

The ruling you have requested has been modified pursuant to a court order. The court judgment has been attached to this document.



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 11, 2008

Mr. William Christian  
Attorney for the Del Mar College District  
Graves, Dougherty, Hearon & Moody  
P.O. Box 98  
Austin, Texas 78767

OR2008-07993

Dear Mr. Christian:

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# 312697.

The Del Mar College District (the "college"), which you represent, received a request for all documents related to any complaints, grievances, charges, and lawsuits involving a named employee of the college from June 2004 to March 24, 2008. You inform us that the college has released some of the requested information. You claim that the remaining information is excepted from disclosure under section 552.103 of the Government Code and privileged under rules 192.3 and 192.5 of the Texas Rules of Civil Procedure and rule 503 of the Texas Rules of Evidence.<sup>1</sup> We have considered your arguments and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, we note that you have redacted portions of the information in Exhibit 1(B). Pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue. Gov't Code §§ 552.301(a), .301(e)(1)(D). You do not assert, nor does our review of the records indicate, that you have been authorized to withhold any of the redacted information without seeking

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<sup>1</sup>We note that this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2, 575 at 2 (1990).

<sup>2</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.

a ruling from this office. *See id.* § 552.301(a); Open Records Decision 673 (2000). As such, these types of information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. In this instance, we can discern the nature of the redacted information; thus, being deprived of that information does not inhibit our ability to make a ruling. In the future, however, the college should refrain from redacting any information it submits to this office in seeking an open records ruling.

You inform us that some of the responsive information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2008-02231 (2008). Additionally, we note that some of the requested information may be subject to Open Records Letter Nos. 2007-12989 (2007) and 2007-02029 (2007). To the extent the pertinent facts and circumstances have not changed since the issuance of these rulings, the college may continue to rely on Open Records Letter Nos. 2008-02231, 2007-12989, and 2007-02029 for the information that was at issue in these prior rulings. *See* Open Records Decision No. 673 (2001) (governmental body may rely on prior ruling as a previous determination when (1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D); (2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; (3) the prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and (4) the law, facts, and circumstances on which the prior ruling was based have not changed since the issuance of the ruling). To the extent the submitted information is not the same as the information previously ruled upon, we will address your submitted arguments.

Next, we note that the submitted information falls within the scope of section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body.” Gov’t Code § 552.022(a)(1). Thus, because the information at issue consists of records of a completed investigation, it must be released, unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. *Id.* You do not claim an exception to disclosure under section 552.108. Although you raise section 552.103 of the Government Code, this exception is discretionary and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App. – Dallas 1999, no pet.) (governmental body may waive Gov’t Code § 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not “other law” that makes information confidential for the purposes of section 552.022. Therefore, the college may not withhold any of the submitted information under this exception.

The Texas Supreme Court has held, however, that the Texas Rules of Evidence and the Texas Rules of Civil Procedure are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider

your arguments under Texas Rule of Evidence 503 and Texas Rules of Civil Procedure 192.3(e) and 192.5.

Texas Rule of Evidence 503 enacts the attorney-client privilege and provides in part:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if 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).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1993, no writ).

You contend that the information submitted in Exhibit 1(D) is protected by the attorney-client privilege. You state that this information consists of communications between lawyers representing the college that were made for the purpose of facilitating the

rendition of professional legal services to the college. You state that those communications remain confidential. Upon review of the information at issue, we find that the information we have marked in Exhibit 1(D) may be withheld under rule 503. You have not demonstrated, however, that the remaining information in Exhibit 1(D) constitutes a communication between privileged parties, and therefore the college may not withhold this letter under rule 503 of the Texas Rules of Evidence.

The consulting expert privilege, found in rule 192.3(e) of the Texas Rules of Civil Procedure, provides that a party to litigation is not required to disclose the identity, mental impressions, and opinions of consulting experts whose mental impressions or opinions have not been reviewed by a testifying expert. *See* TEX. R. CIV. P. 192.3(e). A "consulting expert" is defined as "an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert." TEX. R. CIV. P. 192.7.

You inform us that the college contracted for services from an expert consultant in connection with prior litigation involving the college. You state that the information submitted in Exhibit 1(A) consists of the expert consultant's report to the college. You also state that this expert was never designated as a testifying expert. Further, you state that the consultant's identity and report have not been shared with any outside party. Based on your representations and our review, we find that the information in Exhibit 1(A) and portions of the information in Exhibits 1(B) and 1(C) are confidential under Rule 192.3(e). We therefore conclude that the college may withhold the report in Exhibit 1(A) and the additional information we have marked in Exhibits 1(B) and 1(C) pursuant to Rule 192.3(e) of the Texas Rules of Civil Procedure. However, none of the remaining information may be withheld on this basis.

