



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 18, 2004

Ms. Carol Longoria
Public Information Coordinator
University of Texas System
201 West 7th Street
Austin, Texas 78701-2902

OR2004-8853

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# 211093.

The University of Texas at Austin (the "university") received a request for (1) all documents presented by a professor requesting and otherwise supporting his grievance from 2003-2004, (2) all responses filed by the university in answer to or in defense of the grievance, (3) all documents evidencing a resolution or settlement between the university and the professor, and (4) all communications or reports between a named individual and any faculty member, administrator, and staff who is not a part of the Department of Spanish and Portuguese Executive Committee from January 2003 to the present. You inform us that you will release some of the requested information, but claim that some of the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.117, 552.136, and 552.137 of the Government Code. We also understand you to claim that some of the submitted information is also excepted under section 552.111 of the Government Code.¹ We have

¹We note that you raise the attorney work product privilege in conjunction with section 552.101 of the Government Code. Texas Rule of Civil Procedure 192.5 does not fall within the purview of section 552.101. Open Records Decision No. 676 at 2 (2002). However, section 552.111 encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Therefore, we will address your attorney work product argument under section 552.111.

considered the exceptions you claim and reviewed the submitted representative sample of information.²

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses the common law right to privacy. For information to be protected by common law privacy, it must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976). The *Industrial Foundation* court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685.

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public’s interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that “the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released.” *Id.*

When there is an adequate summary of a sexual harassment investigation, the summary must be released along with the statement of the accused, but the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from disclosure. The documents in Tabs 8 and 9 contain information relating to an investigation of sexual harassment. The information includes an adequate summary of the investigation, as well as the statements of the accused. In accordance with the holding in *Ellen*, the university must release the summary and statements. However, prior to releasing these documents, in accordance with section 552.101 and the holding in *Ellen*, the university must redact the information we have marked that identifies the complainant. The remaining information in Tabs 8 and 9 must likewise be withheld under section 552.101 and the holding in *Ellen*.

You assert that the information in Tabs 5A and 6 is excepted from release under section 552.107. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a

²We 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.

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. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “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). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You assert the information in Tab 5A and Tab 6 consists of communications between identified university attorneys and their clients that were not intended to be disclosed to third parties and that were made in the furtherance of the rendition of professional legal services. Based on this representation and our review of the submitted information, we conclude that the information in Tabs 5A and Tab 6 consists of privileged attorney-client communications that are excepted from release under section 552.107.³

Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” This

³Because we are able to resolve this under section 552.107, we do not address your other argument for exception regarding this information.

section encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as the following:

(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(1), (2). A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude that 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 university informs us that an employee filed a grievance against the university, and it asserts that the information in Tab 5B consists of the materials prepared by a university attorney for litigation involving that grievance. After reviewing the university's arguments, we conclude that the university has shown that this information was created in anticipation of litigation. We also conclude that the information consists of an attorney's mental impressions, opinions, conclusions, or legal theories. Having met both prongs of rule 192.5, the university may withhold the information in Tab 5B as privileged attorney work product.

Section 552.117 is also applicable to some of the submitted information. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section

552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the university may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date that the university received the request for information. For those employees who timely elected to keep their personal information confidential, the university must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members, which we have marked. The university may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential.

You assert that the remaining information contains bank account numbers and university electronic identification numbers that are excepted under section 552.136. Section 552.136 states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. The university must, therefore, withhold the account number information we have marked under section 552.136. However, we find that you have failed to establish that the university identification numbers you have marked constitute access device numbers for purposes of section 552.136. Therefore, they may not be withheld on that basis.

To conclude, (1) the university must release the summary and the statements of the accused in Tabs 8 and 9, but it must withhold the marked information identifying the accuser in these documents, as well as the remaining documents in the investigation file, under section 552.101 in conjunction with common law privacy and *Ellen*; (2) the university may withhold the privileged attorney-client communications in Tabs 5A and Tab 6 under section 552.107; (3) the university may withhold the information in Tab 5B as privileged attorney work product under section 552.111; (4) the university must withhold the marked section 552.117 information from release if it pertains to employees who timely elected to keep their personal information confidential; and (5) the university must withhold the marked bank account numbers under section 552.136. The remaining information must be released.

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 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 Dep't of Pub. 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,



Amy D. Peterson
Assistant Attorney General
Open Records Division

ADP/sdk

Ref: ID# 211093

Enc. Submitted documents

c: Dr. Marta Lujan
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(w/o enclosures)