



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 8, 2006

Ms. Linda Meekins McLain  
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P. O. Box 208  
Navasota, Texas 77868

OR2006-04740

Dear Ms. McLain:

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# 248468.

Blinn College (the "college"), which you represent, received a request for all e-mails and memoranda containing the requestor's name. You state that the college has released some of the requested information. You claim that portions of the remaining requested information are excepted from disclosure under sections 552.101, 552.107, 552.111, 552.114, 552.117, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that you have submitted several documents that either do not include the requestor's name or were created after the date the request was received. These documents, which we have marked, are not responsive to the present request. See Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at the time request was received). This ruling does not address the public availability of information that is not responsive to the request, and the college need not release such information in response to the request. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information made confidential by other statutes. Gov't Code § 552.101. You

contend that portions of the submitted records are confidential under the Family Educational Rights and Privacy Act of 1974 (FERPA), section 1232g of title 20 of the United States Code. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). "Education records" are those records that contain information directly related to a student and 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). The majority of the submitted documents contain information directly related to the student requestor, and thus constitute education records of the requestor that are subject to FERPA.

Under FERPA, a student generally has an affirmative right of access to the student's own education records, although this right does not extend to information in the student's records that identifies other students. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3; *see also* 34 C.F.R. § 99.12(a) ("If the education records of a student contain information on more than one student, the parent or eligible student may inspect and review or be informed of only the specific information about that student."). The college asserts that many of the documents are excepted under the deliberative process privilege encompassed by section 552.111. The Act is a state statute that is preempted by federal law to the extent it conflicts with that federal law. *See, e.g., Equal Employment Opportunity Comm'n v. City of Orange*, 905 F. Supp 381, 382 (E.D. Tex. 1995); *see also* Open Records Decision No. 431 (1985) (when conflict arises between provisions of Act and FERPA, federal statute prevails). Therefore, the college may not withhold any information contained in the requestor's education records under the deliberative process privilege encompassed by section 552.111 of the Government Code. You also assert that many of these documents are excepted under section 552.107 and the work product privilege under section 552.111. The Family Policy Compliance Office of the United States Department of Education has informed this office that a student's right of access under FERPA to information about the student does not prevail over a governmental body's right to assert the attorney-client privilege or work product privilege. Therefore, we will address your claims that portions of requestor's education records are excepted from disclosure pursuant to section 552.107 of the Government Code and the work product privilege as encompassed by section 552.111 of the Government Code. The college has also submitted the education records of other students. Accordingly, we will address all of your claimed exceptions for this remaining submitted information.

Initially, we address the submitted education records of other students. Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 (1982), 206 (1978). The information at issue contains student-identifying information. We generally agree that the information you have marked must be withheld

pursuant to FERPA. We have also marked additional student-identifying information that must be withheld pursuant to FERPA. *See* Open Records Decision No. 224 (1979) (finding student's handwritten comments protected under FERPA because they make identity of student easily traceable through handwriting, style of expression, or particular incidents related).<sup>1</sup>

You also assert that section 552.135 of the Government Code applies to portions of the other students' education records. Section 552.135 provides, in relevant part:

(a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

Gov't Code § 552.135(a)-(b). However, by its terms, section 552.135 only applies to public school districts and not to colleges or universities. *See Ex Parte Torres*, 943 S.W. 2d 469 (Tex. Crim. App. 1997) (stating that if language of statute is not ambiguous, court must give effect to plain meaning of its words unless doing so would lead to absurd results). Accordingly, the college may not withhold any of the information it has marked under section 552.135.

We note, however, that portions of the education records of other students may contain information subject to section 552.117 of the Government Code. Section 552.117(a)(1) 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. Gov't Code § 552.117(a)(1). We note that section 552.117 also encompasses a personal cellular telephone number, provided that the cellular phone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 of the Government Code not applicable to cellular mobile phone numbers paid for by governmental body and intended for official use). 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). You do not state whether the employees at issue timely elected to withhold their personal information in accordance with section 552.024. Therefore, if the employees at issue timely elected to withhold their personal cellular phone numbers and family member information, you must withhold the

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<sup>1</sup>We have marked information pertaining to students that we could identify. However, should the college determine that additional students are identified in the submitted information, those students' identifying information must be withheld pursuant to FERPA.

information pursuant to section 552.117. If the employees at issue did not timely elect to withhold their personal information, the marked information must be released.

We now turn to the education records of the requestor. You assert that section 552.107 of the Government Code is applicable to a majority of these records. Section 552.107 protects information coming within the attorney-client privilege. Gov't Code § 552.107. 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. 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 Tex. 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. Tex. R. Evid. 503(b)(1)(A)-(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 indicate that the portions of information you have marked in the requestor's education records are either attorney-client communications or document an attorney-client communication. You also state that the information at issue was made in connection with the rendition of professional legal services. We understand that this information has remained confidential. Having considered your representations and reviewed the information at issue, we find that you have established that the information you have marked constitutes

privileged attorney-client communications. Thus, the information you have marked may be withheld pursuant to section 552.107 of the Government Code.

Finally, you raise the work product privilege as encompassed by section 552.111 of the Government Code for some of the requestor's education records. 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." 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). 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 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 1) 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 2) 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 college has not provided any arguments explaining how the information it has marked was prepared for trial or in anticipation of litigation. See Gov't Code § 552.301(e) (governmental body must provide comments explaining why exceptions raised should apply to information requested). Therefore, the college may not withhold the information at issue under section 552.111 as attorney work product.

In summary, the college must withhold the information we have marked under section 552.101 of the Government Code in conjunction with FERPA. The college must also withhold the information we have marked pursuant to section 552.117 of the Government

Code if the employees at issue timely elected to withhold such information under section 552.024 of the Government Code; if the employees at issue did not timely elect to withhold such information, it must be released. The college may withhold the information it has marked under section 552.107 of the Government Code. The remaining information 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, 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*, 342 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 Schless 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,

A handwritten signature in black ink that reads "Candice M. De La Garza". The signature is fluid and cursive, with the first letters of each word being capitalized and prominent.

Candice M. De La Garza  
Assistant Attorney General  
Open Records Division

CMD/krl

Ref: ID# 248468

Enc. Submitted documents

c: Ms. Carolyn Randall-Jaska  
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(w/o enclosures)