Next, rule 192.5 of the Texas Rules of Civil Procedure encompasses the attorney work product privilege. For the purposes of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent that the information implicates the core work product aspect of the work product privilege. *See* Open Records Decision 677 at 9-10 (2002). Rule 192.5 defines core work product as the work product of an attorney or an attorney's representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney's representative. *See* TEX. R. CIV. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate that the material was (1) created for trial or in anticipation of litigation and (2) consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *Id.*

The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate 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 conducted the investigation for the purpose of preparing for such litigation. *See Nat'l Tank 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. The second part of the work product test requires the governmental body to show that the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney's or an attorney's representative. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both parts of the work product test is confidential under rule 192.5, provided that the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp.*, 861 S.W.2d at 427.

You contend that the remaining submitted information constitutes attorney work product. You state that Exhibit 1(B) consists of documents generated by the college in connection with the expert consultant's report. You state that Exhibit 1(C) consists of communications between the expert consultant and the college regarding the report. You state that Exhibit 1(D) consists of communications between counsel in the prior litigation and the college's attorney. You have not demonstrated, however, that any of the information at issue consists of the mental impressions, opinions, conclusions, or legal theories of an attorney's or an attorney's representative. Therefore, none of the remaining submitted information may be withheld under rule 192.5 of the Texas Rules of Civil Procedure.

In summary, to the extent the pertinent facts and circumstances have not changed since the issuance of these rulings, the college may continue to rely on Open Records Letter Nos. 2008-02231, 2007-12989, and 2007-02029 for the information that was at issue in these prior rulings. The college may withhold the information we have marked in Exhibit 1(D) under rule 503 of the Texas Rules of Evidence. The college may also withhold the consulting expert's report in Exhibit 1(A) and the additional information we have marked in Exhibits 1(B) and 1(C) pursuant to Rule 192.3(e) of the Texas Rules of Civil Procedure. 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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,



Katherine M. Kroll  
Assistant Attorney General  
Open Records Division

KMK/eeg

Ref: ID# 312697

Enc. Submitted documents

CAUSE NO. D-1-GN-08-002066

DEL MAR COLLEGE DISTRICT,  
Plaintiff,

V.

GREG ABBOTT, ATTORNEY GENERAL  
OF TEXAS,  
Defendant.

§ IN THE DISTRICT COURT OF  
§  
§  
§ TRAVIS COUNTY, TEXAS  
§  
§  
§ 345<sup>TH</sup> JUDICIAL DISTRICT

Filed in The District Court  
of Travis County, Texas

JL FEB 27 2009  
At 9:13 A.M.  
Amalia Rodriguez-Mendoza, Clerk

**AGREED FINAL JUDGMENT**

On this date, the Court heard the parties' motion for agreed final judgment. Plaintiff, Del Mar College District, and Defendant, Greg Abbott, Attorney General of Texas, appeared by and through their respective attorneys and announced to the court that all matters of fact and things in controversy between them had been fully and finally compromised and settled. The requestor, Bruce Olson, did not appear. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code Ann. ch. 552 (West 2004 & Supp. 2008). The parties represent to the Court that, in compliance with Tex. Gov't Code § 552.325(c), (1) the requestor was sent reasonable notice of this setting and of the parties' agreement that the District may withhold the information at issue, and (2) the requestor was also informed of his right to intervene in the suit to contest the withholding of this information. Although the requestor initially filed a letter stating his intent to intervene, the requestor has since stated, in writing, that he does not wish to intervene or contest the Motion for Agreed Judgment. After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. The descriptions, or parts thereof, in the fee bills received by the District and responsive to Mr. Olson's March 11, 2008 request for information, as marked by the Office of the

Attorney General, are confidential under Tex. R. Evid. 503.

2. The consulting expert materials in the District's Exhibit 1 to the District's April 14, 2008 letter to the Chief, Open Records Division, OAG, are confidential under Tex. R. Evid. 503 (Exhibit 1(D)) or Tex. R. Civ. P. 192.3(e) (remaining parts of Exhibit 1).

3. The District may redact the descriptions, or parts thereof, in the attorney fee bills as enumerated in ¶ 1 of Agreed Final Judgment, along with any other information in the attorney fee bills that the Attorney General determined was excepted from disclosure in OR2008-06518. The District may withhold Exhibit 1 in its entirety.

4. If it has not already done so, the District shall disclose the attorney fee bills, with the information described in ¶ 1 of this Agreed Final Judgment redacted, to the requestor, promptly upon receipt by the District of an agreed final judgment signed by the Court.

5. All costs of court are taxed against the parties incurring the same;

6. All relief not expressly granted is denied; and

7. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendant and is a final judgment.

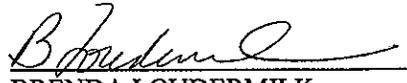
SIGNED this the 27<sup>th</sup> day of February, 2009.

  
\_\_\_\_\_  
PRESIDING JUDGE

APPROVED:



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