



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 14, 2004

Ms. Jennifer H. Davidow
Vinson & Elkins, L.L.P.
1001 Fannin Street
Houston, Texas 77002-6760

OR2004-5796

Dear Ms. Davidow:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 204655.

The Fort Bend County Child Advocates, Inc. (the "Child Advocates"), which you represent, received a request for the press releases, video training tapes, "in-home parent educator," documents describing in-kind donations of a number of named companies, newsletters, the minutes of meetings of certain Court Appointed Special Advocates (the "CASA") committees, and CASA communications for four years. The Fort Bend County Child Advocates Endowment, Inc. (the "endowment"), which you also represent, received a request for audit reports, profit and loss, balance sheets, and tax returns since 2003. You assert that some of the requested information has been made available to the requestor. You claim that some of the requested information does not exist.¹ You also claim that some of the requested information is not subject to the Act, and that some of the remaining information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.117 of the

¹We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opps. Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986); see also Attorney General Opinion JM-48 (1983) (governmental body not required to comply with standing request for information to be collected or prepared in future).

Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, you assert that the endowment is not a governmental body. We understand the endowment neither is supported by nor does it spend public funds, and that its sole source of support is from private fund raising activities. *See* Gov't Code § 552.003(1)(A)(xii) (defining governmental body as entity that is supported by or spends public funds), § 552.003(5) (defining public funds as funds of the state or a governmental subdivision of the state). Consequently, the endowment is not a governmental body, and the information requested from the endowment is not subject to release under the Act. *See id.* § 552.003(1)(A)(xii); *see also* Open Records Decision No. 602 (1992).

You also assert that the information in Exhibit A is not subject to the Act. Exhibit A consists of the minutes of meetings of the following committees of CASA: Board of Directors Marketing Committee, Volunteer Council, Gala Committee, Christmas Home Tour Committee, Boots on the Brazos, National Adoption Day Committee. You assert that these committees are not governmental bodies, and thus are not subject to the Act.

Child Advocates is a governmental body; however, an organization is not necessarily a "governmental body" in its entirety. The Act provides that "[t]he part, section, or portion of an organization, corporation, commission, committee, institution, or agency that spends or that is supported in whole or in part by public funds" is a governmental body. Gov't Code § 552.003(1)(xii); *see also* Open Records Decision No. 602 (1992) (only the records of those portions of the Dallas Museum of Art that were directly supported by public funds are subject to the Act). You assert that Child Advocates does not contribute funds to any of the listed committees and that they are not otherwise supported by public funds. Based on these assertions, we conclude that there is no nexus between the programs or activities of these committees and the receipt or expenditure of public funds. *See* Gov't Code § 552.003(5) (defining public funds). These committees of Child Advocates therefore do not fall within the definition of a governmental body under the Act. *See id.* § 552.003(1)(A)(x). Thus, the information in Exhibit A is not subject to release under the Act.

We note that the information in Exhibits H and I is subject to section 552.022 of the Government Code, which provides, in pertinent part:

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

[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). Exhibits H and I consist of attorney fee bills. You assert that the marked information in Exhibit H is privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. The Texas Rules of Civil Procedure and Rules of Evidence are "other law" for purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001) (Texas Rules of Evidence and Rules of Civil Procedure are "other law"); *see also* Open Records Decision Nos. 677 (2002), 676 (2002). Accordingly, we will address the confidential nature of Exhibit H under these rules.

Texas Rule of Evidence 503(b)(1) provides as follows:

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.

A communication is confidential if it is 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. Tex. R. Evid. 503(a)(5). Thus, to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must (1) show that the document is a communication transmitted between privileged parties or reveals a confidential

communication, (2) identify the parties involved in the communication, and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. On 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). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

For the purpose of section 552.022, information is confidential under Rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. Open Records Decision No. 677 (2000). 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. 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. *Id.* 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). *Caldwell*, 861 S.W.2d at 427.

Based on your arguments and our review of the information, we agree that the information you have marked in Exhibit H consists of privileged communications made between Child Advocates and its attorneys and the core work product of the Child Advocates' attorneys; therefore, we conclude that you may withhold the information you have marked in Exhibit H as privileged attorney-client communications and attorney work product.

We also note that the submitted information includes information pertaining to employees and officers of Child Advocates. Section 552.022(a)(2) provides that the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body are public information and not excepted from required disclosure under the Act unless they are expressly confidential under other law. Section 552.101 is "other law" for purposes of section 552.022; therefore, we will address your claim under section 552.101 with regard to the remaining information.

You assert that some of the submitted information is excepted from release under section 552.101 of the Government Code. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses section 264.610 of the Family Code, which provides that "[t]he attorney general may not disclose information gained through reports, collected case data, or inspections that would identify a person working at or receiving services from a

volunteer advocate program.” Section 264.610 applies only to information maintained by the attorney general. The information at issue is not maintained by the attorney general for purposes of section 264.610; therefore, none of the information is excepted from release under section 552.101 of the Government Code in conjunction with section 264.610 of the Family Code.

