OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

November 19, 2002

Mr. Arnold Polanco
Ross, Banks, May, Cron & Cavin, P.C.
2 Riverway, Suite 700
Houston, Texas 77056-1918

OR2002-6593

Dear Mr. Polanco:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 172453.

The City of Rosenberg (the "city"), which you represent, received a request for copies of eleven categories of information pertaining to certain proposed real property annexation by the city. You state that you have provided the requestor with some responsive information. You claim, however, that the remaining requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.101, 552.103, 552.106, 552.107, and 552.111 of the Government Code.[1] We have considered the exceptions you claim and have reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that person may submit comments stating why information should or should not be released).

You claim that the entirety of the submitted information is excepted from disclosure pursuant to section 552.107 of the Government Code. Section 552.107(1) protects information encompassed by the attorney-client privilege. We note that in instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and the client's confidences made to the attorney. *See* Open Records Decision No. 574 (1990). Accordingly, these two classes of information are the only information contained in the records at issue that may be withheld pursuant to the attorney-client privilege. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that

[1] We note that in Open Records Decision No. 574 (1990), this office determined that the statutory predecessor to section 552.107(1) was the appropriate exception to disclosure for a governmental body to cite when seeking to protect communications made between the governmental body and its legal counsel. Accordingly, we do not address your section 552.101 claim with regard to whether any portion of the submitted information is protected from disclosure under the attorney-client privilege.

section 552.107 excepts from disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *See* Open Records Decision No. 574 at 5 (1990).

Based on our review of your arguments and the information at issue, we find that the entirety of exhibits A through P constitute either a client confidence or an attorney's legal advice or opinion provided in furtherance of the rendition of legal services to the client. Accordingly, we conclude that the city may withhold exhibits A through P pursuant to section 552.107(1). However, we also find that the city has failed to sufficiently demonstrate that exhibit Q constitutes either a client confidence or an attorney's legal advice or opinion communicated in furtherance of the rendition of legal services to the client. Accordingly, we also conclude that the city may not withhold exhibit Q under section 552.107(1) of the Government Code.

You also claim that exhibit Q is excepted from disclosure as attorney work product pursuant to section 552.111 of the Government Code. We note that a governmental body may withhold attorney work product under section 552.111 if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. *See* Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the documents at issue were 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 or release 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 id.* at 4. The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney's mental processes, conclusions and legal theories. You state that exhibit Q was prepared at the request of the city attorney by the city engineer to assist the city attorney in preparing opinions, legal advice, mental processes, conclusions, and legal theories regarding annexation and reasonably anticipated litigation against the city. Based on our review of your arguments and exhibit Q, we agree and, thus, conclude that the city may withhold the entirety of exhibit Q as attorney work product under section 552.111 of the Government Code.[2]

In summary, the city may withhold the entirety of exhibits A through P pursuant to section 552.107(1) of the Government Code. The city may withhold the entirety of exhibit Q pursuant to section 552.111 of the Government Code.

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[2] Because we base our ruling on sections 552.107 and 552.111 of the Government Code, we need not address the applicability of your other claimed exceptions to disclosure.

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).

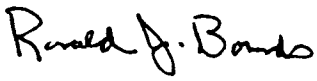
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, 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 Department of Public 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 Texas Building and Procurement Commission 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 172453

Enc. Submitted documents

cc: Mr. Don T. Schwartz
Schwartz & Kalinowski, L.L.P.
1821 Mons Avenue
Rosenberg, Texas 77471
(w/o enclosures)