



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 15, 2012

Mr. Rusty Meurer
Kazen, Meurer & Pérez, L.L.P
211 Calle Del Norte, Suite 100
Laredo, Texas 78041

OR2012-16439

Dear Mr. Meurer:

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# 467808.

The Laredo Community College (the "college"), which you represent, received a request for all documents pertaining to a specified case on the agenda for a specified meeting. We understand the college has redacted some information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g.¹ You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. You state you have notified certain interested parties of the request and of their rights to submit arguments as to why the submitted information should or should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted information.

¹The 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 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>.

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

...

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

Id. § 552.022(a)(1), (3). Portions of the submitted information, which we have marked, consist of completed evaluations that are subject to subsection 552.022(a)(1). The college must release the completed evaluations pursuant to subsection 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or are expressly made confidential under the Act or other law. *See id.* § 552.022(a)(1). Further, a portion of the remaining information consists of completed contracts relating to the receipt or expenditure of funds by a governmental body. These documents, which we have marked, are subject to subsection 552.022(a)(3) and must be released unless they are made confidential under the Act or other law. *See id.* § 552.022(a)(3). You raise section 552.103 of the Government Code for the information subject to section 552.022 of the Government Code. However, section 552.103 is a discretionary exception to disclosure and does not make information confidential under the Act. *See id.* § 552.007; *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 Nos. 665 at 2 n.5 (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). Accordingly, the information subject to section 552.022 may not be withheld under section 552.103 of the Government Code. As you raise no further exceptions against disclosure of the information at issue, the college must release this information pursuant to subsections 552.022(a)(1) and 552.022(a)(3) of the Government Code.

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 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* Open Records Decision No. 551 at 4-5 (1990). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception applies in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the requested information is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); ORD 551 at 4. The governmental body must meet both parts 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 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.² 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. 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).

²In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

You state the college reasonably anticipates litigation because the college's administration has recommended the termination of a specified employee. You state, and provide documentation showing, that prior to the college's receipt of the request for information, the employee's attorney has threatened the college with litigation in two letters. You also state the information in Exhibit B is related to the anticipated litigation. Based on your representations, our review, and the totality of circumstances, we find the college reasonably anticipated litigation on the date the request was received and Exhibit B is related to the anticipated litigation. We therefore conclude the college may generally withhold Exhibit B under section 552.103 of the Government Code.

However, we note some of the information in Exhibit B has been seen by the potential opposing party. 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. Therefore, once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, a section 552.103(a) interest no longer exists as to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, we have marked portions of the information in Exhibit B that were seen by the potential opposing party to the litigation and that the college, therefore, may not withhold under section 552.103. However, the remaining information in Exhibit B may be withheld under section 552.103 of the Government Code. We also note the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov't Code § 552.107(1). 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* 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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *Id.* 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.*, 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, orig. proceeding). 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 the submitted information in Exhibit C consists of communications between the college's attorneys and college representatives made to facilitate the rendition of professional legal services to the college. You inform us the communications were intended to be, and have remained, confidential. Based on your representations and our review, we conclude you have established the communications at issue are protected by the attorney-client privilege. Thus, the college may generally withhold Exhibit C under section 552.107(1) of the Government Code. We note, however, some of the e-mail strings include e-mails received from or sent to non-privileged parties. Furthermore, if the e-mails received from or sent to non-privileged parties are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails, which we have marked, are maintained by the college separate and apart from the otherwise privileged e-mail strings in which they appear, then the college may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code. The college may withhold the remaining information in Exhibit C under section 552.107(1) of the Government Code.

Section 552.111 of the Government Code excepts from disclosure "[a]n 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) [M]aterial 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). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; 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 claim the remaining non-privileged communications in Exhibit C we have marked disclose attorney work product. However, because this information was communicated with non-privileged parties, we find the college has failed to demonstrate the applicability of the work product privilege to it. Accordingly, the remaining non-privileged communications in Exhibit C may not be withheld under the work product privilege of section 552.111 of the Government Code.

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).³ Gov't Code § 552.137(a)-(c). The e-mail addresses we have marked are not a type specifically excluded by section 552.137(c). Accordingly, the college must withhold these e-mail addresses under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release under section 552.137(b).⁴

In summary, with the exception of the information we have marked for release, the college may withhold Exhibit B under section 552.103 of the Government Code. If the non-privileged e-mails, which we have marked in Exhibit C, are maintained by the college separate and apart from the otherwise privileged e-mail strings in which they appear, then the college may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code. The college may withhold the remaining information in Exhibit C under section 552.107(1) of the Government Code. The college must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁴Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold certain 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 seeking a decision from this office.

owners of the e-mail addresses affirmatively consent to their release under section 552.137(b). The remaining information must be released.

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,



Nneka Kanu
Assistant Attorney General
Open Records Division

NK/tch

Ref: ID# 467808

Enc. Submitted documents

c: Requestor
(w/o enclosures)

