



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.  
The ruling and judgment can be viewed in PDF  
format below.



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

March 30, 2015

**The ruling you have requested has been amended as a result of litigation and has been attached to this document.**

Ms. June B. Harden  
Assistant Attorney General  
Assistant Public Information Coordinator  
General Counsel Division  
Office of the Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

OR2015-06036

Dear Ms. Harden:

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# 556641 (OAG PIR No. 14-40042).

The Office of the Attorney General (the "OAG") received a request for payment and billing records for the rendering of legal services to the State of Texas or its agencies by Fulbright & Jaworski, L.L.P.; or Norton Rose Fulbright, L.L.P., during a specified time period.<sup>1</sup> You state the OAG will release some of the requested information.<sup>2</sup> Additionally, you state the OAG will redact certain information pursuant to sections 552.130 and 552.136 of the

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<sup>1</sup>You state the OAG sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad 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). Additionally, you inform us the requestor was required to make a deposit for payment of anticipated costs under section 552.263 of the Government Code, which the OAG received on December 17, 2014. *See* Gov't Code § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date that governmental body receives deposit or bond).

<sup>2</sup>You state the information being released includes information pertaining to the Texas Department of Information Resources, the Texas Department of Parks and Wildlife, and the Texas Public Finance Authority, as these agencies informed the OAG that they do not object to the release of their respective information.

Government Code.<sup>3</sup> Although you take no position regarding the release of the submitted information, you state you notified Stephen F. Austin State University (“SFA”), the Teacher Retirement System of Texas (“TRS”), the Texas A&M University System (“TAMU”), the Texas Department of Transportation (“DOT”), the Texas Education Agency (“TEA”), the Texas Tech University System (“TTU”), the University of Houston (“UH”), the University of North Texas System (“UNT”), the University of Texas at Austin (“UT Austin”), and the University of Texas Medical Branch at Galveston (“UTMB”) of the request and of their right to submit comments to this office stating why the submitted information should or should not be released. *See* Gov’t Code § 552.304 (interested party may submit written comments stating why information should or should not be released). We have received arguments objecting to disclosure of the submitted information from TRS, TAMU, TEA, TTU, UH, UNT, UT Austin, and UTMB (collectively, the “agencies”).<sup>4</sup> We have considered the submitted arguments and reviewed the submitted information.<sup>5</sup>

Initially, we note a portion of the submitted information, which we have marked, is not responsive to the present request for information because it does not consist of payment and billing records for the rendering of legal services to the State of Texas or its agencies by Fulbright & Jaworski, L.L.P.; or Norton Rose Fulbright, L.L.P. This ruling does not address the public availability of non-responsive information, and the OAG is not required to release non-responsive information in response to this request.

Next, UT Austin informs us a portion of the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2014-13205 (2014). In that ruling, we held the OAG may withhold the information we marked under rule 503 of the Texas Rules of Evidence and must release the remaining information. As we have no indication the law, facts, or circumstances upon which the prior ruling was based have changed, we conclude the OAG may continue to rely on Open Records Letter No. 2014-13205 and withhold or release the information at issue in accordance with that ruling. *See* Open Records Decision No. 673 at 6-7 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous

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<sup>3</sup>Section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsection 552.130(a) without the necessity of seeking a decision from the attorney general. Gov’t Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). Section 552.136(c) of the Government Code authorizes a governmental body to redact, without the necessity of requesting a decision from this office, the information described in section 552.136(b). *Id.* § 552.136(c); *see also id.* § 552.136(d)-(e) (requestor may appeal governmental body’s decision to withhold information under section 552.136(c) to attorney general and governmental body withholding information pursuant to section 552.136(c) must provide certain notice to requestor).

<sup>4</sup>As of the date of this letter, we have not received comments from DOT or SFA.

<sup>5</sup>Although TAMU and UH raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure).

Next, we note some of the submitted information consists of attorney fee bills that are subject to section 552.022(a)(16) of the Government Code. Section 552.022(a)(16) provides for required public disclosure of “information that is in a bill for attorney’s fees and that is not privileged under the attorney-client privilege[,]” unless the information is confidential under the Act or other law. Gov’t Code § 552.022(a)(16). Although UNT raises section 552.107 of the Government Code and UH raises sections 552.107 of the Government Code and the deliberative process privilege of section 552.111 of the Government Code for their attorney fee bills, these exceptions are discretionary in nature and do not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). Therefore, the OAG may not withhold the information subject to section 552.022(a)(16) under section 552.107 or section 552.111. However, the Texas Supreme Court has held the Texas Rules of Evidence and Texas Rules of Civil Procedure are “other law” that make information expressly confidential for purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will consider the agencies’ assertion of the attorney-client privilege under Texas Rule of Evidence 503. We will also consider UH’s assertion of the attorney work product privilege under Texas Rule of Civil Procedure 192.5. Because sections 552.101, 552.1235, 552.136, and 552.137 of the Government Code can make information confidential under the Act, we will also address arguments under these sections raised by some of the agencies.

