



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 3, 2020

Mr. C. Cory Rush
Counsel for Coastal Bend College
Karcewski, Bradshaw & Spalding
3700 Buffalo Speedway, Suite 560
Houston, Texas 77098

OR2020-03215

Dear Mr. Rush:

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# 809468.

Coastal Bend College (the "college"), which you represent, received a request for twenty-two categories of information related to specified employees. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, and 552.108 of the Government Code, and privileged under rule 503 of the Texas Rules of Evidence.¹ We have considered the submitted arguments and reviewed the submitted representative sample of information.²

Initially, we must address the college's obligations under the Act. Section 552.301 of the Government Code describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(e) of the Government Code, the governmental body is required to submit to this

¹ Although you raise section 552.101 of the Government Code in conjunction with common-law privacy for portions of the submitted information, you provide no arguments explaining how this doctrine applies to the information at issue. Therefore, we assume you no longer asserts this doctrine. *See* Gov't Code §§ 552.301, .302.

² We assume 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 those records contain substantially different types of information than that submitted to this office.

office within fifteen business days of receiving the request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e). In this instance, you state the college received the request for information on November 6, 2019. You state the college was closed for business November 27, 2019, through November 29, 2019. This office does not count the date the request was received or holidays for purposes of calculating a governmental body's deadlines under the Act. Accordingly, the fifteen-business-day deadline was December 2, 2019. You state the envelope in which the college originally submitted the information required by section 552.301(e) was returned to the college for insufficient postage and the college again mailed the required information to this office in an envelope bearing a postmark of December 4, 2019. You state this envelope was also returned for insufficient postage and the college mailed the required information to this office for a third time in an envelope bearing a postmark of December 10, 2019. Section 552.308 of the Government Code provides, when a submission within a specified time period is required under the Act, the time requirement is met if the submission is sent by first class mail "with postage . . . prepaid" and the postmark date is within the required time period. *See id.* § 552.308. Because the college did not submit the information required by section 552.301(e) within the required time period, we find the college failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ). Although the college claims section 552.101 of the Government Code in conjunction with the informer's privilege, section 552.103, and section 552.108 of the Government Code for the submitted information, we find you have failed to establish a compelling reason to address these arguments. However, because an additional argument under section 552.101, section 552.102, and section 552.107 of the Government Code and rule 503 of the Texas Rules of Evidence can provide compelling reasons to overcome the presumption of openness, we will consider their applicability to the submitted information.

Next, we note the submitted information includes a court-filed document. Section 552.022(a)(17) of the Government Code provides for required public disclosure of "information that is also contained in a public court record[.]" unless the information is expressly made confidential under the Act or other law. Gov't Code § 552.022(a)(17). You seek to withhold the court-filed document under section 552.107 of the Government Code. However, section 552.107 is discretionary in nature and does not make information confidential under the Act. *See* 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 college may not withhold the information subject to section 552.022(a)(17)

under section 552.107 of the Government Code. 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 the college’s assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the information subject to section 552.022(a)(17). We will also consider the college’s arguments against disclosure of the information not subject to section 552.022(a)(17).

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

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

(A) between the client or the client’s representative and the client’s lawyer or the lawyer’s representative;

(B) between the client’s lawyer and the lawyer’s representative;

(C) by the client, the client’s representative, the client’s lawyer, or the lawyer’s representative to a lawyer representing another party in a pending action or that lawyer’s representative, if the communications concern a matter of common interest in the pending action;

(D) between the client’s representatives or between the client and the client’s representative; 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 to further the rendition of professional legal services to the client or reasonably necessary to transmit the communication. *Id.* 503(a)(5).

