ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 4, 2010

Mr. William Christian
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Attorney for Del Mar College District
P.O. Box 98
Austin, Texas 78767

OR2010-06373

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# 377991.

The Del Mar College District (the "college"), which you represent, received fourteen requests from the same requestor for billing and other cost information pertaining to specified litigation against the college, as well as documents and correspondence pertaining to the requestor and several named college employees. You represent the college does not possess or have access to the personal billing records of the individual employees at issue.[1] You state the college has redacted student-identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g.[2] You also state you will release some of the requested information to the requestor. You claim portions of the submitted information are excepted from disclosure under sections 552.103 and 552.107 of the

[1]The Act does not require a governmental body to disclose information that did not exist when the request for information was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.App.–San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986).

[2]The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA 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. The DOE has determined that FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: http://www.oag.state.tx.us/open/20060725usdoe.pdf.

Government Code and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the submitted representative sample of information.[3]

Initially, you inform us that some of the requested information was the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2008-02231 (2008) and 2010-02872 (2010). With regard to information in the current requests that is identical to the information previously requested and ruled upon by this office, we conclude that, as we have no indication that the law, facts, and circumstances on which the prior rulings were based have changed, the college must continue to rely on Open Records Letter Nos. 2008-02231 and 2010-02872 as previous determinations and withhold or release the identical information in accordance with those rulings. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Additionally, you inform us that some of the information responsive to several of the current requests is identical to the information previously requested and ruled upon in Open Records Letter No. 2008-06518 (2008). You state, and provide documentation showing, that this ruling was subsequently modified on appeal by an Agreed Final Judgment in *Del Mar College District v. Abbott*, Cause No. D-1-GN-08-002066 (345th Dist. Ct., Travis County, Tex. Feb. 27, 2009). With regard to the information in the current requests that is identical to the information previously requested and ruled upon in Open Records Letter No. 2008-06518, the college must rely on the Agreed Final Judgment to withhold or release the information at issue. To the extent the submitted information is not encompassed by the previous rulings and Agreed Final Judgment, we will address the submitted arguments.

Next, we note, and you acknowledge, that portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022(a) provides in part that:

> (a) [T]he following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:
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> > (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body; [and]

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[3]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.

...

> (16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(3), (16). In this instance, we note the entirety of Exhibits 6, 7, 10, and 11 consist of either information in an account, voucher, or contract relating to the expenditure of public funds by the college or attorney fee bills. Although you seek to withhold this information under section 552.103 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See 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 section 552.103); Open Records Decision No. 665 at 2 n. 5 (2000) (discretionary exceptions in general). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022, and the college may not withhold any of the information subject to section 552.022 under that exception. The Texas Supreme Court has held 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). We will therefore consider your arguments for Exhibits 6, 7, 10, and 11 under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure. We will also consider your arguments under sections 552.103 and 552.107 for the remaining information not subject to section 552.022.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

> 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:
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> (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
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> (B) between the lawyer and the lawyer's representative;
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> (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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state that portions of the submitted attorney fee bills, which you have marked, document communications between attorneys for the college, college employees, and representatives of a liability insurance carrier. You explain some of the referenced communications concern matters for which the insurance carrier hired the attorneys to defend the college. Thus, we understand you argue the insurance carrier shares a common interest with the college concerning the matters addressed in some of the submitted attorney fee bills. *See* TEX. R. EVID. 503(b)(1)(C) (client has privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for purpose of facilitating rendition of professional legal services to lawyer or representative of lawyer representing another party in pending action and concerning a matter *of common interest* therein) (emphasis added). You state the communications at issue were made for the purpose of facilitating the rendition of professional legal services to the college. Further, you state that the submitted fee bills were intended to be confidential and have maintained their confidentiality. Upon review of the submitted attorney fee bills, we agree that most of the information at issue is protected by the attorney-client privilege. However, we find that the college has failed to demonstrate how the remaining information you have marked is protected by the attorney-client privilege. Accordingly, except for the information we have marked for release, the college may withhold the information you have marked in the submitted attorney fee bills pursuant to Texas Rule of Evidence 503.

