ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 15, 2009

Mr. Stephen D. Henninger
Martin, Disiere, Jefferson & Wisdom
900 Jackson Street, Suite 710
Dallas, Texas 75202

OR2009-06616

Dear Mr. Henninger:

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# 343887.

The City of Corinth (the "city"), which you represent, received a request for police reports concerning a named individual, including a specified incident and the fact sheet, arrest log, and all e-mails concerning the same incident. You state you will release some of the responsive information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information, which we have marked, is not responsive to this request as it was created after the city received the request. As such, this information is not responsive to the instant request. This ruling does not address the public availability of non-responsive information, and the city is not required to release non-responsive information in response to this request. Accordingly, we will address your arguments with regard to the responsive information.

Next, you state the requested information is subject to a previous determination issued by this office. In Open Records Letter No. 2009-02925, this office ruled, to the extent the city maintains law enforcement records depicting the named individual as a suspect, arrestee, or criminal defendant, the city must withhold that information under section 552.101 in conjunction with common-law privacy and the city may generally withhold the remaining

requested information under section 552.103 of the Government Code, but any information that has been previously seen by an opposing party may not be withheld under this exception and must be released. You have not indicated the facts and circumstances have changed since the issuance of this prior ruling. Thus, with regard to the requested information that is identical to the information previously requested and ruled on by this office, we conclude the city must continue to rely on our ruling in Open Records Letter No. 2009-02925 as a previous determination and withhold or release the information at issue in accordance with that decision. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the requested information is not encompassed by the previous ruling, we will consider the submitted arguments.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. A compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U. S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. We agree the present request, in part, requires the city to compile unspecified criminal history records concerning the individual named in the request, and thus, implicates the named individual's right to privacy. Therefore, to the extent the city maintains law enforcement records depicting the named individual as a suspect, arrestee, or criminal defendant, the city must withhold any such information under section 552.101 in conjunction with common-law privacy.[1] The present request also seeks information pertaining to a specified incident which is not considered part of a compilation of the individual's criminal history. Thus, the information pertaining to this specified incident may not be withheld under section 552.101 in conjunction with common-law privacy. Accordingly, we will address your remaining arguments against the disclosure of this information.

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[1]As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

Section 552.101 also encompasses information protected by other statutes, such as section 58.007 of the Family Code, which makes confidential juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997. The relevant language of section 58.007 reads:

> (c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:
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> > (1) if maintained on paper or microfilm, kept separate from adult files and records;
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> > (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
> >
> > (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

Fam. Code § 58.007(c). For purposes of section 58.007, "child" means a person who is ten years of age or older and under seventeen years of age at the time of the reported conduct. *See id.* § 51.02(2). Upon review, we find a portion of the submitted information consists of law enforcement records involving juvenile delinquent conduct that occurred after September 1, 1997. It does not appear that any of the exceptions in section 58.007 apply; therefore, this information is confidential pursuant to section 58.007(c) of the Family Code. Accordingly, the city must withhold the information we have marked from disclosure under section 552.101 of the Government Code.[2]

Next, we will address section 552.103 for the remaining information. Section 552.103 of the Governmental Code provides 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 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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[2]As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

> (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 purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). A governmental body has the burden of providing relevant facts and documents to show 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. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *Univ. of Tex. Law Sch. v. Tex. 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.); ORD 551 at 4. A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and provide documentation showing, a lawsuit styled *Deanna Dwyer v. City of Corinth*, Case No. 2:08-CV-00409-TJW, was filed against the city in the United States District Court for the Eastern District of Texas, Marshall Division. Based on your representations and our review of the submitted information, we conclude litigation was pending when the city received the request. You state, and have submitted documents showing, the request is for information that is related to the incident that is the basis of the pending litigation. Accordingly, we find you have explained how this information relates to the pending litigation for the purposes of section 552.103. Accordingly, the city may generally withhold the remaining information under section 552.103.

We note once the information at issue has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). In this instance, we note the opposing party has seen some of the information at issue. Thus, the information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a). Accordingly, the city may withhold the information that the opposing party to the litigation has not seen or had access to under section 552.103 of the Government Code.[3] We note the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW - 575 (1982); Open Records Decision No. 350 (1982).

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[3]As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

We will now address your remaining arguments against the disclosure of the information the opposing party to the litigation has seen or had access to. 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 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. *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 the remaining information is excepted from disclosure under section 552.107. We note, however, the opposing party to the litigation has either created or had access to the remaining information. Therefore, we find you have not demonstrated that the remaining information consists of privileged attorney-client communications that the city may withhold under section 552.107.

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. Section 552.111 also encompasses the attorney work product privilege found at rule 192.5 of the Texas Rules of Civil Procedure. *See* TEX.

R. CIV. P. 192.5; *City of Garland*, 22 S.W.3d at 360; Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines attorney work product as consisting of

> (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 that seeks to withhold information on the basis of the attorney work product privilege under section 552.111 bears the burden of demonstrating 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 information was created or developed in anticipation of litigation, we must be satisfied

> (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.

You claim the attorney work product privilege under section 552.111 for the remaining information. As noted above, the remaining information consists of information that was provided by the opposing party to litigation or the opposing party has had access to the information. We conclude that because the opposing party to litigation has had access to the remaining information, the work product privilege under section 552.111 has been waived. Thus, the city may not withhold any of the remaining information on the basis of the attorney work product privilege under section 552.111 of the Government Code.

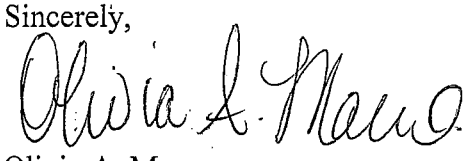
In summary, to the extent the information at issue is identical to the information previously requested and ruled upon by this office, the city must withhold or release such information pursuant to Open Records Letter Ruling No. 2009-02925. To the extent the city maintains law enforcement records depicting the named individual as a suspect, arrestee, or criminal

defendant, the city must withhold any such information under section 552.101 of the Government Code in conjunction with common-law privacy. The city must withhold the information we have marked under section 552.101 in conjunction with section 58.007 of the Family Code. The city may withhold the information that the opposing party to the litigation has not seen or had access to under section 552.103 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, 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,



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OM/eeg

Ref: ID# 343887

Enc. Submitted documents

c: Requestor
(w/o enclosures)