ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 6, 2006

Mr. Lance Vanzant
Hayes, Berry, White & Vanzant, L.L.P.
P.O. Box 50149
Denton, Texas 76206

OR2006-14350

Dear Mr. Vanzant:

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# 265124.

The Mustang Special Utility District (the "district"), which you represent, received a request for six categories of information related to the district. You claim that you have released information responsive to categories one, two, four, and six. You claim that the information responsive to categories three and five is excepted from disclosure under sections 552.103, 552.107, 552.111 of the Government Code, and rule 192.5 of the Texas Rules of Civil Procedure. We have considered the exceptions you claim and reviewed the submitted information.

You state that Exhibits C-1 and C-2 are excepted from public disclosure under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. This exception encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as

> (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
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> (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives,

> including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

Tex. R. Civ. P. 192.5. A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

> a) 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 b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. 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; ORD 677 at 7.

The work product doctrine is applicable to litigation files in criminal as well as civil litigation. *Curry v. Walker*, 873 S.W.2d 379, 381 (Tex. 1994) (*citing United States v. Nobles*, 422 U.S. 225, 236 (1975)). In *Curry*, the Texas Supreme Court held that a request for a district attorney's "entire file" was "too broad" and, citing *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993), held that "the decision as to what to include in [the file] necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case." 873 S.W.2d at 380.[1] Accordingly, if a requestor seeks an attorney's entire litigation file, and a governmental body seeks to withhold the entire file and demonstrates that the file was created in anticipation of litigation, we will presume that the entire file is excepted from disclosure under the attorney work product aspect of section 552.111. Open Records Decision No. 647 at 5 (1996) (citing *Nat'l Union Fire Ins. Co. v Valdez,* 863 S.W.2d 458, 461 (Tex. 1993)) (organization of attorney's litigation file necessarily reflects attorney's thought processes).

You state that Exhibit C-2 constitutes your litigation file for Cause No. 2006-20149-158. You assert, and the records reflect, that the litigation is a petition for deposition before suit and it is currently pending before the 158th District Court in Denton, Texas. Upon review, we agree that Exhibit C-2 constitutes the district's litigation file, and that this request, in part, encompasses all of Exhibit C-2. Furthermore, you have demonstrated that Exhibit C-2 was

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[1]We note, however, that the court in *National Union* also concluded that a specific document is not automatically considered to be privileged simply because it is part of an attorney's file. 863 S.W.2d 458, 461 (Tex. 1993). The court held that an opposing party may request specific documents or categories of documents that are relevant to the case without implicating the attorney work product privilege. *Id.*; Open Records Decision No. 647 at 5 (1996).

created in anticipation of litigation. Therefore, we conclude that the district may withhold Exhibit C-2 from disclosure in its entirety under section 552.111 of the Government Code.

With respect to Exhibit C-1, you state that the district received notice that the requestor, a district board member, had filed a formal complaint against the district with the Texas Commission on Environmental Quality ("TCEQ"). Upon receiving the complaint, the district began an administrative process before the TCEQ District Review Board that involves responding to and resolving the complaint. The majority of Exhibit C-1 constitutes information related to the district's response to the complaint. You assert, and we agree, that upon receiving the requestor's TCEQ complaint the district had a subjective belief that there was substantial chance that litigation would ensue. However, we find that you have failed to demonstrate that a reasonable person would have concluded that there was a substantial chance that litigation would ensue from receiving notice of a complaint. Therefore, you may not withhold Exhibit C-1 under section 552.111.

Next, you state that the information in Exhibit C-1 is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides 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.
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> . . .
>
> (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 governmental body 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 of the governmental body's receipt of the request, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas 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 governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

This office has held that "litigation" within the meaning of section 552.103 includes contested cases conducted in a quasi-judicial forum. *See, e.g.*, Open Records Decision Nos. 474 (1987), 368 (1983), 301 (1982). For instance, this office has held that cases conducted

under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, constitute "litigation" for purposes of section 552.103. *See, e.g.*, Open Records Decision Nos. 588 (1991) (proceeding of former State Board of Insurance), 301 (1982) (proceeding of Public Utilities Commission). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, this office has considered the following factors: 1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding where a) discovery takes place, b) evidence is heard, c) factual questions are resolved, d) a record is made; and 2) whether the proceeding is an adjudicative forum of first jurisdiction, i.e., whether judicial review of the proceeding in district court is an appellate review and not the forum for resolving a controversy on the basis of evidence. *See* Open Records Decision No. 588 (1991).

As described above, you state that the district is involved in an administrative procedure in which you are responding to a formal complaint made to the TCEQ by the requestor. *See* Water Code § 12.081(a) (establishing the authority of TCEQ to supervise special utility districts). You assert generally that this complaint process constitutes a contested case. Based on your representations and our review, we find that you have failed to explain how the complaint process before TCEQ District Review Board rises to the level of a contested case under the Texas Administrative Procedure Act or otherwise constitutes "litigation" within the meaning of section 552.103. Further, you have failed to demonstrate that any party has taken concrete steps toward initiating litigation. Thus, you have failed to establish that litigation was pending or reasonably anticipated with respect to Exhibit C-1 on the date that this request was received, and you may not withhold the information in Exhibit C-1 under section 552.103.

Next, you state that Exhibit C-1 is excepted from public disclosure under section 552.107 of the Government Code. Section 552.107(1) protects information coming within the attorney-client privilege. 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. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client

privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "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).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. 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 v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state that Exhibit C-1 consists of communications between the district and its legal counsel. You further explain that these communications are confidential, were not intended to be disclosed to third parties, and were made in rendering professional legal services. Based on your representations and our review, we find that you have demonstrated the attorney-client privilege is applicable to the marked documents in Exhibit C-1. However, several of the remaining documents were sent to non-privileged parties. Also, it does not appear that some of these documents were part of a communication. Accordingly, we find that you have failed to demonstrate how these documents constitute or document confidential communications between protected parties. Therefore, we find that the district may not withhold these remaining documents under section 552.107. We have marked the documents accordingly.

In summary, you may withhold Exhibit C-2 in its entirety under section 552.111. You may withhold the marked privileged communications in Exhibit C-1 under section 552.107. You must release the remaining information to the requestor.

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).

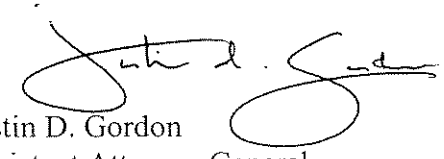
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 appeal 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,



Justin D. Gordon
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JDG/sdk

Ref: ID# 265124

Enc. Submitted documents

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(w/o enclosures)