



May 28, 2002

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

OR2002-2847

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# 163450.

The University of Texas System (the “system”) received a request for copies of the requestor’s personnel records. The requestor also seeks documents pertaining to the requestor or the ROTC Department that may be found in records maintained by the Office of Equal Opportunity/Affirmative Action. You indicate that the system will provide the requestor with the records from her personnel file. You claim, however, that the submitted information, constituting records maintained by the system’s Office of Equal Opportunity/Affirmative Action, is excepted from disclosure pursuant to sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we note that some of the information, which we have marked, is subject to section 552.022 of the Government Code. Section 552.022 makes certain information public, unless it is expressly confidential under other law. *See* Gov’t Code § 552.022(a). 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). The section 552.022(a)(1) information, that we have marked, constitutes completed evaluations under section 552.022(a)(1) of the Government Code. Although the system claims that these evaluations are excepted from disclosure pursuant to sections 552.103, 552.107 and 552.111 of the Government Code, we note that these exceptions to disclosure are discretionary exceptions under the Public Information Act and, as such, do not constitute “other law” that makes information

confidential.¹ Accordingly, we do not address your claims regarding sections 552.103, 552.107 and 552.111 of the Government Code with respect to the 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 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 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

¹ 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. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 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), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute “other law” that makes information confidential.

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 evaluations, we conclude that you have failed to demonstrate that any portion of these evaluations constitutes confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. Accordingly, the system may not withhold any portion of the 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 evaluations, we conclude that you have failed to demonstrate that any portion of these evaluations constitutes the work product of an attorney or an attorney's representative developed in anticipation of litigation or for trial. Accordingly, the system may not withhold any portion of these evaluations from disclosure pursuant to rule 192.5 of the Texas Rules of Civil Procedure. Consequently, we conclude that the system must release the entirety of the completed evaluations to the requestor pursuant to section 552.022(a)(1) of the Government Code.

You claim that the remaining information is excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 provides in pertinent 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 system maintains 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 on the date that the governmental body receives the request for information and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *see also 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 system must meet both prongs of this test for information to be excepted under section 552.103(a).

A governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture" when establishing that litigation is reasonably anticipated. *See Open Records Decision No. 452 at 4 (1986)*. 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 *See Open Records Decision Nos. 555 (1990), 518 at 5 (1989)* (litigation must be "realistically contemplated"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See Open Records Decision No. 452 at 4 (1986)*. You state, and provide documentation showing, that the requestor has filed an Equal Employment Opportunity Commission ("EEOC") complaint against the system. Based on our review of your arguments and the remaining information, we conclude that litigation is reasonably anticipated in this matter and that this information is related to the reasonably anticipated litigation for purposes of section 552.103. Accordingly, the system may withhold some of the remaining information, which we have marked, from disclosure pursuant to section 552.103 of the Government Code.³

However, we note that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See Open Records Decision Nos. 349 (1982), 320 (1982)*. Thus, information

²In addition, this office has concluded that 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)*.

³ We note, however, that the applicability of section 552.103(a) ends once the litigation has been concluded. *See Attorney General Opinion MW-575 (1982)*; *see also Open Records Decision No. 350 (1982)*.

that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a) and may not be withheld from disclosure on that basis. We note that a substantial portion of the remaining information has already been seen by the potential opposing party in this matter. Accordingly, we conclude that the system may not withhold the remaining information from disclosure pursuant to section 552.103 of the Government Code.

However, you also claim that the remaining information that is not excepted from disclosure under section 552.103 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 information, we conclude that you have failed to demonstrate how any portion 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 this information has been disclosed to a member of the public. Accordingly, we conclude that the system may not withhold any portion of this information from disclosure as attorney work product pursuant to section 552.111 of the Government Code.

However, you also claim that the remaining information that is not excepted from disclosure under section 552.103 is excepted from disclosure pursuant to section 552.107 of the Government Code. Section 552.107(1) protects information encompassed by the attorney-client privilege. We note that in instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and the client's confidences made to the attorney. *See* Open Records Decision No. 574 (1990). Consequently, these two classes of information are the only information contained in the records at issue that may be withheld pursuant to the attorney-client privilege. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 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; it does not apply to all client information held by a governmental body's attorney. *See* Open Records Decision No. 574 at 5 (1990). Based on our review of your arguments and this information, we conclude that no portion of the information constitutes either client confidences provided to an attorney in furtherance of the rendition of legal services or the attorney's legal advice or opinion. Further, we note that this information has been obtained by the requestor. Accordingly, the system may not withhold any portion of this information from disclosure pursuant to section 552.107 of the Government Code.

We note, however, that portions of the remaining information that are not excepted from disclosure under section 552.103 are subject to the Family Educational Rights and Privacy Act ("FERPA"). FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *See id.* § 1232g(a)(4)(A). Information must be withheld from disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 (1982), 206 (1978). This includes information that directly identifies a student, as well as information that, if released, would allow the student's identity to be easily traced. *See* Open Records Decision No. 224 (1979).

Additionally, FERPA provides that, "directory information" may be released to the public if the institution or agency complies with section 1232g(a)(5)(B) of title 20 of the United States Code. "Directory information" includes the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student. *See* 20 U.S.C. § 1232g(a)(5)(A). Section 1232g(a)(5)(B) provides as follows:

[a]ny educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.

20 U.S.C. § 1232g(a)(5)(B). Accordingly, if the system has designated the information that we have marked under FERPA as directory information, then the system is required to disclose the information after complying with federal notice requirements for release of

directory information. *See id.*; *see also* 34 C.F.R. § 99.37. However, if the system has not designated the marked information as directory information, then the system must withhold the information from disclosure pursuant to FERPA. *See* Open Records Decision Nos. 539 (1990), 332 (1982), 206 (1978).

We also note that the remaining information contains social security numbers of persons other than the requestor which may be confidential pursuant to federal law. A social security number or "related record" may be excepted from disclosure under section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994).⁴ These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the system to obtain or maintain these social security numbers. Therefore, we have no basis for concluding that the numbers are confidential under section 405(c)(2)(C)(viii)(I). We caution the system, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing these social security numbers, the system should ensure that they were not obtained or are not maintained by the system pursuant to any provision of law enacted on or after October 1, 1990.

Finally, we note that the remaining information contains e-mail addresses that may be subject to section 552.137 of the Government Code. Section 552.137 makes certain e-mail addresses confidential and provides in pertinent part:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. Accordingly, unless the member of the public in question has affirmatively consented to its release, the system must withhold the e-mail address that we have marked from disclosure pursuant to section 552.137 of the Government Code.

In summary, the system must release the entirety of the completed evaluations to the requestor pursuant to section 552.022(a)(1) of the Government Code. The system may withhold some of the information, which we have marked, from disclosure pursuant to

⁴ 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.

section 552.103 of the Government Code. If the system has designated the information that we have marked under FERPA as directory information, then the system is required to disclose the information after complying with federal notice requirements for release of directory information. However, if the system has not designated the marked information as directory information, then the system must withhold that information from disclosure pursuant to FERPA. Social security numbers of persons other than the requestor contained within the remaining information may be confidential pursuant to federal law. The system must withhold the e-mail address that we have marked from disclosure pursuant to section 552.137 of the Government Code, unless the member of the public in question has affirmatively consented to its release. The system must release the remaining information to the requestor.

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).

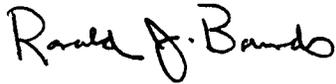
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 163450

Enc. Marked documents

cc: Ms. Ina Sawyer
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(w/o enclosures)