



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 13, 2008

Mr. Scott A. Kelly
Deputy General Counsel
The Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845-3424

OR2008-11029

Dear Mr. Kelly:

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# 318962.

The Texas A&M University System (the "system") received a request for several categories of information including: (1) all final audit reports sent to Texas A&M University Corpus Christi ("TAMU-CC") from 2005 to the present which deal with intercollegiate athletics; (2) all notes and reports from meetings during and regarding the most recent NCAA audit at TAMU-CC; (3) all notes and reports from investigations regarding a named individual; (4) all notes from interview of four TAMU-CC coaches done by auditors during the most recent audit; (5) all correspondence from the system's chancellor office to a named individual; and (6) all correspondence from the system's chancellor's office to a named individual regarding the intercollegiate athletics program. You state that the system has redacted some of the responsive information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You state that you will provide the requestor access to the information requested in item (1), copies of the final audit reports in Exhibits C and D. You also state that you will provide the requestor access to a portion of the information requested in items (5) and (6). You claim that the information

¹Because 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 information.

requested in items (2), (3), and (4) is excepted to disclosure in its entirety under section 552.116 of the Government Code. You also claim that portions of the information requested in items (5) and (6) are excepted from disclosure under sections 552.107, 552.111, and 552.116 of the Government Code. You further state that portions of the submitted information are excepted from disclosure under sections 552.117, 552.130, 552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.²

Initially, we will address the system's claim that the request for information should be considered received by the university on June 9, 2008. You state, and provide documentation showing, that the system received the initial request for information on May 14, 2008. On May 29, 2008, you sent the requestor an itemized cost estimate and requested a deposit from the requestor prior to processing the request. On that same day, the requestor amended her request to receive access to the records instead of copies and requested a revised cost estimate. The revised cost estimate and deposit request was sent to the requestor on May 30, 2008. Because the system's estimated cost to process the request was over \$100, the system explains that it required the requestor to make a deposit for payment of the anticipated costs in accordance with section 552.263 of the Government Code. Section 552.263(a) provides in relevant part that a governmental body "may require a deposit or bond for payment of anticipated costs . . . if [the governmental body] has provided the requestor with the required *written itemized statement* detailing the estimated charge for providing the copy and if the charge" is estimated to exceed \$100, if the governmental body has more than 15 full-time employees or \$50, if the governmental body has fewer than 16 full-time employees. Gov't Code § 552.263(a) (emphasis added). Further, section 552.263(e) of the Government Code provides that a request for a copy of public information is considered to have been received by a governmental body on the date the governmental body receives the deposit or bond for payment of anticipated costs. *See* Gov't Code § 552.263(e). The system informs us, and provides documentation showing, that on June 5, 2008, the requestor accepted the revised cost estimate and sent in the requested deposit, which the system received on June 9, 2008. Thus, pursuant to section 552.263(e), June 9, 2008 is the date the system received the request for the purposes of section 552.301. Accordingly, the system's ten-business-day deadline was June 23, 2008 and the system's fifteen-business-day deadline was June 30, 2008. The system's request for a ruling was postmarked June 10, 2008 and the system's arguments stating why the stated exceptions apply and the specific information responsive to the request was postmarked June 30, 2008. Therefore, we find that the system's request for a ruling was timely. *See* Gov't Code §§ 552.301(b), (e); .263.

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.

Section 552.116 of the Government Code provides as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You inform us that the submitted documents in Exhibits C-1, C-2, D-1, E-1, and E-2 consist of audit working papers of audits that were conducted by the system's Internal Audit Department and that "were prepared and maintained by System auditors in the course of conducting and preparing the yearly NCAA review and API# 28159581." You also explain that this audit was authorized by the Internal Auditing Act, chapter 2102 of the Texas Government Code. *See id.* § 2102.005 (requiring state agencies to conduct internal audit programs); *see also id.* § 2102.003 (defining types of audits). Based on your representations and our review of the information submitted in Exhibits C-1, C-2, D-1, E-1, and E2, we agree that this information consists of audit working

papers that the system may withhold under section 552.116 of the Government Code.³ See *id.* § 552.116(b)(2).

You assert that portions of the information submitted in Exhibit B are excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) protects information coming within the attorney-client privilege. When asserting the attorney-client privilege under section 552.107, 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 contend that the information you have marked in Exhibit B consists of correspondence between system attorneys and TAMU-CC personnel made for the purpose of providing legal

³As our ruling is dispositive for the information in Exhibits C-1, C-2, D-1, E-1, and E-2, we need not address your remaining arguments for this information.

advice and counsel regarding various personnel matters related to the TAMU-CC athletic department including various audits and investigations. You have identified the parties to the communications. You state that these communications were intended to be confidential, and that confidentiality has been maintained. Based on your representations and our review of the information at issue, we agree that portions of the information in Exhibit B are protected by the attorney-client privilege. Accordingly, the system may withhold the submitted e-mails and their attachments that we have marked in Exhibit B pursuant to section 552.107 of the Government Code.⁴

Finally, you assert that the remaining information submitted in Exhibit B is excepted from disclosure pursuant to section 552.111 of the Government Code. Section 552.111 encompasses the attorney work product privilege found at rule 192.5 of the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 192.5; *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 attorney work product as consisting of:

(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 governmental body that seeks to withhold information on the basis of the attorney work product privilege under section 552.111 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. *See id.*; Open Records Decision No. 677 at 6-8. In order for this office to conclude that information was created 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.

⁴As our ruling is dispositive for this information, we need not address your 552.111 claim for this information.

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; Open Records Decision No. 677 at 7.

You state that the information you have marked in Exhibit B consists of materials prepared in anticipation of litigation "during the audit of the TAMU-CC athletic department and the investigation of various personnel issues." You state that "in the course of these activities . . . TAMU-CC's associate compliance officer, was terminated" and that the former employee "in turn, filed a formal complaint, which is currently under investigation." You state that the former employee has retained counsel, and you state that you have attached correspondence from his attorneys as evidence that litigation is reasonably anticipated." We reviewed the attached correspondence, and find that a portion of the remaining information in Exhibit B contains information that was prepared by a party's representatives in anticipation of this litigation. Therefore, the system may withhold the information we have marked in Exhibit B under section 552.111 of the Government Code as attorney work product. The remaining submitted information in Exhibit B must be released to the requestor.

In summary, the system may withhold the information submitted in Exhibits C-1, C-2, D-1, E-1, and E-2 under section 552.116 of the Government Code. The system may withhold the information we have marked in Exhibit B under section 552.107(1) of the Government Code. The system may withhold the information we have marked in Exhibit B under section 552.111 of the Government Code. The remaining submitted 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). If the governmental body does not file suit over 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,



Jessica J. Maloney
Assistant Attorney General
Open Records Division

JJM/jh

Ref: ID# 318962

Enc. Submitted documents

c: Ms. Deborah Secord
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(w/o enclosures)