



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 22, 2006

Ms. Karen Rabon
Assistant Attorney General
Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2006-13828

Dear Ms. Rabon:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 264189.

The Office of the Attorney General (the "OAG") received a request for information pertaining to the requestor's lawsuit. The requestor excludes private e-mail addresses from his request, and the OAG has released some information to him. The OAG asserts Exhibit B is excepted from disclosure under section 552.111 of the Government Code. Because the information in Exhibit C pertains to a former University of Texas - Pan American (the "university") professor, the OAG notified the University of Texas System (the "system") of the request. The system asserts some of Exhibit C is excepted from disclosure under sections 552.103, 552.107, and 552.117 of the Government Code.¹ We have considered the OAG's and system's arguments and have reviewed the submitted information.² The system has

¹The system also asserts exception under section 552.137. Because the requestor excludes private e-mail addresses from his request, we need not address this exception. *See* Gov't Code § 552.137 (excepts private e-mail address from disclosure).

²The OAG and the system assert the information is protected under section 552.101 of the Government Code in conjunction with the work product privilege pursuant to Texas Rule of Civil Procedure 192.5 and the attorney-client privilege pursuant to Texas Rule of Evidence 503. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. It does not encompass the discovery privileges found in these rules because they are not constitutional law, statutory law, or judicial decisions. Open Records Decision No. 676 at 1-2 (2002).

submitted a document that the OAG did not submit. This decision does not address information that has not been submitted by the OAG.

First, we note that the submitted information includes education records obtained from the system. The United States Department of Education Family Policy Compliance Office (the "DOE") recently informed this office that the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(a), does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.³ Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. See 34 C.F.R. § 99.3 (defining "personally identifiable information"). Because our office is prohibited from reviewing education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records. Such determinations under FERPA must be made by the educational authority.⁴ The OAG states it has redacted the student identifying information from its records. Thus, we only address the applicability of the remaining claimed exceptions to the submitted information.

The OAG contends Exhibit B constitutes attorney work product excepted from disclosure under section 552.111. 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 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

(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,

³A copy of the DOE's letter can be found on our website at http://www.oag.state.tx.us/opinopen/og_resources.

⁴In the future, if parental consent is obtained to submit unredacted education records and a ruling from this office is sought on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

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. Tex. R. Civ. P. 192.5; 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 OAG explains the information in Exhibit B was created by OAG attorneys and staff "in anticipation of litigation against the requestor, a former professor. Because the OAG has demonstrated that Exhibit B was created in anticipation of litigation by its attorneys and staff, we conclude the OAG may withhold Exhibit B from disclosure under section 552.111 of the Government Code as attorney work product.

Next, we address the system's section 552.103 claim. Section 552.103 provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

The system asserts a professor sued two faculty members of the university, in their official capacities, for defamation, slander, and interference with the professor's employment contract with the university. However, the petition does not reflect that the two employees were sued in their official capacities. Furthermore, the system acknowledges that at the time the request was received, the two faculty members were nonsuited from the litigation. Upon review of the system's arguments and the submitted information, we find that the system failed to demonstrate that the university is a party to the remaining pending litigation.

The system also argues the university anticipates litigation because the requestor sent a letter to several university officials alleging harassment, discrimination, and being subjected to a hostile work environment. To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.⁵ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Here, the system has not shown that the requestor has taken any concrete steps toward litigation. Therefore, Exhibit C is not excepted from disclosure under section 552.103.

The system further contends some of the information is excepted from disclosure under section 552.107. Section 552.107(1) protects information that comes within the

⁵In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

attorney-client privilege. 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 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. See 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. See *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 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. See 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. See *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.

The system states the information for which it asserts the attorney-client privilege was given to the OAG in the course of the OAG’s representation of the university. The system reasons that because the university is the OAG’s client, the exchange of information did not waive the privilege. However, while the faculty members were represented by the OAG in the litigation and were clients of the OAG, they were not sued in their official capacities, and thus, the university was not the OAG’s client in this matter. We therefore conclude such an exchange waived the attorney-client privilege. See TEX. R. EVID. 511 (privilege waived if matter is voluntarily disclosed).

For the information that is not excepted under section 552.107, the system argues it is also protected as work product. Again, the system argues the information was prepared by the OAG in preparation of its defense of the university. However, the information was not prepared by the OAG, and as we stated above, the university was not the OAG’s client in the litigation at issue. Disclosure of the information by the system to the OAG waives the work product privilege. See TEX. R. EVID. 511 (privilege waived if matter is voluntarily

disclosed); *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 554 (Tex. 1990) (because privileged information was disclosed to Federal Bureau of Investigation, Internal Revenue Service, and *Wall Street Journal*, the attorney-client and work product privileges were waived). Furthermore, the work product privilege exists to protect the attorney by shielding his mental impressions, conclusions, opinions, and legal theories from discovery. *Hickman v. Taylor*, 329 U.S. 495, 511-12 (1947). If it were the OAG's work product, the OAG did not assert the privilege. Accordingly, the OAG may not withhold the information as work product under section 552.111.

Finally, the system asserts section 552.117 excepts from disclosure a professor's address. Section 552.117(a)(1) excepts from disclosure the home address of a current employee of a governmental body who timely requests that this information be kept confidential under section 552.024. We note, however, that the protection of section 552.117 only applies to information that the governmental body holds in its capacity as an employer. *See* Gov't Code § 552.117 (providing that employees of governmental entities may protect certain personal information in the hands of their employer); *see also* Gov't Code § 552.024 (establishing election process for Gov't Code § 552.117). In this instance, the submitted information is held by the OAG, which is not the professor's employer. Consequently, we find that the address is not excepted under section 552.117(a)(1).

Exhibit C contains information excepted under sections 552.136 and 552.147 of the Government Code. 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 OAG must, therefore, withhold the marked credit card number under section 552.136. Section 552.147 provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Public Information Act (the "Act"). The OAG has redacted a social security number pursuant to section 552.147(b), which authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. We have also marked a social security number the OAG must withhold under section 552.147.

In summary, the OAG may withhold Exhibit B under section 552.111 as work product and must withhold the marked credit card number under section 552.136 and a social security number under section 552.147. The OAG must release the remaining requested information.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/sdk

Ref: ID# 264189

Enc: Submitted documents

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