



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 25, 2011

Ms. Neera Chatterjee  
Office of General Counsel  
The University of Texas System  
201 West Seventh Street  
Austin, Texas 78701

OR2011-10625

Dear Ms. Chatterjee:

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# 424837 (OGC# 137295).

The University of Texas at Austin (the "university") received a request for records related to the university's Actual Innocence Clinic's involvement in a specified case. You state you will redact e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).<sup>1</sup> You claim that the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5.<sup>2</sup> We

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<sup>1</sup>We note this office issued Open Records Decision No. 684, a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

<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 section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

have considered your arguments and reviewed the submitted representative sample of information.<sup>3</sup>

You acknowledge some of the submitted information is made expressly public under section 552.022 of the Government Code, which provides in relevant part as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). In this instance, the submitted information includes a voucher relating to the receipt or expenditure of public funds by the university. This information, which we have marked, is subject to section 552.022(a)(3). You claim this information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. However, these sections are discretionary exceptions that protect a governmental body's interests and are, therefore, not "other law" for purposes of section 552.022. *See id.* § 552.007; Open Records Decision Nos. 677 at 8 (2002) (attorney work product privilege under section 552.111 may be waived), 676 at 10-11 (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.107 and 552.111 are 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 those sections. However, the Texas Supreme Court has held the Texas Rules of Evidence the Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will address your claim under rule 503 of the Texas Rules of Evidence for the information at issue, as well as your assertion of the attorney work product privilege under Texas Rule of Civil Procedure 192.5, for the information subject to section 552.022 of the Government Code. Additionally, we will consider your claims under sections 552.107 and 552.111 of the Government Code for the portions of information that are not subject to section 552.022.

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<sup>3</sup>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.

You raise rule 503 of the Texas Rules of Evidence for the information subject to section 552.022. Rule 503 encompasses the attorney-client privilege and provides:

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 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). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You claim the information that is subject to section 552.022 of the Government Code consists of privileged communications you wish to withhold under rule 503. You state the information at issue consists of a communication between attorneys for and employees of the university, an outside client of the university's Actual Innocence Clinic, two forensic science

associates hired by the university as part of the investigation at issue, as well as outside counsel working with the university on the investigation at issue. You state the information at issue was made in the furtherance of the rendition of legal services, and was intended to be, and has remained, confidential. Accordingly, the university may withhold the information that is subject to section 552.022 of the Government Code under Texas Rule of Evidence 503.<sup>4</sup>

Next, we turn to your arguments for the information not subject to section 552.022 of the Government Code. Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107(1) of the Government Code are the same as those discussed for Rule 503. 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. *See* ORD 676 at 6-7. 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 assert the information you have marked consists of communications between attorneys for and employees of the university, an outside client of the university's Actual Innocence Clinic, two forensic science associates hired by the university as part of the investigation at issue, as well as outside counsel working with the university on the investigation at issue. You indicate these communications were made in connection with the rendition of professional legal services for the university's Actual Innocence Clinic. You state the communications were not intended to be, and have not been, disclosed to third parties. Based on your representations and our review of the information at issue, we find you have generally demonstrated the applicability of the attorney-client privilege to the information at issue. We note, however, some of e-mail messages in the otherwise privileged e-mail strings consist of communications with parties you have not shown to be privileged. Therefore, if these e-mail messages, which we have marked, exist separate and apart from the otherwise privileged e-mail strings to which they are attached, the university may not withhold these e-mail messages under section 552.107(1) of the Government Code. If the marked e-mail messages do not exist separate and apart from the privileged e-mail strings, the university may withhold them under section 552.107(1) of the Government Code. Regardless, the university may withhold the remaining information not subject to section 552.022 under section 552.107(1) of the Government Code.<sup>5</sup>

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<sup>4</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

<sup>5</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure.

You assert the remaining information is excepted from public disclosure based on the attorney work product privilege. 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); ORD 677 at 4-8. 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 remaining information consists of communications by and among attorneys for and employees of the university, an outside client of the university's Actual Innocence Clinic, two forensic science associates hired by the university as part of the investigation at issue, as well as outside counsel working with the university on the investigation at issue. You state the remaining information constitutes work product. However, as noted above, to the extent the non-privileged e-mails we have marked exist separate and apart from the submitted e-mail chains, they constitute communications that include non-privileged parties. Accordingly, we conclude that because a non-privileged party has had access to the information at issue, the work product privilege under section 552.111 has been waived.

Thus, the university may not withhold this information on the basis of the attorney work product privilege under section 552.111 of the Government Code.

In summary, the university may withhold the information subject to section 552.022 under Texas Rule of Evidence 503. The university may generally withhold the information not subject to section 552.022 of the Government Code under section 552.107(1) of the Government Code, but may not withhold the non-privileged e-mail messages we have marked, if the messages exist separate and apart from the otherwise privileged e-mail strings to which they are attached.

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,



Vanessa Burgess  
Assistant Attorney General  
Open Records Division

VB/dls

Ref: ID# 424837

Enc. Submitted documents

c: Requestor  
(w/o enclosures)