



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 30, 2007

Ms. Bertha A. Ontiveros
Assistant County Attorney
El Paso County
500 East San Antonio, Room 503
El Paso, Texas 79901

OR2007-06789

Dear Ms. Ontiveros:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 279899.

The El Paso County Attorney's Office and the El Paso County Human Resources Department (collectively the "county") received requests for all information pertaining to Ethics Code Cases 2007-01, 2007-02, and 2007-03. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered your claimed exceptions to disclosure and have reviewed the submitted information.

Initially, you claim that all of the submitted records are excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides in relevant part as follows:

- (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 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). A 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 was pending or reasonably anticipated on the date that the governmental body 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.*, 958S.W.2d 479, 481 (Tex. App.—Austin 1997, nopen.); *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). A governmental body 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).

You explain that the submitted records pertain to three cases that are pending before the county's Board of Ethics. You assert that matters pending before the Board of Ethics are pending litigation for the purposes of section 552.103. 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). 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).

You have submitted arguments and supporting materials in an attempt to demonstrate that a hearing before the Board of Ethics is a quasi-judicial proceeding for purposes of section 552.103. In reviewing this material, however, we note that the Board of Ethics only has the power to issue a public censure for violations or make disciplinary recommendations to other governing bodies. Thus, it does not appear that the Board of Ethics fully adjudicates the interests of the respondents. Further, the Code of Ethics does not speak to judicial review. See *id* at 4 (stating that unless agency's statute expressly provides for trial de novo, court usually serves as appellate tribunal for such cases, not as forum for resolving controversy on basis of evidence). Accordingly, we find that the Board of Ethics proceeding is not litigation for the purposes of section 552.103 and none of the information may be withheld under that exception.

You claim that the records submitted as Exhibit C are privileged, attorney-client communications. Section 552.107(1) of the Government Code 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).

The county explains that all of the records submitted as Exhibit C were created by county attorneys and their investigators for the purpose of providing legal advice to their client, the Board of Ethics, regarding their ongoing investigation of alleged ethics violations. You state that these communications were intended to be confidential and that their confidentiality has

been maintained.¹ After reviewing your arguments and the records at issue, we agree that these documents are privileged attorney-client communications. Therefore, the county may withhold the information in Exhibit C under section 552.107(1).

You claim that Exhibit D is excepted from disclosure under section 552.111 as attorney work product. Section 552.111 of the Government Code 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 section 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
- (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.

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. Tex. R. Civ. P. 192.5; ORD 677 at 6-8.

You state that Exhibit D contains handwritten notes and other materials gathered and prepared by attorneys and investigators of the county. You state that this information was created in anticipation of the Board of Ethics proceeding. You acknowledge that the Board of Ethics proceeding is subject to the county’s Code of Ethics, which does not address formal discovery. Instead, the Code authorizes the Board to promulgate its own rules and regulations “consistent with fundamental fairness and due process.” Since the Board of Ethics proceeding operates under its own rules instead of the Texas Rules of Civil Procedure, we conclude that the attorney work product privilege does not apply. *Cf.* Gov’t Code

¹You state that the Board of Ethics determined that a subject of a complaint will be given access to certain records in order to protect the subject’s due process rights. Generally, if a governmental body voluntarily discloses non-confidential information, the governmental body may not withhold that information from another member of the public under one of the Act’s discretionary exceptions. *See* Gov’t Code § 552.007(prohibiting selective disclosure). This office has concluded, however, that when a governmental body discloses information because it reasonably concludes it has a constitutional obligation to do so, such a release is not a violation of section 552.007. *See* Open Records Decision No. 454 (1986); *see also* *Brady v. Maryland*, 373 U.S. 83 (1963) (prosecution is required to provide defense with all potentially exculpatory evidence).

§ 2001.091 (stating that contested cases under Administrative Procedures Act are subject to limitations of discovery under the Texas Rules of Civil Procedure). Accordingly, Exhibit D must be released.

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).

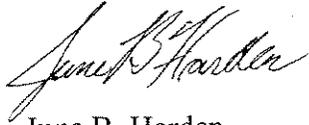
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,

A handwritten signature in cursive script, appearing to read "June B. Harden".

June B. Harden
Assistant Attorney General
Open Records Division

JBH/sdk

Ref: ID# 279899

Enc: Submitted documents

c: Mr. Enrique Moreno
Law Offices of Enrique Moreno
701 Magoffin Avenue
El Paso, Texas 79901
(w/o enclosures)