



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 29, 2009

Mr. David M. Swope  
Assistant County Attorney  
Harris County Attorney's Office  
1019 Congress, 15<sup>th</sup> Floor  
Houston, Texas 77002-1700

OR2009-05690

Dear Mr. Swope:

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# 341505 (C.A. File No. 09GEN0323).

The Harris County Attorney's Office (the "county") received a request for court filings, e-mails, and related information regarding a specified lawsuit. You claim that you will make some of the requested information available to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that some of the submitted information, which we have marked, is not responsive to the instant request. The request seeks court filings, e-mail communications, prosecution costs, and parties related to the Clear Channel litigation. Accordingly, any

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<sup>1</sup>Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Civil Procedure 192.5, we note that section 552.101 does not encompass discovery privileges. *See* Open Records Decision No. 676 at 1-3 (2002). Further, we note that the proper exception to raise when asserting the attorney work product privilege for information that is not subject to section 552.022 is section 552.111 of the Government Code. *See* Open Records Decision Nos. 677 (2002), 676 at 6. Accordingly, we will consider your arguments under this exception.

information extraneous to these specified documents is not responsive to the current request. The county need not release non-responsive information in response to this request, and this ruling will not address that information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W. 2d 266 (Tex. Civ. App. – San Antonio 1978, writ dism'd).

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. *See 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 Tex. 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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). 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. *See 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 claim the submitted e-mails consist of communications made for the purpose of facilitating the rendition of professional legal services. You state that the communications were between county attorneys and their client Harris County and departments within Harris County such as the Harris County Toll Road Authority. You further inform us that the communications were intended to be confidential, and that the confidentiality of the communications has been maintained. Upon review, we find the county may withhold portions of the submitted information under section 552.107 of the Government Code. However, we note that the attorney representing the opposing party in litigation has either created or had access to some of the e-mails you seek to withhold as privileged. We also

note that some of the submitted e-mails, which we have marked, are between a county attorney and individuals that you have not identified. Therefore, we find that you have not demonstrated that this information consists of privileged attorney-client communications. Accordingly, this information may not be withheld under section 552.107 of the Government Code. We further note that some of the individual e-mails contained in the submitted e-mail strings consist of communications with non-privileged parties. Accordingly, to the extent these non-privileged e-mails, which we have marked, exist separate and apart from the submitted e-mail string, they may not be withheld under section 552.107. As you also raise the attorney work product privilege for the submitted information, we will address your argument for the remaining e-mails not privileged under section 552.107 under this exception.

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 section encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *See 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.

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. *See 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 and civil litigation. *See Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994). In *Curry*, the Texas Supreme Court held that a request for a district attorney's "entire litigation file" was "too broad" and, quoting *National Union Fire Insurance Company v. Valdez*, 863 S.W.2d 458, 460 Tex. 1993, orig. proceeding), 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." *Curry*, 873 S.W. 2d at 380. Therefore, 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. *See Open Records Decision No. 647 at 5 (1996).*

You claim the work product privilege. You inform us that the e-mails at issue were created while the Clear Channel litigation was pending against the county. You also assert, citing *Curry*, that complying with the instant request for "all e-mails in the particular file" would reveal the attorney's thought processes in litigating similar cases.

We note that the request in the instant case was not for the county attorney's entire litigation file; thus we find that you have not demonstrated how this aspect of the work product privilege is applicable to the information at issue. Moreover, as noted above, the opposing party in litigation has either created or had access to some of the e-mails you seek to withhold as privileged. We find that because the opposing party to litigation has had access to this information, the work product privilege under section 552.111 has been waived. We further find that you have not demonstrated that the e-mails between the county attorney and the unspecified individuals and the remaining non-privileged e-mails consist of material prepared or mental impressions developed in anticipation of litigation or for trial by a party or a representative of a party. Likewise, you have not sufficiently shown that this information consists of a communication made in anticipation of litigation or for trial between a party and a representative of a party or among a party's representatives. *See TEX.R.CIV.P. 192.5.* Thus, the county may not withhold any of the remaining e-mails on the basis of the attorney work product privilege under section 552.111 of the Government Code. Also, to the extent the remaining non-privileged e-mails, which we have marked, exist separate and apart from the submitted e-mail strings, the county may not withhold them on the basis of the attorney work product privilege under section 552.111 of the Government Code.

We note that some of the non-privileged e-mails include e-mail addresses subject to section 552.137 of the Government Code, which 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).<sup>2</sup> *See* Gov't Code § 552.137(a)-(c). Accordingly, the county must withhold the e-mail addresses we have marked under section 552.137, unless the owners of the addresses have affirmatively consented to their release. *See id.* § 552.137(b).

In summary, the county may withhold the e-mails we have marked, under section 552.107 of the Government Code. To the extent the non-privileged e-mails exists separate and apart from the submitted e-mail chains, the county must release them. The county must withhold the e-mail addresses we have marked under section 552.137 of the Government Code. The remaining information must be released.

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.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Pamela Wissemann  
Assistant Attorney General  
Open Records Division

PFW/jb

Ref: ID# 341505

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>2</sup>The Office of the Attorney General will raise a mandatory exception like section 552.137 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).