



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

October 30, 2007

Mr. Phillip A. McKinney  
Attorney for Coastal Bend College  
P.A. McKinney & Associates  
PO Box 2747  
Corpus Christi, Texas 78403

OR2007-14241

Dear Mr. McKinney:

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# 293127.

The Coastal Bend College District (the "college"), which you represent, received two requests from the same requestor for emails and memos written to or from a specified college employee from January 1, 2006 to August 10, 2007, as well as all information contained on a specific DVD. The requestor states that the college may redact social security numbers and telephone numbers.<sup>1</sup> You indicate that upon payment, you will provide the requestor with a portion of the requested information. You state that the remaining information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, 552.114, 552.117, 552.123, 555.130, 552.136, 552.137, and 552.139 of the Government Code.<sup>2</sup> We have considered the exceptions you raise and have reviewed the representative sample of

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<sup>1</sup>Any of this information within the requested documents is therefore non-responsive to the present requests. Our ruling does not address this non-responsive information, and the college need not release it in response to the requests. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed).

<sup>2</sup>Although you raise section 552.024 of the Government Code, we note that section 552.024 is not an exception to public disclosure under chapter 552 of the Government Code. Rather, this section permits a current or former official or employee of a governmental body to choose whether to allow public access to certain information relating to the current or former official or employee that is held by the employing governmental body. *See Gov't Code § 552.024*. The proper exception to raise in this instance is section 552.117 of the Government Code. Further, although you assert the attorney-client privilege exception and work product privilege exception under section 552.022 of the Government Code, section 552.022 provides a list of eighteen categories of information that are expressly public and may not be withheld unless confidential under other law. *See Gov't Code § 552.022*. Thus, section 552.022 is not an exception to disclosure. The proper exception to raise for the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107, as well as section 552.111 for the work product privilege. *See Open Records Decision No. 676 at 6 (2002)*. Thus, we will consider your arguments under these exceptions.

information you submitted.<sup>3</sup> We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA, section 1232g of title 20 of the United States Code, 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 purposes of our review in the open records ruling process under the Act. 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"). You contend that the requested information includes student records. Because our office is prohibited from reviewing education records, we will not address the applicability of FERPA to the information at issue. Such determinations under FERPA must be made by the educational authority in possession of the education record. Accordingly, we also do not address your arguments under section 552.114 of the Government Code. *See* Gov't Code §§ 552.026 (incorporating FERPA into the Act), .114 (excepting from disclosure "student records"); Open Records Decision No. 539 (1990) (determining the same analysis applies under section 552.114 of the Government Code and FERPA).

The college asserts that all of the requested documents must be withheld under section 552.103. Section 552.103 of the Government Code provides as follows:

(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.

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<sup>3</sup>We 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.

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 was 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).

You state, and provide documentation showing, that the college is currently involved in a lawsuit styled *In re Coastal Bend College*; Cause No. 07-04-45797, that was filed and is currently pending in the District Court of Jim Wells County, Texas, 79th Judicial District. Furthermore, the college is involved in a related lawsuit styled *Coastal Bend College District, et al vs. Anthony Sanders, et al*; Cause No. B-07-1257-CV-8, that was filed and is currently pending in the District Court of Bee County, Texas, 36<sup>th</sup> Judicial District. Based upon your representations and our review, we conclude that litigation was pending when the college received the request. Additionally, after review of your arguments and the information at issue, we conclude that information created prior to the date of the backup of the DVD, which we have marked, is related to the pending litigation and therefore may be withheld under section 552.103 of the Government Code. Furthermore, we determine that Exhibit 9 may also be withheld under this section.<sup>4</sup> However, you have not established that the remaining information is related to pending litigation involving the college. Therefore, the college may not withhold any of the remaining information under section 552.103 of the Government Code.

We note, however, that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103 interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note that section 552.103 is no longer applicable to this information once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

The college argues that a portion of the remaining information is a confidential attorney-client communication. Section 552.107 of the Government Code 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).

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<sup>4</sup>As our ruling is dispositive, we need not consider your remaining claimed arguments against the disclosure of this information.

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 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). Having considered your representations and reviewed the information at issue, we find that you have established that a portion of the submitted information constitutes a privileged attorney-client communication. Thus, the college may withhold the documents we have marked pursuant to section 552.107 of the Government Code.

Finally, the college argues that the remaining information contains identifying information of applicants for the position of the college president, which must be withheld. Section 552.123 of the Government Code excepts from required public disclosure the “name of an applicant for the position of chief executive officer of an institution of higher education . . . except that the governing body of the institution must give public notice of the name or names of the finalists being considered for the position at least 21 days before the date of the meeting at which final action or vote is to be taken on the employment of the person.” *See Gov’t Code* § 552.123.

The college is an institution of higher education. *See, e.g.*, Educ. Code §61.003. You inform us that the president is the “chief executive officer” and is appointed by the college’s board of trustees in accordance with section 85.17(b) of the Education Code. You have marked

information that you assert identifies the unsuccessful candidates for the college's presidency and that you seek to withhold under section 552.123. Based on your representations and our review of the information, we conclude that, pursuant to section 552.123 of the Government Code, you may withhold the information that we have marked as identifying the unsuccessful candidates for the presidency. *See* Open Records Decision No. 540 (1990).

In summary, this ruling does not address the applicability of FERPA to the requested information. Should the college determine that all or portions of those documents consist of "education records" that must be withheld under FERPA, the college must dispose of that information in accordance with FERPA, rather than the Act. The college may withhold information we have marked under section 552.103 of the Government Code as it relates to pending litigation. The college may also withhold the attorney-client communications we have marked under section 552.107 of the Government Code. Finally, under section 552.123 of the Government Code, the college may withhold the information that we have marked as identifying the unsuccessful candidates for president of the college. 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, 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,

A handwritten signature in cursive script that reads "C. Chantaplin-McLelland".

Chanita Chantaplin-McLelland  
Assistant Attorney General  
Open Records Division

CC/jb

Ref: ID#293127

Enc. Submitted documents

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