



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 21, 2004

Mr. William T. Buida
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OR2004-3237

Dear Mr. Buida:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 199922.

The Texas Department of Human Services (the "department") received five requests for certain information related to the department's special nutrition programs. You state that most of the requested information is being released. You also state that the department does not have any responsive information related to Nutrition Express.¹ Further, you claim that a portion of the requested information is excepted from disclosure under sections 552.101, 552.107, 552.110, 552.111, 552.116, and 552.136 of the Government Code.² You make no arguments and take no position as to whether the submitted information is excepted from

¹We note that the Public Information Act (the "Act") does not require the department to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

²Although you raise rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure as potential exceptions to disclosure, the information you have marked under these rules is not subject to section 552.022 of the Government Code. Therefore, rule 503 and rule 192.5 do not apply in this instance. See Open Records Decision Nos. 676 at 4 (2002) (appropriate exception for claim of attorney-client privilege for information not subject to section 552.022 is section 552.107(1)), 677 at 9 (2002) (appropriate exception for claim of attorney work product privilege for information not subject to section 552.022 is section 552.111). Further, although you have marked portions of the submitted information as subject to section 552.103 of the Government Code, you have failed to submit any comments stating the reasons why section 552.103 is applicable to the submitted information. Therefore, we find that the department has waived section 552.103. See Gov't Code §§ 552.301, .302; see also *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions in general).

disclosure under section 552.110. However, you have notified interested third parties Alliance Public Services, Inc. ("Alliance"), All Children's Nutrition, Tara Nutrition Program, Inc. ("Tara"), Cool Kids Child Care Education and Nutrition ("Cool Kids"), and We Are Caring Hearts of the requests for information pursuant to section 552.305 of the Government Code. See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Chapter 552 of Government Code in certain circumstances). The department has submitted the information at issue to this office. We also received correspondence from All Children's Nutrition and Cool Kids. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that in subsequent correspondence with this office, you state that neither requestor seeks the identities of children receiving federal assistance in the form of free and reduced-price meals provided by a Child and Adult Care Food Program ("CACFP") as part of their requests for information.³ Accordingly, this information is non-responsive to the requests for information, and we need not address the arguments submitted by the department and Cool Kids regarding this information.

In regard to the responsive information, section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses the doctrine of common law privacy, which protects information if it is highly intimate or embarrassing such that its release would be highly objectionable to a reasonable person and the public has no legitimate interest in it. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). Prior decisions of this office have found that personal financial information not relating to a financial transaction between an individual and a governmental body is protected by common law privacy. See Open Records Decision Nos. 600 (1992), 545 (1990). The personal financial information we have marked must be withheld under section 552.101 in conjunction with common law privacy.

Section 552.101 also encompasses information made confidential by other statutes. The 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), 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 Open Records Decision No. 622 (1994). We

³The department sought and received clarification of the requests for information. See Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); see also Open Records Decision No. 31 (1974) (stating that when governmental bodies are presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed).

have no basis for concluding that the social security numbers in the responsive information are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Act on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, the department should ensure that no such information was obtained or is maintained pursuant to any provision of law enacted on or after October 1, 1990.

You also assert section 552.107(1) 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).

You represent that some of the submitted information consists of confidential communications between the department and its attorneys and their staff. Upon review of

the submitted information, we conclude that the information we have marked is protected by the attorney-client privilege, and thus, may be withheld under section 552.107 of the Government Code.⁴

Additionally, Cool Kids claims section 552.107 of the Government Code in regard to its information and states that “[w]e wish to invoke the attorney-client privilege and have all correspondence, judgements, and legal findings taken from open records.”⁵ Based on the representations submitted by Cool Kids and our review of its information, we conclude that Cool Kids has not demonstrated that any portion of its remaining information reflects a confidential communication between privileged parties in furtherance of the rendition of legal services to the client. Accordingly, the department may not withhold any portion of the remaining submitted information related to Cool Kids under section 552.107(1) of the Government Code.

Section 552.111 of the Government Code excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” This section encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Evidence. *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) material 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.

⁴As our ruling on this issue is dispositive, we need not address your argument under section 552.111 of the Government Code regarding internal communications consisting of advice, recommendations, and opinions reflecting the policymaking processes of the department.

⁵Cool Kids also states that “[a]lthough we believe that all correspondence, documents, legal findings and decisions should be excluded from the request under the Attorney - Client privilege argument, it should be noted that it appears as if [the department] has only submitted select documents from the appeal process.” We note that the Act requires a governmental body to release only information that it believes to be responsive to a request. However, in determining whether information is responsive, a governmental body has a duty to make a good faith effort to relate the request to information that it holds. Open Records Decision No. 590 at 1 n. 1 (1991). This ruling does not address records that the department has not submitted for our review.

