

CAUSE NO. GN200388

UNIVERSITY OF TEXAS MEDICAL
BRANCH AT GALVESTON and
UNIVERSITY OF TEXAS SYSTEM,
Plaintiffs,

V.

GREG ABBOTT, ATTORNEY GENERAL
OF TEXAS,
Defendant.

§ IN THE DISTRICT COURT OF
§
§
§
§ TRAVIS COUNTY, TEXAS
§
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§
§
§ 53RD JUDICIAL DISTRICT

FILED
05 MAY -3 AM 8:51
JUDICIAL DISTRICT
TRAVIS COUNTY, TEXAS

AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for entry of an agreed final judgment.

Plaintiffs The University of Texas Medical Branch at Galveston (UTMB) and The University of Texas System (collectively, referred to as "The University") and Defendant Greg Abbott, Attorney General of Texas, announced to the Court that all matters of fact and things in controversy between them had been fully and finally compromised and settled. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code ch. 552. The parties represent to the Court that, in compliance with Tex. Gov't Code § 552.325(c), the requestor, David R. Layton, was sent reasonable notice of this setting and of the parties' agreement that The University may withhold part of the information at issue; that the requestor was also informed of his right to intervene in the suit to contest the withholding of this information; and that the requestor has not informed the parties of his intention to intervene. Neither has the requestor filed a motion to intervene or appeared today. After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. The documents behind Tab A to UTMB's original submission to the OAG, are

excepted from disclosure by Tex. Gov't Code § 552.107(1) in conjunction with Tex. R. Evid. 503, and The University may withhold from the requestor this information. Because the parties have agreed that Tex. Gov't Code § 552.107(1) in conjunction with Tex. R. Evid. 503 excepts the information at issue from disclosure, it is not necessary for the Court to reach Plaintiff's other arguments.

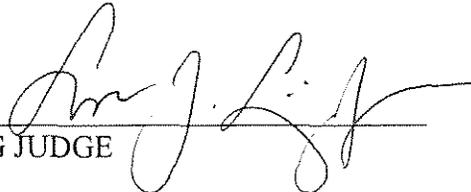
2. The University no longer contests the disclosure of documents behind Tab C, including bates-stamped pages PL-0036 and PL-0037, to UTMB's original submission to the OAG. If it has not already done so, The University shall disclose these documents to the requestor promptly upon receipt of a final judgment signed by the court.

3. All costs of court are taxed against the parties incurring the same;

4. All relief not expressly granted is denied; and

5. This Agreed Final Judgment finally disposes of all claims between Plaintiffs and Defendant and is a final judgment.

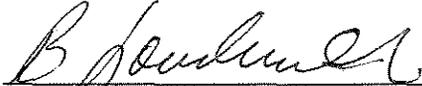
SIGNED this the 3rd day of May, 2005.


PRESIDING JUDGE

APPROVED:


RAYMOND E. WHITE

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January 22, 2002

Mr. J. Robert Giddings
University of Texas System
2010 West 7th Street
Austin, Texas 78701-2981

OR2002-0300

Dear Mr. Giddings:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 156483.

The University of Texas System (the "system") received a request for copies of all records pertaining to a specified investigation of sexual harassment claims and a specified termination. You state that you have already provided the requestor with copies of his personnel file to include documents that reflect and reference any disciplinary action taken against the requestor. You claim, however, that the submitted information is excepted from disclosure pursuant to sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted representative sample documents.¹

Initially, we note that section 552.022 of the Government Code makes certain information public, unless it is expressly confidential under other law. One category of public information under section 552.022 is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108[.]" Gov't Code § 552.022(a)(1). Several of the submitted documents in Tabs A and C constitute completed evaluations prepared for the system. You claim that these evaluations are excepted from disclosure pursuant to sections 552.107 and 552.111 of the Government Code. However, sections 552.107 and 552.111 are discretionary exceptions under the Public Information Act and, as such, do not constitute "other law" that makes information

¹ 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.

confidential.² See Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 473 (1987) (governmental body may waive section 552.111). Accordingly, we do not address sections 552.107 and 552.111 of the Government Code with respect to these completed evaluations.

