



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

February 27, 2008

Mr. Cobby A. Caputo  
Bickerstaff Heath Delgado Acosta LLP  
Counsel for Austin Community College  
816 Congress Avenue, Suite 1700  
Austin, Texas 78701

OR2008-02604

Dear Mr. Caputo:

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# 303244.

Austin Community College (the "college"), which you represent, received a request for twenty-one categories of information pertaining to alleged mercury contamination, disputes regarding mercury contamination, and related matters. You state that some of the requested information has been released. You have submitted information that the college seeks to withhold under sections 552.101, 552.102, 552.103, 552.107, and 552.111 of the Government Code, Texas Rule of Evidence 503, and Texas Rules of Civil Procedure 192.3(e) and 192.5.<sup>1</sup> We have considered your arguments and have reviewed the submitted information.<sup>2</sup> We note that some of the submitted information does not appear to be responsive to this request. This decision does not address the public availability of that information, which we have marked, and it need not be released to this requestor.

We note that the college failed to submit some of the information at issue to this office within the fifteen-business-day period prescribed by section 552.301(e) of the Government Code. *See Gov't Code* § 552.301(e)(1)(D). Under section 552.302 of the Government Code,

---

<sup>1</sup>We note that section 552.101 does not encompass discovery privileges such as Texas Rule of Evidence 503 and Texas Rules of Civil Procedure 192.3(e) and 192.5. *See* Open Records Decision No. 676 at 1-3 (2002). Therefore, this decision will not consider whether the college may withhold any of the submitted information on any of those grounds under section 552.101.

<sup>2</sup>This letter ruling assumes that the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the college to withhold any information that is substantially different from the submitted information. *See Gov't Code* §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

that information is therefore presumed to be public and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *see also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). You seek to withhold the information that was not timely submitted under sections 552.101, 552.102, and 552.111 of the Government Code and Texas Rule of Civil Procedure 192.5. Because the applicability of sections 552.101 and 552.102 can provide a compelling reason for non-disclosure, we will consider whether the district must withhold any of the information that was not timely submitted under those exceptions. However, the college's assertion of the attorney work product privilege under section 552.111 and rule 192.5 is not a compelling reason for non-disclosure under section 552.302. *See* Open Records Decision No. 677 at 10 (2002) (attorney work product privilege under Gov't Code § 552.111 or TEX. R. CIV. P. 192.5 does not provide compelling reason for non-disclosure if claim does not implicate third party rights). Therefore, the college may not withhold any of the information that was not timely submitted on the basis of section 552.111 or rule 192.5.

We next note that the rest of the submitted information falls within the scope of section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body." Gov't Code § 552.022(a)(1). Thus, because the remaining information consists of records of completed investigations, it must be released, unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. *Id.* You do not claim an exception to disclosure under section 552.108. You do claim an exception under section 552.101 of the Government Code, which is a confidentiality provision for the purposes of section 552.022. Accordingly, we will consider whether the college must withhold any of the remaining information under section 552.101. Although you also raise sections 552.103, 552.107, and 552.111 of the Government Code, those exceptions are discretionary and may be waived. *See id.* § 552.007; *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 Gov't Code § 552.103); Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under Gov't Code § 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103, 552.107, and 552.111 are not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the college may not withhold any of the remaining information under any of those exceptions.

The Texas Supreme Court has held, however, that the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we also will consider your claims under Texas Rule of Evidence 503 and Texas Rules of Civil Procedure 192.3(e) and 192.5.

Rule 503 enacts the attorney-client privilege and provides in part:

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. *Id.* 503(a)(5).

Thus, in order 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. 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). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You contend that the information submitted as Exhibits D and E is protected by the attorney-client privilege. You state that the information in Exhibit D consists of attorney-client communications that were made for the purpose of facilitating the rendition of professional legal services. You state that those communications remain confidential. You state that the information in Exhibit E is related to mediation of a dispute between the college and an opposing party. Based on your representations and our review of the information at issue, we conclude that the college may withhold Exhibit D under rule 503. You have not

demonstrated, however, that the information in Exhibit E either constitutes or documents communications between privileged parties, and therefore the college may not withhold any of that information under rule 503.

Rule 192.5 encompasses the attorney work product privilege. For the purposes of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent that the information implicates the core work product aspect of the work product privilege. *See* ORD 677 at 9-10. Rule 192.5 defines core work product as the work product of an attorney or an attorney's representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney's representative. *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 the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *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 part of the work product test requires the governmental body to show that the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney's or an attorney's representative. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both parts of the work product test is confidential under rule 192.5, provided that the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d at 427.

