



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 2, 2010

Ms. Lisa A. Brown  
Thompson & Horton LLP  
711 Louisiana Street, Suite 2100  
Houston, Texas 77002-2746

OR2010-07948

Dear Ms. Brown:

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# 381412.

Brazosport College (the "college"), which you represent, received a request for (1) all documents, including e-mails, in relation to the requestor's client's placement on administrative leave; (2) complaints, grievances, write-ups, reprimands, directives, professional improvement plans or professional growth plans, awards, commendations, media reports, employment contracts, salary and assignment information, and appraisals and evaluations issued to or pertaining to the requestor's client from August 1, 2007 to the date of the request; and (3) college policies and administrative procedures pertaining to placing an employee on administrative leave, dismissing the employee, and hearings regarding the same. You state the college has released some information to the requestor. You claim portions of the submitted information are excepted from disclosure under sections 552.101,

552.107, and 552.111 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note a portion of Exhibit G, which we have marked, is not responsive to the instant request as it was created after the date the request was received. This ruling does not address the public availability of non-responsive information, and the college is not required to release non-responsive information in response to this request.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. 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. ORD 676 at 6-7. First, a governmental body must demonstrate 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 a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). 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 pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a

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<sup>1</sup>Although you also raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, rule 192.5 of the Texas Rules of Civil Procedure, rule 26(b)(3) of the Federal Rules of Civil Procedure, and rule 1.05 of the Texas Disciplinary Rules of Professional Conduct, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Thus, we will not address your claim the submitted information is confidential under section 552.101 in conjunction with any of these rules. Accordingly, we will address your attorney-client and attorney work product privilege claims under sections 552.107 and 552.111 of the Government Code, respectively. *See* Open Records Decision Nos. 677 (2002), 676 at 6. Further, although you raise section 552.022 of the Government Code, that provision is not an exception to disclosure. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are expressly confidential under other law. *See* Gov't Code § 552.022.

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 state Exhibits A through M-16, N through Q-3, and the information you highlighted in pink in Exhibits M-17 and M-18 constitute communications or document communications made between the college's attorney and college employees for the purpose of providing legal services to the college. You have identified all parties to the communications. You indicate these communications were made in confidence and have maintained their confidentiality. Based on your representations and our review, we find the college may withhold Exhibits A through M-16, N through Q-3, and the information you highlighted in pink in Exhibits M-17 and M-18 under section 552.107.<sup>2</sup>

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. This office has found medical information or information indicating disabilities or specific illnesses is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find the information we marked in Exhibit R is highly intimate or embarrassing and of no legitimate public interest. Therefore, the college must withhold the information we marked in Exhibit R under section 552.101 in conjunction with common-law privacy. However, we find the remaining information you marked in Exhibit R and the information you marked in Exhibit S do not contain highly intimate or embarrassing facts; thus, the college may not withhold any of the remaining information under section 552.101 on the basis of common-law privacy.

In summary, the college may withhold Exhibits A through M-16, N through Q-3, and the information you highlighted in pink in Exhibits M-17 and M-18 under section 552.107 of the Government Code. The college must withhold the information we marked in Exhibit R under section 552.101 of the Government Code in conjunction with common-law privacy. The remaining information must be released.

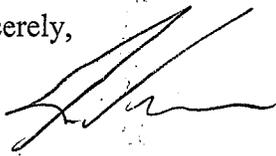
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<sup>2</sup>As our ruling is dispositive for this information, we do not address your remaining argument against disclosure of portions of this information.

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](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,



Ana Carolina Vieira  
Assistant Attorney General  
Open Records Division

ACV/eeg

Ref: ID# 381412

Enc. Submitted documents

c: Requestor  
(w/o enclosures)