We note, however, that the attorney-client privilege is also found in rule 503 of the Texas Rules of Evidence. The Texas Supreme Court recently held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” See *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will determine whether the completed evaluations are confidential under rule 503. Rule 503(b)(1) 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.

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

² Discretionary 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. 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body’s position in litigation and does not itself make information confidential), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute “other law” that makes information confidential.

services to the client or those reasonably necessary for the transmission of the communication. *See id.* Therefore, in order for information to be withheld from disclosure under rule 503, a governmental body must: (1) show that 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 that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that 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). Based on our review of your arguments and the completed evaluations, we conclude that you have failed to demonstrate that the evaluations constitute confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. Accordingly, the system may not withhold any of the completed evaluations from disclosure pursuant to rule 503 of the Texas Rules of Evidence.

The attorney work product privilege is also found in rule 192.5 of the Texas Rules of Civil Procedure. For purposes of section 552.022, 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). Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate that the material was 1) created for trial or in anticipation of litigation and 2) consists of an attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *See id.* Based on our review of your arguments and the completed evaluations, we conclude that you have failed to demonstrate that the evaluations constitute 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. Accordingly, the system may not withhold any of the completed evaluations from disclosure pursuant to rule 192.5 of the Texas Rules of Civil Procedure.

You also claim that the completed evaluations, as well as other information contained in Tabs A and C, are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with rule 408 of the Texas and Federal Rules of Evidence.³ Rule 408 governs the admissibility of information developed through compromise negotiations. *See*

³ Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses information protected by other statutes.

TEX. R. EVID. 408; *see also* FED. R. EVID. 408. However, rule 408 does not expressly make information confidential. We note that the confidentiality protected by section 552.101 requires express language making certain information confidential or requires that information not be released to the public. *See* Open Records Decision Nos. 658 at 4 (1998), 478 at 2 (1987), 465 at 4-5 (1987). We will not imply a confidentiality requirement from the structure of a statute or rule. *See* Open Records Decision No. 465 at 4-5 (1987). Because rule 408 of the Texas or Federal Rules of Evidence does not explicitly make information confidential, we do not agree that rule 408 constitutes "other law" for purposes of section 552.022 of the Government Code. *See In Re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001) (finding that Texas Rules of Civil Procedure and Texas Rules of Evidence that expressly make information confidential are "other law" within the meaning of section 552.022). Accordingly, the system may not withhold any portion of the submitted information from disclosure pursuant to section 552.101 of the Government Code in conjunction with rule 408 of the Texas or Federal Rules of Evidence. Consequently, the system must release the completed evaluations to the requestor.

You also claim that the remaining submitted information in Tabs A and C is excepted from disclosure pursuant to section 552.107 of the Government Code. Section 552.107(1) excepts information encompassed by the attorney-client privilege from disclosure. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions. *See* Open Records Decision No. 574 at 5 (1990). In addition, purely factual communications from attorney to client, or between attorneys representing the client, including factual recountings of events, documentation of calls made, meetings attended, or memos sent are not protected under section 552.107(1). *See id.* at 3. Finally, when a governmental body voluntarily discloses privileged material to a third party, the attorney-client privilege is waived. *See* Open Records Decision No. 630 at 4 (1994). Based on our review of your arguments and the remaining submitted information in Tabs A and C, we conclude that you have failed to demonstrate how any of this information constitutes either a client confidence or an attorney's legal advice or opinion. Further, we note that some of this information has been obtained by a third party. Accordingly, we conclude that the system may not withhold any portion of the remaining submitted information in Tabs A and C from disclosure pursuant to section 552.107(1) of the Government Code.

