



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 2, 2004

Ms. Denise Nance Pierce
Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, L.L.P.
816 Congress Avenue, Suite 1700
Austin, Texas 78701

OR2004-4482

Dear Ms. Pierce:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 202749.

The Austin Community College (the "college"), which you represent, received a request for information pertaining to a specified incident and its "administrative aftermath." You indicate that you have provided the requestor with some of the requested information. You claim, however, that the remaining requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.022, 552.101, 552.103, 552.107, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and have reviewed the submitted information.²

¹ Although the college claims that the remaining requested information, or portions thereof, is excepted from disclosure under section 552.022 of the Government Code, we note that section 552.022 is not an exception to disclosure under the Public Information Act (the "Act"), but, instead, constitutes an illustrative list of types of information that are public and that may not be withheld from disclosure unless they are "expressly confidential under other law." See Gov't Code § 552.022. Accordingly, we do not address whether any portion of the remaining requested information is excepted from disclosure under section 552.022 of the Government Code.

² We note that you indicate that portions of the submitted information are not responsive to the request for information. Accordingly, this ruling does not address the public availability of that particular information, and the college need not release it to the requestor in response to this ruling. We further note that subsequent references to the "submitted information" refer to the portions of the submitted information that are responsive to the request for information.

Initially, we note that although you state that the college is “currently working with [the requestor] to clarify the extent of his request for records,” you have submitted information that you indicate is responsive to the request and that is excepted from disclosure. Accordingly, we will address your claimed exceptions to disclosure regarding the submitted information. However, if after clarifying with the requestor the extent of his request, the college ascertains that other information exists that is responsive to the request, then the college must seek another ruling from us before withholding any such information from the requestor. *See* Gov’t Code § 552.222(b) (stating that if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *see also* Open Records Decision No.663 (1999) (providing for tolling of ten business day deadline for requesting attorney general decision while governmental body awaits clarification).

Next, we must address the procedural requirements of section 552.301 of the Government Code. Section 552.301(e) provides, in part, that a governmental body that requests an attorney general decision under section 552.301(a) must, within a reasonable time, but not later than the fifteenth business day after the date of receiving the written request, submit to the attorney general a copy of the specific information requested or representative samples of it, labeled to indicate which exceptions to disclosure apply to which parts of the documents. *See id.* § 552.301(e). You state that the college received this request for information on March 11, 2004. Therefore, the college had until April 8, 2004 under section 552.301(e) to provide us with all of the requested information that is at issue for review.³ However, the college failed to provide us with some of the requested information that is at issue until April 13, 2004. Further, to date, the college has failed to provide us with copies of, or representative samples of, the requested “entire litigation file for the cases [the requestor] has filed against [the college] relating to the August 8, 2002 incident.” Accordingly, we conclude that the college has failed to comply with the procedural requirements of section 552.301 in requesting this decision from us with regard to this particular information.

Because the college failed to comply with the procedural requirements of section 552.301 in requesting this decision from us with regard to this particular information, this information is now presumed public. *See* Gov’t Code § 552.302; *see also* *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.—Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ’g Co.*, 673 S.W.2d 316, 323 (Tex. App.—Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The college must demonstrate a compelling interest in order to overcome the presumption that this particular information is now public. *See id.* Normally, a compelling interest is demonstrated when some other source of law makes the

³ You inform us that the college “was closed for Spring Break from March 15, 2004 through March 19, 2004.” Consequently, the fifteen business day deadline for submitting to us all of the requested information that is at issue was April 8, 2004.

requested information confidential or third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977).

Although the college indicates that this particular information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code, we note that these exceptions to disclosure are discretionary exceptions to disclosure under the Act that may be waived by a governmental body. *See* Gov't Code §552.301; *see also* Open Records Decision Nos. 676 (2002) (governmental body may waive section 552.107), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 630 at 4-5 (1994) (governmental body may waive statutory predecessor to section 552.107), 522 at 4 (1989) (discretionary exceptions in general). In failing to comply with the procedural requirements of section 552.301 with regard to this particular information, the college waived its section 552.107 and section 552.111 claims with regard to this information. Accordingly, we conclude that the college may not withhold any portion of this particular information under either section 552.107 or 552.111 of the Government Code. Consequently, the college must release all of this particular information to the requestor.