A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. Tex. R. Civ. P. 192.5; 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 explain that a portion of the submitted information was "developed by a department attorney or under the direction of the attorney in anticipation of or in connection with administrative litigation," and that "[t]hese documents directly relate to an administrative appeal that was before [the State Office of Administrative Hearings] of the department's decision to deny an application by a potential CACFP sponsoring organization." Additionally, you state that at the time the information in question was created, "there was a substantial chance that [an] administrative enforcement action or other litigation would ensue." Upon review of your arguments and the submitted information, we find that you have demonstrated that the information we have marked was prepared for trial or in anticipation of litigation. Therefore, you may withhold this information under section 552.111 of the Government Code as attorney work product.

Next, you assert section 552.116 of the Government Code, which provides as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency or institution of higher education as defined by Section 61.003, Education Code, a county, or a municipality is excepted from [public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

You explain:

Through contracts with independent day-care centers and sponsoring organizations, the department's [CACFP] provides cash reimbursement to child and adult day-care providers ("contractors") for serving meals to participants who meet U.S. Department of Agriculture ("USDA") standards. The CACFP is administered under the authority of the National School Lunch Act, 42 U.S.C.A. §§ 1751-1769h (1994 & Supp. 2000), and the Child Nutrition Act of 1966, 42 U.S.C.A. §§ 1771-1790 (1994 & Supp. 2000). Section 17 of the National School Lunch Act, as amended, authorizes assistance to States through grants-in-aid and other means to initiate, maintain, and expand nonprofit food service programs for children or adult participants in nonresidential institutions which provide care. 7 C.F.R. § 226.1 (2000).

A portion of the information at issue pertains to the department's administration of the above-described programs. We note that as part of administering the above-described programs, federal regulations specifically provide that the "books and records of the food service management company pertaining to the institution's food service operation shall be available for inspection and audit by representatives of the [department]." 7 C.F.R. § 226.6(i)(5). Thus, the department is specifically authorized to conduct such audits. Further, your representations demonstrate that a portion of the submitted documents meet the definition of an "audit working paper." See Gov't Code § 552.116(b)(2). We therefore conclude that the department may withhold the audit working papers you have marked under section 552.116 of the Government Code.

Additionally, you assert that a portion of the submitted information is confidential under section 552.136 of the Government Code, which states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. Thus, pursuant to this section, the department must withhold the account numbers we have marked.

Further, we note that section 552.137 of the Government Code provides:

(a) Except as otherwise provided by this section, 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.

....

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Section 552.137 requires a governmental body to withhold certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the governmental body, unless the members of the public with whom the e-mail addresses are associated have affirmatively consented to their release. Section 552.137 does not apply to a government employee's work e-mail address or a business's general e-mail address or web address. We find that the e-mail address we have marked is excepted from disclosure under section 552.137(a). Accordingly, we conclude that, unless consent to release has been granted, the department must withhold this e-mail address pursuant to section 552.137(a) of the Government Code.

Next, All Children's Nutrition and Cool Kids assert section 552.110(b) of the Government Code, which protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Having reviewed the submitted briefs, we find that All Children's Nutrition and Cool Kids have made only conclusory allegations and have made no specific factual or evidentiary showing that release of their information would likely cause them substantial commercial harm. Accordingly, the department may not withhold any of the remaining submitted information related to All Children's Nutrition and Cool Kids under section 552.110 of the Government Code.

Finally, we note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons,

if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, Alliance, Tara, and We Are Caring Hearts have not submitted to this office any reasons explaining why their information should not be released. Therefore, these parties have provided us with no basis to conclude that they have a protected proprietary interest in any of the submitted information. *See, e.g.,* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Therefore, the remaining submitted information from Alliance, Tara, and We Are Caring Hearts must be released.

In summary, we conclude that: 1) the personal financial information we have marked must be withheld under section 552.101 in conjunction with common law privacy; 2) the submitted social security numbers may be confidential under federal law; 3) the department may withhold the information we have marked under sections 552.107 and 552.111 of the Government Code; 4) the department may withhold the information you have marked under section 552.116 of the Government Code; and 5) the department must withhold the information we have marked under sections 552.136 and 552.137 of the Government Code.⁶ All remaining responsive information must be released.

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

⁶As our ruling on these issues is dispositive, we need not address the remaining arguments submitted by Cool Kids.

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 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,



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WMM/lmt

Ref: ID# 199922

Enc: Submitted documents

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