



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 22, 2010

Ms. Destinee Waiters  
Assistant General Counsel  
Houston Community College  
3100 Main Street  
Houston, Texas 77002

OR2010-17613

Dear Ms. Waiters:

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# 400996.

The Houston Community College (the "college") received a request for any reports from the Office of Systemwide Compliance and any internal or external investigations or fact inquiries involving five named individuals. You state you have no responsive information regarding portions of the request.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.111, and 552.135 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5.<sup>2</sup> We have considered your arguments and reviewed the submitted information.

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<sup>1</sup>The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

<sup>2</sup>Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure, this office has concluded that section 552.101 does not encompass discovery privileges. See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

Initially, we note Exhibit B is subject to section 552.022 of the Government Code, which provides in part:

[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:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[.]

Gov't Code § 552.022(a)(1). In this instance, Exhibit B is a completed report, which is made expressly public by section 552.022(a)(1) of the Government Code. You claim this information is excepted from disclosure under section 552.111 of the Government Code. However, this section is a discretionary exception that protects a governmental body's interests and is, therefore, not "other law" for purposes of section 552.022. *See id.* § 552.007; Open Records Decision Nos. 677 at 10-11 (2002) (attorney work-product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (governmental body may waive section 552.111), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111 deliberative process). As such, section 552.111 is not other law that makes information expressly confidential for the purposes of section 552.022, and the information at issue may not be withheld under this section. You also seek to withhold Exhibit B under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court has held the Texas Rules of Evidence and 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 assertions of the attorney-client privilege under rule 503 of the Texas Rules of Evidence, and the attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure for Exhibit B.

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:

- (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 it is 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 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 the communication is confidential by explaining it was not intended to be disclosed to third persons and 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 assert Exhibit B constitutes a privileged attorney-client communication between attorneys for the college and college officials. You explain the communication was made for the purpose of facilitating the rendition of professional legal services to the college. You also state the communication was made in confidence, and that confidentiality has been maintained. Based on your representations and our review, we find the college has established Exhibit B is protected by the attorney-client privilege. Thus, the college may withhold Exhibit B pursuant to rule 503 of the Texas Rules of Evidence.<sup>3</sup>

Next, we address your arguments against disclosure of the remaining information, which is not subject to section 552.022 of the Government Code. 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 exception encompasses information other statutes make confidential. You raise

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

section 552.101 in conjunction with section 51.971 of the Education Code, which provides in part:

(a) In this section:

(1) "Compliance program" means a process to assess and ensure compliance by the officers and employees of an institution of higher education with applicable laws, rules, regulations, and policies, including matters of:

(A) ethics and standards of conduct;

(B) financial reporting;

(C) internal accounting controls; or

(D) auditing.

...

(c) The following are confidential:

(1) information that directly or indirectly reveals the identity of an individual who made a report to the compliance program office of an institution of higher education, sought guidance from the office, or participated in an investigation conducted under the compliance program; and

(2) information that directly or indirectly reveals the identity of an individual as a person who is alleged to have or may have planned, initiated, or participated in activities that are the subject of a report made to the compliance program office of an institution of higher education if, after completing an investigation, the office determines the report to be unsubstantiated or without merit.

(d) Subsection (c) does not apply to information related to an individual who consents to disclosure of the information.

Educ. Code § 51.971(a), (c), (d). You seek to withhold Exhibit C and D under section 552.101 in conjunction with section 51.971(c) of the Education Code. You state Exhibit C relates to a completed compliance investigation involving a former college trustee. You inform us that the allegations at issue in Exhibit C were found to be unsubstantiated. You state Exhibit D relates to a separate compliance investigation, involving complaints

made by a college employee. You explain the investigation at issue in Exhibit D remains open. Upon review, we agree Exhibits C and D relate to the college's administrative investigations for purposes of section 51.971. *See* Educ. Code § 51.971(a). Additionally, we understand that none of the individuals involved in these reports as complainants or participants have consented to the release of their information. *See id.* § 51.971(d).

Upon review, we have marked the identifying information the college must withhold under section 552.101 of the Government Code in conjunction with section 51.971(c)(2) of the Education Code in Exhibit C and the identifying information that must be withheld under section 552.101 in conjunction with section 51.971(c)(1) in Exhibit D. However, you have failed to demonstrate how the remaining information at issue is confidential under section 51.971(c), and none of the remaining may be withheld on this basis.

Next, you assert the remaining portions of Exhibit C are excepted from disclosure under section 552.111. Section 552.111 of the Government Code encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *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 work product as:

- (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 seeking to withhold information under this exception 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. TEX. R. CIV. P. 192.5; ORD 677 at 6-8. In order for this office to conclude that the information was made 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.

*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; ORD 677 at 7.

You state Exhibit C consists of a communication that is attorney work product and should be withheld from disclosure. Upon review, however, we find you have failed to demonstrate the information at issue consists of material prepared or mental impressions developed in anticipation of litigation or for trial by a party or a representative of a party. Accordingly, the college may not withhold any of the information at issue under the work product privilege of section 552.111.

We also understand you to assert the remaining portions of Exhibit C are excepted from disclosure under the deliberative privilege process encompassed by section 552.111 of the Government Code, which excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. Section 552.111 also encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. But, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

You state the remaining information in Exhibit C includes the mental impressions of college employees based on opinion regarding compliance issues regarding a potential conflict of interests. Upon review, we agree a portion of the information at issue contains advice, opinions, and recommendations related to policymaking. Accordingly, the college may withhold the information we have marked under the deliberative process privilege of section 552.111. However, we find the remaining information at issue concerns administrative and personnel matters that do not rise to the level of policymaking in this instance. Accordingly, the college may not withhold any of the remaining information at issue under deliberative process privilege of section 552.111 of the Government Code.

Next, we address your argument under section 552.135 of the Government Code, which provides, in relevant part:

(a) "Informer" means a student or a former student or an employee or former employee of a school district who has furnished a report of another person's possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

Gov't Code § 552.135(a)-(b). You assert some of the remaining information in Exhibit D is excepted from disclosure under section 552.135. By its terms, however, section 552.135 applies to only public school districts and not to colleges or universities. *See Ex Parte Torres*, 943 S.W. 2d 469 (Tex. Crim. App. 1997) (stating if language of statute is not ambiguous, court must give effect to plain meaning of its words unless doing so would lead to absurd results). Accordingly, the college may not withhold any of the remaining information under section 552.135 of the Government Code.

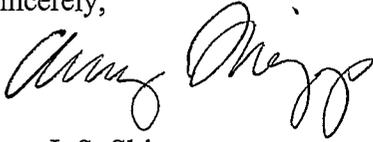
In summary, the college may withhold Exhibit B under rule 503 of the Texas Rule of Evidence. The college must withhold the information we have marked in Exhibits C and D under section 552.101 of the Government Code in conjunction with section 51.971(c) of the Education Code. The college may withhold the information we have marked in Exhibit C under section 552.111 of the Government Code. 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](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,

A handwritten signature in cursive script, appearing to read "Amy Shipp".

Amy L.S. Shipp  
Assistant Attorney General  
Open Records Division

ALS/tp

Ref: ID# 400996

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Enc. Submitted documents

c: Requestor  
(w/o enclosures)