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 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).

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. *See* ORD 676 at 6-7. 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. *Id.* Upon a demonstration of all three factors, the information is 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, orig. proceeding).

Each of the agencies explains the fee bills at issue document communications made between each agency’s outside legal counsel and employees, officials, and consultants of each agency for the purpose of facilitating the rendition of professional legal services to each agency. Additionally, the OAG and the agencies explain the fee bills at issue were submitted by each agency to the OAG for the OAG’s review and approval pursuant to section 402.0212 of the Government Code and section 57.3 of title 1 of the Texas Administrative Code. *See* Gov’t Code § 402.0212 (providing contract for services between state agency and outside attorney must be approved by OAG to be valid); 1 T.A.C. § 57.3 (providing OAG serves as State of Texas’ legal counsel and represents state agencies and institutions of higher education, and “[a]gencies may not retain or select any Outside Counsel without first receiving authorization and approval from” OAG). Thus, the OAG and the agencies claim, and we agree, the OAG is a privileged party with respect to the fee bills at issue. Additionally, UT Austin explains that portions of its fee bills contain communications with legal counsel for Baylor University (“Baylor”), which UT Austin explains pertain to a joint research project between UT Austin and Baylor. Accordingly, we understand UT Austin to claim Baylor is a privileged party for the purposes of the communications at issue. Each of the agencies contends the communications were intended to be and have remained confidential. Based on these representations and our review, we conclude the OAG may withhold the information we have

marked under Texas Rule of Evidence 503.<sup>6</sup> However, some of the communications at issue are with individuals the agencies at issue have not demonstrated are privileged parties. Further, some of the information at issue does not document a communication. Thus, we find it has not been established the remaining information reveals privileged attorney-client communications for the purposes of Texas Rule of Evidence 503. Accordingly, the OAG may not withhold any of the remaining information under Texas Rule of Evidence 503.

Texas Rule of Civil Procedure 192.5 encompasses the attorney work product privilege. For purposes of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent 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 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 the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation there was a substantial chance litigation would ensue, and (2) the party resisting discovery believed in good faith there was a substantial chance 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 the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney 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 the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp.*, 861 S.W.2d at 426.

UH argues some of its remaining information at issue consists of privileged attorney work product. Upon review, we find UH has not demonstrated any of the information at issue consists of mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative that were created for trial or in anticipation of litigation. Therefore,

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<sup>6</sup>As our ruling is dispositive for this information, we need not address the remaining arguments against its disclosure.

we conclude the OAG may not withhold any of UH's remaining information under Texas Rule of Civil Procedure 192.5.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information made confidential by other statutes. UH contends some of its remaining information is confidential under section 7525 of title 26 of the United States Code. That section provides, in part, as follows:

(a) Uniform application to taxpayer communications with federally authorized practitioners. --

(1) General rule.-- With respect to tax advice, the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any federally authorized tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney.

(2) Limitations.-- Paragraph (1) may only be asserted in --

(A) any noncriminal tax matter before the Internal Revenue Service; and

(B) any noncriminal tax proceeding in Federal court brought by or against the United States.

26 U.S.C. § 7525(a)(1)-(2). We note the privilege may only be asserted in a noncriminal tax matter before the Internal Revenue Service and a noncriminal tax proceeding in Federal court brought by or against the United States. *See id.* §7525(a)(2). However, we note the requestor is seeking information pursuant to the Act. Accordingly, we find UH has not demonstrated section 7525 of title 26 of the United States Code is applicable in this instance, and the OAG may not withhold any of UH's remaining information under section 552.101 of the Government Code on that basis.

Section 552.107(1) protects information that comes within the attorney-client privilege. *See* Gov't Code § 552.107(1). The elements of the privilege under section 552.107 are the same as those for rule 503. 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. *See* ORD 676 at 6-7. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege. *See Huie*, 922 S.W.2d at 923.

