



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 4, 2013

Mr. Brian S. Nelson
General Counsel
Lone Star College System
5000 Research Forest Drive
The Woodlands, Texas 77381-4356

OR2013-03640

Dear Mr. Nelson:

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# 480199 (LSCS File No. PR13-1108-00028).

The Lone Star College System (the "system") received a request for all information pertaining to the termination of a named individual, including eleven specified categories of information. You state you have no information responsive to some of the requested categories of information.¹ You indicate the system has redacted student-identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.² You claim that the submitted

¹The Act does not require a governmental body to release information that did not exist when it received a request or to create responsive information. See *Economic 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).

²The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental or student consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined FERPA determinations must be made by the educational authority in possession of the education records. A copy of this letter may be found on the Office of the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See Gov't Code § 552.304* (interested party may submit comments stating why information should or should not be released).

Initially, we must address the requestor's assertion that the system did not comply with section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request for information. *See id.* § 552.301(b). The system received the initial request on November 8, 2012. The system states, and provides documentation showing, it requested clarification of the request on November 15, 2012. *See id.* § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). In *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010), the Texas Supreme Court held that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed. *See id.* at 384. The system states it received clarification from the requestor on December 11, 2012. We have no indication the system did not act in good faith in seeking clarification of the request. Therefore, based on the submitted documentation, we consider the system's ten-business-day deadline for requesting a decision under section 552.301 to have begun on December 11, 2012, the date the system received the requestor's clarification. Thus, as the system requested a decision on December 19, 2012, we find the system fully complied with the requirements of section 552.301(b) of the Government Code in requesting this decision.

Next, we note you have indicated some of the submitted information in Exhibit 13 is not responsive to the clarified request for information. This ruling does not address the public availability of non-responsive information, and the system is not required to release non-responsive information in response to the present request.

We next note some of the responsive information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under [the Act] or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

...

(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)(1), (16). A portion of the submitted information consists of a completed report and thus is subject to subsection 552.022(a)(1). The system must release this information pursuant to subsection 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. *See id.* § 552.022(a)(1). You seek to withhold the information subject to section 552.022(a)(1) under section 552.103 of the Government Code. The submitted information also contains attorney fee bills that are subject to subsection 552.022(a)(16). This information must be released unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(16). You seek to withhold the information subject to section 552.022(a)(16) under sections 552.103 and 552.107 of the Government Code. However, sections 552.103 and 552.107 are discretionary exceptions and do not make information confidential under the Act. *See 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); *see also* Open Records Decision Nos. 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), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the information subject to section 552.022, which we have marked, may not be withheld under section 552.103 or section 552.107 of the Government Code. As you raise no other exceptions against the release of the information subject to subsection 552.022(a)(1), it must be released. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the submitted fee bills. We will also consider your arguments under sections 552.103 and 552.107 of the Government Code for the responsive information not subject to section 552.022.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 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.

TEX. R. EVID. 503(b)(1). 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. *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 it was not intended to be disclosed to third persons and 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You assert portions of the submitted attorney fee bills must be withheld under rule 503. You state the information at issue contains privileged attorney-client communications between the attorneys for the system. You indicate the communications at issue were made for the purpose of the rendition of legal services to the system. You further state the communications at issue have not been, and were not intended to be, disclosed to third parties. Thus, based on your representations and our review of the information at issue, we find portions of the information at issue, which we have marked, constitute confidential attorney-client communications under rule 503. Accordingly, the system may withhold the information we have marked within the submitted attorney fee bills pursuant to rule 503 of the Texas Rules of Evidence. However, the remaining information at issue either does not reveal a communication, reveals a communication with a party who is not identified as privileged with respect to the communication, or reveals the creation of a document but does not reflect whether the document was communicated. Thus, you have not shown how the remaining information at issue documents privileged attorney-client communications, and

none of the remaining information at issue may be withheld under Texas Rule of Evidence 503.

You claim section 552.103 of the Government Code for the information not subject to section 552.022. Section 552.103 states in relevant part:

(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). The system 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 on the date the system received the request for information, 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). The system must meet both prongs of this test for information to be excepted under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* This office has found a pending Equal Employment Opportunity Commission ("EEOC") complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You state a claim of discrimination with the EEOC was filed prior to the date of the system's receipt of the present request for information. Thus, we agree the system reasonably anticipated litigation on the date it received the present request for information. You state the information at issue is related to the anticipated litigation. Upon review, we agree the information at issue is related to the anticipated litigation for purposes of section 552.103.

Accordingly, the system may generally withhold the information at issue under section 552.103 of the Government Code.

We note, however, that the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* ORD 551 at 4-5. Therefore, if the opposing party has seen or had access to information relating to pending litigation through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). In this instance, the opposing party in the pending litigation has already seen or had access to some of the information at issue. The information we have marked has been seen by the opposing party and may not be withheld from the requestor under section 552.103. The city may withhold the remaining information not subject to section 552.022 under section 552.103.³ We note the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We note some of the information seen by the opposing party is subject to sections 552.117(a)(1) and 552.137 of the Government Code.⁴ Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, emergency contact information, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Therefore, if the individuals whose information we have marked timely requested confidentiality under section 552.024, the system must withhold the marked information under section 552.117(a)(1) of the Government Code. If the individuals whose information is at issue did not make a timely election under section 552.024, the system may not withhold the information at issue under section 552.117(a)(1) of the Government Code.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with

³As our ruling is dispositive, we do not address your remaining argument against disclosure of this information.

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov’t Code § 552.137(a)-(c). The e-mail address at issue is not specifically excluded by section 552.137(c). As such, this e-mail address, which we have marked, must be withheld under section 552.137 of the Government Code, unless the owner of the address affirmatively consents to its release.⁵

In summary, the system may withhold the information we have marked pursuant to rule 503 of the Texas Rules of Evidence. Except for the information we have marked that has been seen by the opposing party, the system may withhold the information not subject to section 552.022 of the Government Code under section 552.103 of the Government Code. If the individuals whose information we have marked timely requested confidentiality under section 552.024 of the Government Code, the system must withhold the marked information under section 552.117(a)(1) of the Government Code. The system must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the address affirmatively consents to its release. The system must release the remaining information subject to section 552.022 of the Government Code and seen by the opposing party.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Sarah Casterline
Assistant Attorney General
Open Records Division

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⁵Open Records Decision No. 684 (2009) serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137, without the necessity of requesting an attorney general decision.

Ref: ID# 480199

Enc. Submitted documents

c: Requestor
(w/o enclosures)