



April 24, 2001

Ms. R. Yvette Clark
General Counsel
Stephen F. Austin State University
P.O. Box 13065, SFA Station
Nacogdoches, Texas 75962-3065

OR2001-1624

Dear Ms. Clark:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 146327.

Stephen F. Austin State University (the “university”) received a request for the investigative file concerning a claim of sexual harassment. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We will first address your attorney work product argument under section 552.111. In Open Records Decision No. 647 (1996), this office concluded that a governmental body may withhold attorney work product under section 552.111 if the governmental body can show (1) that the information was created for trial or in anticipation of litigation under the test articulated in *National Tank v. Brotherton*, 851 S.W.2d 193 (Tex. 1993), and (2) that the information consists of or tends to reveal an attorney’s “mental processes, conclusions, and legal theories.” Open Records Decision No. 647 at 5 (1996). Under the *National Tank* test, it must be shown that a reasonable person would have concluded that there was a substantial chance that litigation would ensue and that the party resisting disclosure believed in good faith that there was a substantial chance that litigation would ensue and prepared or collected the information in question for purposes of such litigation. *National Tank Co.*, 851 S.W.2d at 207; ORD 647 at 4.

With regard to whether litigation is anticipated in this case, you inform us that the file was developed and maintained by counsel for the university due to the actionable nature of the complaint, the fact that the complainant secured legal representation, and the reasonable possibility that litigation would ensue. You further assert that the accused also secured legal representation due to the probability of litigation. Upon review of your arguments and the information submitted, we conclude that you have shown that there was a substantial chance of litigation involving the university in this matter, and that the requested investigation file was prepared for litigation purposes.

The second requirement that must be met is that the work product “consists of or tends to reveal the thought processes of an attorney in the civil litigation process.” Open Records Decision No. 647 at 4 (1996). Although the attorney work product privilege protects information that reveals the mental processes, conclusions, and legal theories of the attorney, it generally does not extend to facts obtained by the attorney. *Id.*

In this case, the requestor seeks the investigation file pertaining to a sexual harassment complaint. In *Curry v. Walker*, 873 S.W.2d 379, 381 (Tex. 1994), the Texas Supreme Court held that a request for a district attorney’s “entire file” was “too broad” and that, citing *National Union Fire Insurance Company v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993), “the decision as to what to include in [the file] necessarily reveals the attorney’s thought processes concerning the prosecution or defense of the case.” *Curry*, 873 S.W.2d at 380. If a requestor seeks an attorney’s entire litigation file, and a governmental body seeks to withhold the entire file and demonstrates that the file was created in anticipation of litigation, we will presume that the entire file is excepted from disclosure under the attorney work product aspect of section 552.111. Open Records Decision No. 647 at 5 (1996)(citing *National Union*). Therefore, as the requestor seeks the entire investigative file, and as you have demonstrated that the file was prepared in anticipation of litigation, we conclude that the requested file may be withheld from disclosure in its entirety under section 552.111.

We note, however, that the Seventy-sixth Legislature amended section 552.022 of the Government Code to make certain information expressly public, and therefore not subject to discretionary exceptions to disclosure. Section 552.022 now states in relevant part:

- (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 are not excepted from required disclosure under this chapter unless they are expressly confidential under other law.

Gov’t Code § 552.022. One such category of expressly public information under section 552.022 is “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). Another category of expressly public information is “a policy statement or interpretation that has been adopted or issued by an agency[.]” Gov’t Code § 552.022(a)(13).

After reviewing the submitted information, we conclude that a portion of the submitted information is made public by sections 552.022(a)(3) and 552.022(a)(13) of the Government Code. Therefore, as prescribed by section 552.022, these pages must be released to the requestor unless they are confidential under other law. You argue that the information subject to section 552.022 is excepted from disclosure under sections 552.103 and 552.111. Sections 552.103 and 552.111 are discretionary exceptions and not "other law" for purposes of section 552.022.¹ See Open Records Decision No. 473 (1987) (governmental body may waive section 552.111). However, the attorney work product privilege of section 552.111 is also found in Rule 192.5 of the Texas Rules of Civil Procedure. Recently, the Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, No. 00-0453, 2001 WL 123933, at *8 (Tex. Feb. 15, 2001). Thus, we will determine whether the information subject to section 552.022 is confidential under Rule 192.5.

An attorney's core work product is confidential under Rule 192.5. Core work product is defined as the work product of an attorney or an attorney's representative developed in anticipation of litigation or for trial that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. See Tex. R. Civ. P. 192.5(a), (b)(1). Upon review of the submitted information and your arguments, we conclude that the information subject to section 552.022 does not meet the definition of core attorney work product for purposes of Rule 192.5(b)(1). Therefore, this information, which we have marked with red flags, must be released to the requestor. The remainder of the requested investigation file may be withheld from disclosure under section 552.111. As we resolve your request under section 552.111, we need not address your other claimed exceptions.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the

¹Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. See, e.g., Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/seg

Ref: ID# 146327

Encl: Submitted documents

cc: Mr. Greg B. Cagle
Texas Municipal Police Association
P.O. Box 2294
Austin, Texas 78768
(w/o enclosures)