We next address your argument under Texas Rule of Civil Procedure 192.5 for the remaining information you seek to withhold within the submitted attorney fee bills. Rule 192.5 encompasses the attorney work product privilege. Information is confidential under rule 192.5 of the Texas Rules of Civil Procedure only to the extent the information implicates the core work product aspect of the work product privilege. Open Records Decision No. 677 at 9-10 (2002). Core work product is defined as the work product of an attorney or an attorney's representative developed in anticipation of litigation or for trial that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or

legal theories. 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 an attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *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 prong of the work product test requires the governmental body to show that the documents at issue contain the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test is confidential under rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in rule 192.5(c). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You contend that the remaining information you have marked in the submitted attorney fee bills consist of attorney work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. Upon review of submitted arguments and the information at issue, we find you have failed to establish that the remaining information at issue consists of core work product for purposes of Texas Rule of Civil Procedure 192.5. Thus, the college may not withhold any of the remaining information under rule 192.5.

We note portions of the remaining information in Exhibit 6 are subject to sections 552.136 and 552.137 of the Government Code.[4] Section 552.136 provides 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. Accordingly, the college must withhold the bank account and routing numbers we have marked in Exhibit 6 pursuant to section 552.136 of the Government Code.

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[4]The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). The e-mail address we have marked in Exhibit 6 is not specifically excluded by section 552.137(c). Therefore, unless the owner consents to the release of her e-mail address, the college must withhold the e-mail address we have marked in Exhibit 6 under section 552.137.

We next address your arguments for the information that is not subject to section 552.022. Section 552.103 of the Government Code provides in pertinent 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.
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> ...
>
> (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). The 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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* 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. 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).

In this instance, you assert that the information not subject to section 552.022 should be excepted from disclosure under section 552.103 because the college reasonably anticipated litigation with the requestor on the date the present requests were received. You state, and provide documentation showing, that prior to the date of the present requests, the requestor threatened suit against the college if the college did not take action on his complaint. However, as noted above, a threat of litigation without any objective steps toward filing suit is not sufficient to establish anticipated litigation. You have not provided this office with evidence any objective steps had been taken by the requestor toward filing a lawsuit against the college prior to the date the college received the request for information. *See* Gov't Code § 552.301(e); ORD 331. Therefore, we find you have not established litigation was reasonably anticipated on the date the college received the request for information. Accordingly, the college may not withhold any portion of the remaining information at issue under section 552.103 of the Government Code.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. The elements of the privilege under section 552.107 are the same as those discussed for rule 503. 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 state Exhibits 3 and 4 consist of confidential communications between two representatives of the college and attorneys for the college made for the purpose of rendering professional legal services to the college. You further inform us that the communications were intended to be and have remained confidential. Based on your representations and our review, we agree that Exhibits 3 and 4 constitute privileged attorney client communications that you may generally withhold under section 552.107. We note, however, one of the individual e-mails contained in the submitted e-mail strings in Exhibit 4 consists of a communication with a non-privileged party. We have marked this non-privileged e-mail. To the extent this non-privileged e-mail exists separate and apart from the submitted e-mail strings, it may not be withheld under section 552.107 of the Government Code.

In summary, with regard to information in the current requests that is identical to the information previously requested and ruled upon by this office, the college must continue to rely on Open Records Letter Nos. 2008-02231 and 2010-02872 as previous determinations and withhold or release the identical information in accordance with those rulings. The college also must rely on the Agreed Final Judgment that was issued as a result of Open Records Letter No. 2008-06518, to withhold or release the identical information in accordance with that agreement. With the exception of the information we marked for release, the college may withhold the remaining information you marked in the submitted

attorney fee bills under Texas Rule of Evidence 503. The college must withhold the information we have marked in Exhibit 6 under section 552.136 of the Government Code and the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the e-mail address has consented to its release.[5] The college may generally withhold Exhibits 3 and 4 under section 552.107 of the Government Code. However, to the extent the e-mail we have marked exists separate and apart from the e-mail strings, the non-privileged e-mail must be released. The remaining information must be released to the requestor.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

Adam Leiber
Assistant Attorney General
Open Records Division

ACL/rl

Ref: ID# 377536

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

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[5]We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including bank account and routing numbers under section 552.136 and an e-mail address of a member of the public under section 552.137, without the necessity of requesting an attorney general decision.