



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 22, 2011

Mr. William Christian
Graves, Dougherty, Hearon & Moody, P.C.
P.O. Box 98
Austin, Texas 78767

OR2011-02610

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# 409632.

The Del Mar College District (the "district"), which you represent, received a request for: (1) the policies and procedures for providing reasonable accommodations for students in accordance with section 503 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act; (2) information pertaining to the appeals process regarding the reasonable accommodations; (3) two specified student handbooks; and (4) eight categories of information pertaining to a named student. You state the district has released some of the requested information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.² We have also received and considered comments from the

¹You also claim this information is protected under the attorney-client privilege based on Texas Rule of Evidence 503 and under the attorney work product privilege based on Texas Rule of Civil Procedure 192.5. In this instance, however, the information is properly addressed here under section 552.107, rather than rule 503, and section 552.111, rather than rule 192.5. Open Records Decision No. 676 at 3 (2002).

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.

requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we address the requestor's claim the district failed to provide her with a copy of its written comments to this office stating the reasons why the stated exceptions apply that would permit the requested information to be withheld. Section 552.301(e-1) requires a governmental body that submits written comments to the attorney general under subsection (e)(1)(A) to send a copy of those comments to the person who requested the information from the governmental body within fifteen business days of receiving the request for information. *Id.* § 552.301(e-1). The determination of whether or when a governmental body mailed its notice of the request for a decision or a copy of the written comments to the requestor is a question of fact. This office cannot resolve disputes of fact in its decisional process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where a fact issue cannot be resolved as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernible from the documents submitted for our inspection. ORD 552 at 4. The district states it received the request for information on December 2, 2010. The district informs us that it was closed for business from December 17, 2010 until January 3, 2011. Accordingly, the district's fifteen-business-day deadline was January 7, 2011. The envelope in which the district's written comments to this office were mailed is postmarked January 3, 2011. Gov't Code § 552.308(a) (describing rules for calculating submission dates of documents sent via first class United States mail). The district's brief reflects it mailed a copy of these comments to the requestor concurrent with the timely mailing to this office. Consequently, based on the district's correspondence, we find the district complied with section 552.301(e-1) in requesting this ruling.

Next, we note that the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, does not permit state and local educational authorities to disclose to this office, without the adult student's consent, unredacted, personally identifiable information contained in education records for the purposes of our review in the open records ruling process under the Act. Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. *See* 34 C.F.R. § 99.3 (defining "personally identifiable information"). You have submitted for our review unredacted education records. The requestor has identified herself as an authorized representative of the named student to whom the records pertain. Because our office is prohibited from reviewing education records, we will not address the applicability of FERPA to the information at issue, other than to note that an adult student has a right of access to her own education records and that this right of access prevails over a claim under section 552.103 of the Government Code. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3; Open Records Decision No. 431 (1985) (information subject to right of

access under FERPA may not be withheld pursuant to statutory predecessor to section 552.103). Such determinations under FERPA must be made by the educational authority in possession of the education record. The DOE also has informed this office, however, that an adult student's right of access under FERPA to her own education records does not prevail over an educational institution's right to assert the attorney-client and attorney work product privileges.³ Therefore, we will consider your assertion of these privileges under sections 552.107 and 552.111 of the Government Code. We will also consider your claim under section 552.103 of the Government Code to the extent the requestor does not have a right of access under FERPA.

Section 552.103 of the Government Code provides in relevant 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.

...

(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, 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 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* Concrete evidence to support

³Ordinarily, FERPA prevails over an inconsistent provision of state law. See *Equal Employment Opportunity Comm'n v. City of Orange, Tex.*, 905 F.Supp. 381, 382 (E.D. Tex. 1995); ORD 431 at 3.

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). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

In this instance, you inform us that, prior to the district's receipt of the request, the named student filed a complaint with the United States Department of Education Office for Civil Rights (the "OCR"). You inform us the OCR is currently is investigating the complaint. Based on your representations and our review of the submitted documentation, we conclude you have shown that litigation was reasonably anticipated at the time the district received the present request. Further, you explain that the information at issue is related to the anticipated litigation because it directly pertains to the subject matter of the complaint. Thus, we find that the district has demonstrated the submitted information is related to the anticipated litigation for purposes of section 552.103(a). Therefore, the district may generally withhold the submitted information under section 552.103.

We note, however, that the opposing party in the anticipated litigation has seen or had access to some of the information in Exhibit B. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, to the extent that the opposing party in the anticipated litigation has seen or had access to any portion of the submitted information, such information is not protected by section 552.103 and may not be withheld on that basis. As you raise no further exceptions for the information the opposing party has seen or accessed in Exhibit B, it must be released.⁴ We also note that the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). Accordingly, if the requestor does not have a right of access pursuant to FERPA, then, with the exception of the information the opposing party to the anticipated litigation has seen or accessed, the

⁴We note that the information being released contains confidential information to which the requestor has a right of access. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual or authorized representative asks governmental body to provide information concerning that individual). Thus, if the district receives another request for this particular information from a different requestor, then the district should again seek a decision from this office.

district may withhold the submitted information pursuant to section 552.103 of the Government Code.

We will now address your claims under sections 552.107 and 552.111 of the Government Code for Exhibits D and E, to the extent the requestor has a right of access to that information pursuant to FERPA. Section 552.107(1) protects information that comes 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. 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 a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* 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, 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 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 Exhibit E consists of communications between an attorney for the district and district personnel. You also state that these communications were made in furtherance of the rendition of legal services to the district. You inform this office that these communications were intended to be and remain confidential. Based on your representations and our review, we agree that the e-mails contained in Exhibit E constitute privileged attorney-client communications. Accordingly, to the extent the requestor has a right of access under FERPA, the district may withhold Exhibit E under section 552.107(1) of the Government Code.

You claim Exhibit D is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts "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 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 the information in Exhibit D consists of communications among the district's attorneys and employees pertaining to the anticipated litigation discussed above. Based on your representations and our review, we agree the information in Exhibit D consists of work product. Therefore, to the extent the requestor has a right of access under FERPA, the district may withhold Exhibit D under section 552.111 of the Government Code.

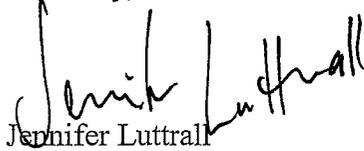
In summary, to the extent the submitted information does not consist of education records subject to FERPA, and to the extent the opposing party to the anticipated litigation has not

seen or had access to this information, the district may withhold the submitted information under section 552.103 of the Government Code. The remaining information must be released. To the extent the submitted information consists of education records to which the requestor has a right of access under FERPA, the district may withhold Exhibit E under section 552.107(1) of the Government Code and Exhibit D under section 552.111 of the Government Code. This ruling does not address the applicability of FERPA to the submitted information. Should the district determine that all or portions of the submitted information consist of education records subject to FERPA, the district must dispose of that information in accordance with FERPA, rather than the Act.

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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/dls

Ref: ID# 409632

Enc. Submitted documents

c: Requestor
(w/o enclosures)