Accordingly, 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. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy*

Corp., 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

You state the information at issue consists of an attachment to a communication between an attorney for the college and a board member in his capacity as a client. You state the communication was intended to be confidential and has remained confidential. Based on your representations and our review, we find the information subject to section 552.022(a)(17) of the Government Code consists of a privileged attorney-client communication the college may generally withhold under Texas Rule of Evidence 503. We note, however, the attachment at issue was received from a non-privileged party. Furthermore, if the attachment received from a non-privileged party is removed from the otherwise privileged e-mail string in which it appears and stands alone, it is responsive to the request for information. Therefore, if the non-privileged attachment is maintained by the college separate and apart from the otherwise privileged e-mail string in which it appears, then the college may not withhold the non-privileged attachment under Texas Rule of Evidence 503.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. The elements of the privilege under section 552.107(1) are the same as those discussed above 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. 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 unless otherwise waived by the governmental body. *See Huie*, 922 S.W.2d at 923.

As noted above, the college informs us the remaining information in Exhibit F consists of communications between the college's attorneys and college officials and staff in their capacities as clients, made for the purpose of facilitating the rendition of legal services to the college. You also state the remaining information in Exhibit F was intended to be confidential and has remained confidential. Based on your representations and our review, we find the information at issue consists of privileged attorney-client communications. Therefore, the college may generally withhold the remaining information in Exhibit F under section 552.107(1) of the Government Code. We note, however, some of these otherwise privileged e-mail strings include e-mails received from or sent to a non-privileged party. Furthermore, if the e-mails received from or sent to the non-privileged party are removed from the otherwise privileged e-mail strings in which they appear and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails, which we marked, are maintained by the college separate and apart from the otherwise privileged e-mail strings in which they appear, then the college may not withhold these non-privileged e-mails under section 552.107(1).

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 protected by other statutes, such as section 411.083 of the Government Code, which pertains to criminal history record information ("CHRI"). CHRI generated by the National Crime Information Center

(“NCIC”) or by the Texas Crime Information Center (“TCIC”) is confidential under federal and state law. CHRI means “information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” *Id.* § 411.082(2). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI obtained from the NCIC network or other states. *See* 28 C.F.R. § 20.21. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. Open Records Decision No. 565 at 7 (1990). *See generally* Gov’t Code ch. 411 subch. F. Section 411.083 of the Government Code deems confidential CHRI the Texas Department of Public Safety (“DPS”) maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F, or subchapter E-1, of the Government Code. *See* Gov’t Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Thus, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411. We note Federal Bureau of Investigation (“FBI”) numbers constitute CHRI generated by the FBI. Accordingly, the college must withhold the FBI number we marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code.³

Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). The Texas Supreme Court held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). You assert the remaining information is excepted from disclosure under section 552.102(a) of the Government Code. Upon review, we find you have failed to demonstrate any portion of the remaining information is subject to section 552.102(a) of the Government Code, and the college may not withhold any of the remaining information on that basis.

Section 552.102(b) of the Government Code excepts from public disclosure “a transcript from an institution of higher education maintained in the personnel file of a professional public school employee[.]” Gov’t Code § 552.102(b). We note the information at issue does not contain a transcript from an institution of higher education. Upon review, you have failed to demonstrate any portion of the remaining information is subject to section 552.102(b) of the Government Code, and the college may not withhold any of the remaining information on that basis.

In summary, the college may generally withhold the information we marked pursuant to section 552.022(a)(17) of the Government Code under rule 503 of the Texas Rules of Evidence; however, if the attachment subject to section 552.022(a)(17) is maintained by the college separate and apart from the otherwise privileged e-mail communication to which it is attached, the college must release it. The college may generally withhold the

³ We note the requestor may obtain his own CHRI from DPS. Gov’t Code § 411.083(b)(3).

remaining information in Exhibit F under section 552.107(1) of the Government Code; however, if the college maintains the non-privileged e-mails we marked separate and apart from the otherwise privileged e-mail strings in which they appear, then the college must release them. The college must withhold the FBI number we marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code. The college must release the remaining information.⁴

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Sean McCormick
Attorney
Open Records Division

SMC/eb

Ref: ID# 809468

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴ We note the requestor has a right of access to some of the information being released under section 552.023 of the Government Code. *See* Gov't Code § 552.023; (governmental body may not deny access to person to whom information relates or person's agent on ground that information is considered confidential by privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Accordingly, if the college receives another request for this same information from a different requestor, the college must again seek a ruling from this office.