas Rules of Evidence, the entire communication is excepted from disclosure under section 552.107. *See* Open Records Decision No. 676 at 5 (2002). A governmental body that raises section 552.107 bears the burden of explaining how the particular information requested is protected by the attorney-client privilege. *See id.* at 6; *see also Strong v. State*, 773 S.W.2d 543, 552 (Tex. Crim. App. 1989) (burden of establishing attorney-client privilege is on party asserting it). We agree that portions of the submitted information, which we have marked, constitute client confidences and attorney advice and opinion. Therefore, you may withhold this information from disclosure under section 552.107(1).² However, the remaining documents were either prepared by opposing counsel or were provided to the opposing party, and the university has not demonstrated that these documents contain or consist of confidential attorney-client communications. *See* Tex. R. Evidence 503 (a)(5) (defining "confidential communication" as a communication that is not intended to be disclosed to third parties); *see also* Open Records Decision Nos. 676 at 10-11 (2002), 630 at 4 (1990) (governmental body may waive section 552.107(1).) Thus, the university may not withhold the remaining submitted documents under section 552.107, and they must be released to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body

²As we reach this conclusion, we need not address your argument that some of the submitted information is subject to section 552.101 in conjunction with the Family Education Rights and Privacy Act ("FERPA").

fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



V.G. Schimmel
Assistant Attorney General
Open Records Division

VGS/sdk

Ref: ID# 175321

Enc: Submitted documents

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(w/o enclosures)