Section 552.101 also encompasses information made confidential by constitutional law or judicial decision. In the opinion *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371 (Tex. 1998), the Texas Supreme Court determined that the First Amendment right to freedom of association could protect an advocacy organization’s list of contributors from compelled disclosure through a discovery request in pending litigation. In reaching this conclusion, the court stated the following:

Freedom of association for the purpose of advancing ideas and airing grievances is a fundamental liberty guaranteed by the First Amendment. *NAACP v. Alabama*, 357 U.S. 449, 460, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958). Compelled disclosure of the identities of an organization’s members or contributors may have a chilling effect on the organization’s contributors as well as on the organization’s own activity. *See Buckley v. Valeo*, 424 U.S. 1, 66-68, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). For this reason, the First Amendment requires that a compelling state interest be shown before a court may order disclosure of membership in an organization engaged in the advocacy of particular beliefs. *Tilton*, 869 S.W.2d at 956 (citing *NAACP*, 357 U.S. at 462-63, 78 S.Ct. 1163). “[I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.” *Id.*

Bay Area Citizens, 982 S.W.2d at 375-76 (footnote omitted). The court held that the party resisting disclosure bears the initial burden of making a *prima facie* showing that disclosure will burden First Amendment rights but noted that “the burden must be light.” *Id.* at 376. Quoting the United State Supreme Court’s decision in *Buckley v. Valeo*, 424 U.S. 1, 74 (1976), the Texas court determined that the party resisting disclosure must show “a reasonable probability that the compelled disclosure of a party’s contributors’ names will subject them to threats, harassment, or reprisals from either Government officials or private parties.” *Id.* Such proof may include “specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself.” *Id.*

You argue that Child Advocates has, in this instance, made the requisite *prima facie* showing to this office. Considering the representations made to this office, the submitted supporting information, and the totality of the circumstances, we agree that you have made a *prima facie* showing that disclosure of the identities of contributors to Child Advocates in this instance

will burden First Amendment rights of freedom of association. We believe the term "contributor" encompasses the identities of both those individuals and corporations who make financial donations to Child Advocates, and volunteers who donate their time and services to Child Advocates. We note that the term "contributor" does not encompass members of the Child Advocates governing board or officers or employees of Child Advocates. *See generally* Gov't Code § 552.022(a)(2). In addition, *Bay Area Citizens* does not make confidential information pertaining to the donations themselves, such as the amount donated or types of donations. *See Bay Area Citizens*, 982 S.W.2d at 376-77 (only the names of contributors were at issue). Therefore, you must withhold the remaining information that identifies contributors under section 552.101 pursuant to the right of association, unless the contributors have waived their right of association.

Section 552.101 also encompasses the doctrine of common law privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has found that the following types of information are excepted from required public disclosure under common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). We have marked the information that is confidential under common law privacy, and that must be withheld under section 552.101.

You assert that the remaining information in Exhibits B-F and the information you have marked in Exhibit G is excepted under section 552.103 of the Government Code. Section 552.103 provides as follows:

- (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). Child Advocates has 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, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *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). Child Advocates must meet both prongs of this test for information to be excepted under 552.103(a).

You inform us, and provide documentation showing, that there are two lawsuits currently pending between the requestor and Child Advocates: one in federal court (No. H-02-0495) and one in state court (No. 02-CV-119502, where the requestor is next friend for his children). You inform us that the federal case is “in its procedural infancy”, and that, in the state lawsuit, the requestor is currently appealing a final summary judgment granted in favor of Child Advocates. Based on your assertions and our review of the submitted information, we agree that the remaining information in Exhibits B-F and the information you have marked in Exhibit G is related to the pending litigation, and is therefore excepted from release under section 552.103 of the Government Code.³

Generally, however, 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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information 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 it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You assert that Exhibit J is excepted from release under section 552.107 of the Government Code. Section 552.107(1) 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

³Because we are able to resolve this under section 552.103, we do not address your other arguments for exception regarding this information.

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 a 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 assert that the information in Exhibit J consists of confidential communications between the representatives of Child Advocates and its lawyers for the purpose of providing legal advice. Based on this assertion and our review of the submitted information, we conclude that you may withhold the information in Exhibit J under section 552.107.⁴

You also assert that section 552.117 is applicable to some of the remaining information.⁵ Section 552.117 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

⁴Because we are able to resolve this under section 552.107, we do not address your other arguments for exception regarding the information in Exhibit J.

⁵You assert section 552.017 in your brief, but we assume you refer to 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, you may only withhold information that we have marked under section 552.117 for those current or former officials or employees who timely elected to keep their personal information confidential; you may not withhold information under section 552.117 for any current or former official or employee who did not make a timely election to keep the information confidential.

In addition, a social security number may be excepted from disclosure under section 552.101 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). 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.* In this case, we have no basis for concluding that any of the social security numbers in the reports are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 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.

We also note that some of the remaining information contains account numbers. Section 552.136 of the Government Code 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. Therefore, you must withhold the information that we have marked under section 552.136.

Finally, we note that the remaining information includes personal e-mail addresses. Section 552.137 of the Government Code provides the following:

(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.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor’s agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(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.

Child Advocates must withhold the marked e-mail addresses of members of the public under section 552.137, unless these members have affirmatively consented to the release of their e-mail addresses.

To conclude, (1) the information in Exhibit A is not subject to the Act and need not be released, (2) the information in Exhibits B-F and the marked information in Exhibit G are excepted from release under section 552.103 of the Government Code, (3) you may withhold the marked information in Exhibit H pursuant to the attorney-client communication and attorney work product privileges, (4) the information in exhibit J is excepted from release under section 552.107, (5) the identifying information of volunteers of and contributors to Child Advocates is confidential under the right of association, and must be withheld under section 552.101, (6) the home address and telephone numbers of public employees are excepted under section 552.117 if the employees timely elected to keep that information confidential, (7) the marked account numbers are excepted from release under section 552.136, and (8) the marked personal e-mail addresses are excepted from release under section 552.137 unless their owners affirmatively consented to their release. The remaining information must be released 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).

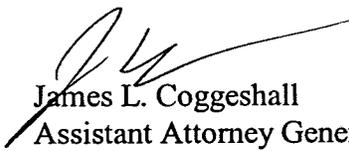
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 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,


James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/seg

Ref: ID# 204655

Enc. Submitted documents

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