



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 1, 2009

Mr. James T. Jeffrey, Jr.
Law Office of Jim Jeffrey
2214 Park Springs Boulevard
Arlington, Texas 76013

OR2009-12352

Dear Mr. Jeffrey:

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# 353973.

The Town of Westover Hills (the "town"), received a request for information in the requestor's police, personal and legal files maintained by the town's police department. You state you have released some of the responsive information. You claim the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you inform us that the town does not maintain a police file or a legal file on the requestor. We note the Act does not require a governmental body to take affirmative steps to create or obtain responsive information that is not in its possession, so long as no other individual or entity holds such information on behalf of the governmental body that received the request for information. *See* Gov't Code § 552.002(a); Open Records Decision Nos. 534 at 2-3 (1989), 518 at 3 (1989). However, a governmental body must make a good-faith effort to relate a request to any responsive information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). Moreover, a governmental body may not refuse to comply with a request on the ground of administrative inconvenience. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976) (cost or difficulty in complying with predecessor of Act does not determine availability of information); Open Records Decision No. 497 (1988). In this case, as you have submitted responsive personnel

records for our review and raised exceptions to disclosure for these documents, we consider the town to have made a good faith effort to identify information that is responsive to the request, and we will address the applicability of your claimed exceptions to the submitted information.

Next, we note that one of the submitted documents, which we have marked, is not responsive as it was created after the date of the request. The town 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 dismissed).

Section 552.107(1) of the Government Code protects information that comes 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. *See 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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* 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, 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 indicate the submitted information consists of confidential communications to and from the town and its attorney. You have identified the parties to the communications. You indicate these communications were made for the purpose of facilitating the rendition of

professional legal services. Based on your representations and our review, we find the town may generally withhold the submitted information under section 552.107 of the Government Code.

However, we note that the attorney representing the potential opposing party in litigation has seen some of the documents you seek to withhold as privileged. We also note that one of the submitted e-mails, which we have marked, is between the town and individuals 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. To the extent these non-privileged e-mails, which we have marked, exist separate and apart from the submitted e-mail strings, 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 under this exception for the remaining information not privileged under section 552.107.¹

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*, 22S.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

¹Although you raise the work product privilege under section 552.107 of the Government Code, we note that section 552.111 of the Government Code is the proper exception to raise. *See* Gov’t Code § 552.111.

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 contend that the remaining information at issue is privileged as attorney work product because of the request for an administrative appeal in this case. As noted above, however, some of the remaining information you seek to withhold has been shared with the potential opposing party in litigation. Therefore, we find that because the potential opposing party 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 remaining non-privileged e-mail consists 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 town may not withhold the remaining information on the basis of the attorney work product privilege under section 552.111 of the Government Code.

We note that a portion of the remaining information contains e-mail addresses subject to section 552.137 of the Government Code.² Section 552.137 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). *See* Gov't Code § 552.137(a)-(c). The addresses we have marked are not a type specifically excluded by section 552.137. Accordingly, the town 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, with the exception of the documents we have marked, the town may withhold the submitted information under section 552.107 of the Government Code. However, to the extent the non-privileged e-mails we have marked exist separate and apart from the submitted e-mail chains, the town must release them. The town must withhold the e-mail

²The 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).

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, 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, toll free, at (888) 672-6787.

Sincerely,



Pamela Wissemann
Assistant Attorney General
Open Records Division

PFW/jb

Ref: ID# 353973

Enc. Submitted documents

c: Requestor
(w/o enclosures)