You contend that the information submitted as Exhibit B constitutes attorney work product. We also understand you to claim that the information in Exhibit C is attorney work product. You state that Exhibit B consists of communications between the college's attorneys and outside experts and consultants who were engaged during the course of litigation. You state that Exhibit C consists of agreements with experts and consultants relating to litigation to which the college was a party. Having considered your arguments and reviewed the information at issue, we conclude that the college may withhold Exhibit B under rule 192.5.<sup>3</sup> You have not demonstrated, however, that the information in Exhibit C consists of the

---

<sup>3</sup>As we are able to make this determination, we need not address your claim under rule 192.3(e).

mental impressions, opinions, conclusions, or legal theories of an attorney's or an attorney's representative. Therefore, Exhibit C may not be withheld under rule 192.5.

Next, we address section 552.101 of the Government Code. This section excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information that other statutes make confidential. Gov't Code § 552.101. Medical records are confidential under the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(a)-(c). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Act. *See* Open Records Decision No. 598 (1991). Medical records must be released on the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) the reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). We have marked the submitted information that is confidential under the MPA.<sup>4</sup> That information must not be released unless the college receives written consent that complies with sections 159.004 and 159.005 of the MPA.

You raise section 552.101 in conjunction with section 154.073 of the Civil Practice and Remedies Code, which provides in part:

---

<sup>4</sup>As we are able to make this determination, we do not address your other claims with regard to this information under sections 552.101 and 552.102.

(a) Except as provided by Subsections (c), (d), (e), and (f) a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.<sup>5</sup>

(b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

(d) A final written agreement to which a governmental body, as defined by Section 552.003, Government Code, is a signatory that is reached as a result of a dispute resolution procedure conducted under this chapter is subject to or excepted from required disclosure in accordance with Chapter 552, Government Code.

Civ. Prac. & Rem. Code § 154.073(a), (b), (d). In Open Records Decision No. 658 (1998), this office found that communications during the formal settlement process were intended to be confidential. *See* Open Records Decision No. 658 at 4: *see also* Gov't Code § 2009.054(c). You also seek to withhold the information in Exhibit E under section 154.073. You state that the information at issue relates to mediation that resulted in settlement of a dispute.<sup>6</sup> Based on your representations and our review of Exhibit E, we have marked information that the college must withhold under section 552.101 of the Government Code in conjunction with section 154.073 of the Civil Practice and Remedies Code. We find that you have not demonstrated that the remaining information in Exhibit E consists of either a communication relating to the subject matter of the dispute made by a participant in an alternative dispute resolution procedure or a record made at such a procedure. *See* Civ. Prac. & Rem. Code § 154.073(a)-(b). We therefore conclude that the remaining information in Exhibit E is not confidential under section 154.073 and may not be withheld on that basis under section 552.101.

You also seek to withhold Exhibit E under section 552.101 in conjunction with Texas Rule of Evidence 408. In order for information to be confidential under this exception in conjunction with another provision of law, the other law must explicitly require confidentiality. A confidentiality requirement will not be inferred from a provision's structure. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality

---

<sup>5</sup>We note that subsections 154.073(c), (e), and (f) are not applicable in this instance.

<sup>6</sup>You inform us that the final mediated settlement agreement is being released.

provision must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (statutory confidentiality requires express language making information confidential), 465 at 4-5 (1987). We note that rule 408 governs the admissibility of information developed through compromise negotiations. *See* TEX. R. EVID. 408. Because rule 408 does not explicitly provide that information is confidential, we conclude that the college may not withhold any of the remaining information in Exhibit E under section 552.101 in conjunction with rule 408.

Lastly, we note that some of the submitted information appears to be protected by copyright. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information also must comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information 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 at 8-9 (1990).

In summary: (1) the college may withhold Exhibit D under Texas Rule of Evidence 503; (2) the college may withhold Exhibit B under Texas Rule of Civil Procedure 192.5; (3) the marked medical records are confidential under the MPA and must not be released unless the college receives written consent that complies with sections 159.004 and 159.005 of the MPA; and (4) the college must withhold the information that we have marked in Exhibit E under section 552.101 of the Government Code in conjunction with section 154.073 of the Civil Practice and Remedies Code. The rest of the submitted information must be released. Any information that is protected by copyright must be released in accordance 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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,



James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/ma

Ref: ID# 303244

Enc: Submitted documents

c: Mr. Tom "Smitty" Smith  
Public Citizen Texas  
1002 West Avenue Suite 300  
Austin, Texas 78701  
(w/o enclosures)