You also claim that the remaining submitted information in Tabs A and C is excepted from disclosure as attorney work product pursuant to section 552.111 of the Government Code. A governmental body may withhold attorney work product from disclosure under section 552.111 if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. *See* Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the documents at issue were created in anticipation of litigation, has two parts. A governmental body must

demonstrate that 1) 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 2) the party resisting discovery or release believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See id.* at 4. The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney's mental processes, conclusions and legal theories. We also note that a governmental body waives its interest in section 552.111 when information it holds has been disclosed to a member of the public. *See Open Records Decision Nos. 400 (1983), 435 (1986).*

Based on our review of your arguments and the remaining submitted information in Tabs A and C, we conclude that you have failed to demonstrate how any of this information constitutes attorney work product developed under a good faith belief that there was a substantial chance that litigation would ensue against the system. Further, we note that some of this information has been disclosed to a member of the public. Accordingly, the system may not withhold any portion of the remaining submitted information in Tabs A and C from disclosure as attorney work product pursuant to section 552.111 of the Government Code.

You claim that the submitted information in Tab B is excepted from disclosure pursuant to section 552.101 in conjunction with section 161.032 of the Health and Safety Code. Section 161.032 provides in relevant part:

The records and proceedings of a medical committee are confidential and are not subject to court subpoena . . . Records, information, or reports of a medical committee, medical peer review committee, or compliance officer . . . are not subject to disclosure under Chapter 552, Government Code.

Health & Safety Code § 161.032(a). A "medical committee" means "any committee . . . of (1) a hospital; (2) a medical organization; [and] (3) a university medical school or health science center." *Id.* § 161.031(a). However, the confidentiality afforded records under section 161.032 does not extend to "records made or maintained in the regular course of business by a hospital, health maintenance organization, medical organization, university medical center or health science center, hospital district, hospital authority, or extended care facility." Health & Safety Code § 161.032(c). The phrase "documents made or maintained in the regular course of business" has been construed to refer to routine records the creation of which did not entail a "deliberative process." *See Memorial Hosp.-the Woodlands v. McCown*, 927 S.W.2d 1, 9 (Tex. 1996) (citing *Barnes v. Whittington*, 751 S.W.2d 493, 496 (Tex. 1988)). In *Jordan v. Court of Appeals for Fourth Supreme Judicial District*, 701 S.W.2d 644, 648 (Tex. 1985), the court stated that records "gratuitously submitted to a committee or which have been created without committee impetus and purpose are not

protected.”⁴ See *Memorial Hosp.-the Woodlands v. McCown*, 927 S.W.2d 1 at 9-10 (discussing business records and holdings in *Barnes and Jordan*). Therefore, even if records are submitted to or created by a medical committee, medical peer review committee, or compliance officer, the records are not generally confidential if made or maintained in the regular course of business so as to be devoid of a deliberative process. See Health & Safety Code § 161.032(c).

You state that the submitted information in Tab B constitutes information “generated by the [system’s] Institutional Compliance Office during the investigation of the billing problems in the Conroe Family Practice Clinic. . . .” Based on your representation and our review of your arguments and the submitted information in Tab B, we conclude that the information reveals a deliberative process undertaken by the Institutional Compliance Office with respect to the Conroe Family Practice Clinic. See *Memorial Hosp.-the Woodlands v. McCown*, 927 S.W.2d at 9-10. Accordingly, the system must withhold the submitted information in Tab B from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code.

In summary, the system must withhold Tab B from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code. The system must release Tabs A and C to the requestor in their entirety.

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 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

⁴*Barnes and Jordan* both relied upon the predecessor statute to 161.032 of the Health & Safety Code, section 3 of article 447d, Vernon’s Texas Civil Statutes, which provided, in part, that “records made or maintained in the regular course of business” were not confidential.

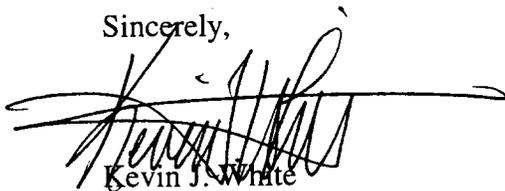
governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge 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 Texas Building and Procurement 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,



Kevin J. White
Assistant Attorney General
Open Records Division

KJW/RJB/seg

Ref: ID# 156483

Enc. Submitted documents

cc: Mr. David R. Layton
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Conroe, Texas 77304
(w/o enclosures)