



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

August 13, 2003

Ms. Lisa A. Brown
Bracewell & Patterson, L.L.P.
711 Louisiana Street, Suite 2900
Houston, Texas 77002-2781

OR2003-5637

Dear Ms. Brown:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 185907.

The Houston Community College System (the "system"), which you represent, received a request for all records "held by HR" and by a named individual pertaining to the requestor, any formal written complaints and charges against the requestor, a specified police report, and a signed release. You claim that some of the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code, and under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note that you did not submit the requested police report or signed release for our review. Further, you have not indicated that such information does not exist or that you wish to withhold any such information from disclosure. Therefore, to the extent information responsive to these aspects of the request exists, we assume that the system has released it to the requestor. If the system has not released any such information, the system must release it to the requestor at this time. *See* Gov't Code §§ 552.301(a), .302; Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances).

We next note that some of the submitted documents are not responsive to the instant request for information. We have marked these documents, which the system need not release in response to this request.

Furthermore, we observe that a portion of the requested information is the identical information that was the subject of a previous ruling from this office. In Open Records Letter No. 2003-4264 (2003), we concluded that the system may or must withhold and release certain information under sections 552.107(1) and 552.111 of the Government Code and the Family Educational Rights and Privacy Act of 1974 ("FERPA"). Assuming that the four criteria for a "previous determination" established by this office in Open Records Decision No. 673 (2001) have been met, the system may or must withhold and release the documents at issue in accordance with Open Records Letter No. 2003-4264 (2003).¹ See Gov't Code § 552.301(f); Open Records Decision No. 673 (2001). To the extent that the information requested in this instance was not the subject of the ruling in Open Records Letter No. 2003-4264 (2003), we will address your arguments.

You claim the attorney-client and work product privileges under section 552.101 of the Government Code and the Texas Rules of Evidence and the Texas Rules of Civil Procedure. Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." As we recently reaffirmed in Open Records Decision No. 676 (2002), section 552.101 does not encompass the Texas Rules of Evidence and Civil Procedure. See Open Records Decision No. 676 at 2 ("We find no authority to support a conclusion that the Texas Rules of Civil Procedure or the Texas Rules of Evidence are constitutional law, statutory law, or judicial decisions so as to fall within section 552.101's purview"). The Texas Supreme Court has held that the Texas Rules of Evidence are "other law" that makes information expressly confidential for the purposes of section 552.022 of the Government Code. *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). However, the information that is at issue here does not come within the scope

¹The four criteria for this type of "previous determination" are 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling. See Open Records Decision No. 673 (2001).

of section 552.022. Therefore, *City of Georgetown* is not applicable in this instance. Accordingly, the city may not withhold the submitted information under section 552.101 of the Government Code in conjunction with the Texas Rules of Evidence or the Texas Rules of Civil Procedure.

We will next address your claim that portions of the submitted information are excepted from disclosure under section 552.107 of the Government Code, which protects information coming within the attorney-client privilege. 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. 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). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). 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.* 503(b)(1), 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, no writ). 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). Based on our review of your representations and the submitted records that the system claims to be excepted from disclosure under section 552.107, we agree that this information reflects confidential communications exchanged between privileged parties in furtherance of the rendition of legal services to a client. Accordingly, we conclude that the system may withhold the information you have marked pursuant to section 552.107(1) of the Government Code.

Next, you claim that section 552.103 of the Government Code excepts from public disclosure portions of the remaining submitted information. This exception provides in 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 governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551

at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

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 establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue 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. *See* Open Records Decision No. 331 (1982).

You inform us that the requestor reported alleged illegal behavior on the part of system employees to the Harris County District Attorney’s Office, and subsequently invoked the protection of the Whistleblower Act, Chapter 554 of the Government Code.³ You state, and provide documentation showing, that the requestor stated that he was represented by an attorney and instructed system personnel to contact him only through his attorney. After carefully reviewing your arguments and the submitted information, we find that the system has failed to present us with concrete evidence that litigation was reasonably anticipated by the system on the date that it received this request. *See* Open Records Decision No. 361 (1983) (fact that potential opposing party hired attorney who makes request for information does not establish that litigation is reasonably anticipated). Accordingly, we conclude that

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).

³The Whistleblower Act provides procedures for filing suit against a governmental body that suspends or terminates an employee who in good faith reports a violation of law to an appropriate enforcement authority.

the system may not withhold the information at issue pursuant to section 552.103 of the Government Code.

Next, we address your assertion that portions of the submitted information are excepted from disclosure under the attorney work product privilege as encompassed by section 552.111 of the Government Code. In order to be considered "work product," the information must have been created for trial or in anticipation of litigation by or for a party or a party's representative. Tex. R. Civ. P. 192.5; Open Records Decision No. 677 at 4 (2002). In order for this office to conclude that information was created 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.

See 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.

Having considered your representations and reviewed the information at issue, we find that the system has failed to demonstrate that the information at issue was created in anticipation of litigation. Thus, the system may not withhold any of the information at issue under section 552.111 of the Government Code as attorney work product.

Section 552.117 may also be applicable to some of the submitted information. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the system may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made.

For those employees who timely elected to keep their personal information confidential, the system must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members. The system may not withhold this information under section 552.117(a)(1) for those employees who did not make a timely election to keep the information confidential.

The submitted information also contains e-mail addresses obtained from the public. Section 552.137 of the Government Code makes certain e-mail addresses confidential, and provides:

(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. You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The system must, therefore, withhold e-mail addresses of members of the public under section 552.137.

We next observe that a student's identifying information is contained in the submitted records. In this regard, section 552.026 of the Government Code provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

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. *Id.* § 1232g(a)(4)(A). Information must be withheld from required public 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). We have marked the information that the system must withhold in accordance with FERPA.

Finally, we note that some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the system may or must withhold and release the documents at issue in accordance with Open Records Letter No. 2003-4264 (2003). We have marked the student identifying information that the system must withhold in accordance with FERPA. The system may withhold the information you have marked pursuant to section 552.107(1). The system must withhold under section 552.117(a)(1) the marked information for those employees who timely elected to keep their personal information confidential. E-mail addresses of members of the public must be withheld under section 552.137. The remaining submitted information must be released to the requestor in compliance with copyright law.

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 Dep't of Pub. 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

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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,

A handwritten signature in black ink, appearing to read "Cindy Nettles". The signature is fluid and cursive, with the first name "Cindy" written in a larger, more prominent script than the last name "Nettles".

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 185907

Enc. Submitted documents

c: Mr. Benito Alcala
5116 Gano Street
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(w/o enclosures)