UH claims section 552.107(1) for some of the remaining information not subject to section 552.022 and states this information consists of communications involving UH attorneys and UH representatives. We understand the information at issue was communicated by UH to the OAG as part of the OAG's review and approval of UH's fee bills pursuant to section 402.0212 of the Government Code and section 57.3 of title 1 of the Texas Administrative Code. *See* Gov't Code § 402.0212; 1 T.A.C. § 57.3. Thus, we agree the OAG is a privileged party with respect to the information at issue. UH states the communications were made for the purpose of facilitating the rendition of professional legal services to UH and these communications have remained confidential. Upon review, we find UH has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the OAG may withhold the information we have marked under section 552.107(1) of the Government Code.<sup>7</sup>

Section 552.1235 of the Government Code excepts from disclosure "the name or other information that would tend to disclose the identity of a person, other than a governmental body, who makes a gift, grant, or donation of money or property to an institution of higher education[.]" Gov't Code § 552.1235(a). For purposes of this exception, "institution of higher education" is defined by section 61.003 of the Education Code. *Id.* § 552.1235(c). Section 61.003 defines an "institution of higher education" as meaning "any public technical institute, public junior college, public senior college or university, medical or dental unit, public state college, or other agency of higher education as defined in this section." Educ. Code § 61.003(8). Because section 552.1235 does not provide a definition of "person," we look to the definition provided in the Code Construction Act. *See* Gov't Code § 311.005. "Person" includes a corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity. *Id.* § 311.005(2).

UH claims some of the remaining information identifies donors to UH and states these individuals have not consented to release of their identifying information. However, we note these persons are publicly identified as donors on UH's website for the particular gifts at issue. Additionally, we find no portion of the remaining information at issue identifies persons in their capacity as donors to UH. Accordingly, we find the OAG may not withhold any of the remaining information at issue on the basis of section 552.1235 of the Government Code.

As noted above, the OAG will redact information subject to section 552.136 of the Government Code, including any bank account and routing numbers, credit card numbers, and other account numbers.<sup>8</sup> However, we note UH seeks to withhold tax identification

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<sup>7</sup>As our ruling is dispositive for this information, we need not address UH's remaining argument against its disclosure.

<sup>8</sup>Accordingly, we need not address any of the agencies' arguments for this information.

numbers in the remaining information. Section 552.136 of the Government Code provides, in pertinent part:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding 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.

*Id.* § 552.136(a)-(b). Upon review, we find UH has not explained how the tax identification numbers it marked consist of credit card, debit card, or charge card numbers, or are access device numbers used to obtain money, goods, services, or any item of value, or used to initiate the transfer of funds. *See id.* §§ 552.136(a), .301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies). Therefore, we find UH has failed to demonstrate the applicability of section 552.136 to the information at issue and the OAG may not withhold the tax identification numbers on the basis of section 552.136 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 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). *See id.* § 552.137(a)-(c). We note section 552.137(c) provides section 552.137(a) does not apply to an e-mail address provided to a governmental body by a person who has or seeks a contractual relationship with the governmental body or by the contractor's agent. *Id.* § 552.137(c)(1)-(2). TTU claims section 552.137 for e-mail addresses within the remaining information; however, we note the e-mail addresses at issue are subject to section 552.137(c) of the Government Code. Accordingly, the OAG may not withhold any of the e-mail addresses at issue under section 552.137 of the Government Code.

In summary, the OAG may continue to rely on Open Records Letter No. 2014-13205 as a previous determination and withhold or release the information at issue in accordance with that ruling. The OAG may withhold the information we have marked under rule 503 of the Texas Rules of Evidence and the information we have marked under section 552.107(1) of the Government Code. The OAG must release the remaining responsive information.

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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Kristi L. Godden  
Assistant Attorney General  
Open Records Division

KLK/cz

Ref: ID# 556641

Enc. Submitted documents

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information subject to disclosure in Letter Ruling OR2015-06036. The Court is of the opinion that entry of an agreed dismissal order is appropriate.


It is THEREFORE, ORDERED, ADJUDGED and DECREED that this cause is DISMISSED in all respects;

All costs of the court and attorney fees are taxed against the parties incurring the same;


All relief not expressly granted is denied; and

This order disposes of all claims between the parties and is final.

Signed this 18 day of march, 2019.

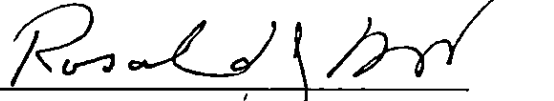
  
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JUDGE PRESIDING  
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AGREED:



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