In addition, we note that the information that the college submitted to us for review as Exhibit A is subject to section 552.022 of the Government Code. Section 552.022 provides in pertinent part:

[T]he following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(16). Thus, information that is contained in attorney fee bills must be released under section 552.022, unless it is expressly confidential under other law. Although the college claims that portions of Exhibit A 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 to disclosure under the Act that protect a governmental body's interests and may be waived.⁴ Thus, these particular exceptions to

⁴ 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 which implicates 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), 522 at 4 (1989) (discretionary exceptions in general), 473 (1987) (governmental body may waive

disclosure do not constitute “other law” that makes information expressly confidential for purposes of section 552.022(a). Accordingly, we conclude that the college may not withhold any portion of Exhibit A under either section 552.103, 552.107, or 552.111 of the Government Code. However, we note that the Texas Supreme Court has determined that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); *see also* Open Records Decision Nos. 677 (2002), 676 (2002). Accordingly, we will address the confidential nature of Exhibit A under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure.

We note that 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.* The first prong of the work product test, which requires a governmental body to show that the information at issue was 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 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 Nat’l Tank 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. The second prong of the work product test requires the governmental body to show that the documents at issue contain the attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. *See* Tex. R. Civ. P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test is confidential under rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

In this instance, you have adequately demonstrated that Exhibit A was either created for trial or in anticipation of litigation. Thus, we find that the college has met the first prong of this test. Further, we find that the college has adequately demonstrated that portions of Exhibit

statutory predecessor to section 552.111); *see also Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103). Discretionary exceptions, therefore, do not constitute “other law” that makes information confidential.

A constitute an attorney's or attorney's representative's mental impressions, opinions, conclusions, or legal theories. Accordingly, we conclude that the college may withhold the information that we have marked in Exhibit A pursuant to rule 192.5 of the Texas Rules of Civil Procedure.

Rule of Evidence 503(b)(1) of the Texas Rules of Evidence 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(b)(1). 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.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show 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 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. *See Open Records Decision No. 676 (2002)*. 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 Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996)

(privilege extends to entire communication, including facts contained therein); *see also In re Valero Energy Corp.*, 973 S.W.2d 453, 4527 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (privilege attaches to complete communication, including factual information); *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ); *see also* Open Records Decision No. 676 (2002). Based on your representations and our review of the remaining portions of Exhibit A, we find that portions of this information that we have marked reflect confidential communications made for the purpose of facilitating the rendition of professional legal services to a client. Accordingly, we conclude that the college may withhold this particular marked information pursuant to rule 503 of the Texas Rules of Evidence. The college must release the remaining submitted portions of Exhibit A to the requestor.

You also claim that the information that you submitted to us for review as Exhibit C and the remaining submitted information in Exhibit E is excepted from disclosure pursuant to section 552.107 of the Government Code. Section 552.107(1) protects information that is encompassed by the attorney-client privilege. *See* Gov't Code § 552.107(1). When asserting the attorney-client privilege, a governmental body maintains the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *See 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. *See* 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. *See 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. *See* 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, *see 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." *See 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. *See 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 your representations and our review of Exhibit C and the remaining submitted information in Exhibit E, we find that the entirety of this information constitutes communications exchanged between privileged parties in furtherance of the rendition of legal services to a client. Accordingly, we conclude that the college may withhold Exhibit C and the remaining submitted information in Exhibit E pursuant to section 552.107(1) of the Government Code.⁵

In summary, the college must release to the requestor the information that we have marked for release, as well as the “entire litigation file for the cases [the requestor] has filed against [the college] relating to the August 8, 2002 incident.” The college may withhold the information that we have marked in Exhibit A pursuant to rule 192.5 of the Texas Rules of Civil Procedure and rule 503 of the Texas Rules of Evidence. The college may withhold Exhibit C and the remaining submitted information in Exhibit E pursuant to section 552.107(1) of the Government Code. The college must release the remaining submitted information in Exhibit A 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

⁵ Because we base our ruling regarding Exhibit C on section 552.107(1) of the Government Code, we need not address your remaining claimed exception to disclosure with regard to this particular information.

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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/krl

Ref: ID# 202749

Enc. Marked documents

c: Mr. Spencer Nutting
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(w/o enclosures)