



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 14, 2006

Mr. Phillip A. McKinney  
P.A. McKinney & Associates  
Post Office Box 2747  
Corpus Christi, Texas 78403

OR2006-06298

Dear Mr. McKinney:

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# 251799.

Coastal Bend College (the "college"), which you represent, received a request for complete copies of the following information pertaining to a named employee: (1) the personnel file, (2) every document and/or email kept by a named employee pertaining to the requestor, (3) every document and/or email kept by another named employee pertaining to the requestor, (4) the requestor's sexual harassment grievance against a named employee, (5) all investigations, including but not limited to audio tapes and other statements, as well as all conclusions of the requestor's sexual harassment grievance against a named employee, and (6) all corrective action taken as a result of all investigations of the requestor's sexual harassment grievance against a named employee. You claim that information responsive to items 2 and 5 of the request are excepted from disclosure under section 552.111 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note that you have submitted information that is responsive to only two of the six categories of requested information. To the extent any other information responsive to the request existed on the date the college received this request, we assume you have released

it. If you have not released any such information, you must do so at this time.<sup>1</sup> See Gov't Code § 552.301(a), .302; see also Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we note that the submitted information consists of a completed investigation. A completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public under section 552.022 of the Government Code and may not be withheld unless confidential under other law. See Gov't Code § 552.022(a)(1). The submitted information constitutes a completed investigation made of, for, or by the college; therefore, the college may only withhold this information if it is confidential under other law. Although you argue that the submitted information is excepted from disclosure under section 552.111 of the Government Code, this section is a discretionary exception and, as such, is not other law for purposes of section 552.022. See Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 470 at 7 (1987) (statutory predecessor to section 552.111 may be waived). Accordingly, the submitted information may not be withheld under section 552.111. You also assert that the submitted information is excepted from release under Rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court held 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). Thus, we will determine whether the submitted investigation is confidential under Rule 192.5.

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 at 9-10 (2002). 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.* 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

---

<sup>1</sup>We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

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 contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. 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). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1993, no writ).

You inform us that in July of 2004, the requestor filed a sexual harassment grievance against another college employee. You state that pursuant to college policy, the Director of Personnel Services (the "director") conducted an investigation into the grievance and sought the advice of legal counsel "due to her concern that the claim could lead to litigation." During this investigation, the director conducted employee interviews and collected "memos and emails regarding [college] employee opinions/observations" of the requestor and the requestor's supervisor. You also state that the director found the requestor's grievance to be unsustainable. You further explain that the requestor filed a complaint with the EEOC claiming sexual and racial discrimination. Finally, you state that the director's investigation was conducted at the direction of legal counsel. Upon review of your arguments and the submitted information, we find that you have demonstrated that the information at issue was prepared in anticipation of litigation and contains mental impressions, opinions, conclusions, or legal theories developed at the direction of legal counsel. Therefore, you may withhold this information under Rule 192.5 of the Texas Rules of Civil Procedure.

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).

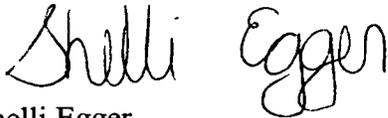
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



Shelli Egger  
Assistant Attorney General  
Open Records Division

SE/sdk

Ref: ID# 251799

Enc. Submitted documents

c: Ms. Janey Ong  
901 Avenue C  
Beeville, Texas 78102  
(w/o enclosures)