



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 10, 2009

Mr. John V. Rabel
McLeod, Alexander, Powel, & Apffel
Counsel to Port of Galveston
1415 Louisiana, Suite 3600
Houston, Texas 77002

OR2009-12822

Dear Mr. Rabel:

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# 354848.

The Port of Galveston (the "port"), which you represent, received a request for ten categories of information pertaining to particular legislation, amounts paid to attorneys, lobbyists, employees, and public relations entities during a specified time period, a specified loan application, and meeting notices. You state 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 552.103, 552.107, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that request items 9 and 10 seek a future loan application made by the port and notices of future meetings made by the port's board of trustees. The Act does not require a governmental body to comply with a continuing request to supply information as such

¹Although you also raise section 552.101 of the Government Code as an exception to disclosure, you did not submit to this office any written comments stating the reasons why this section would allow the submitted information to be withheld; therefore, we do not address section 552.101. See Gov't Code §§ 552.301(e)(1)(A), .302. Further, although you raise Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, we note that, in this instance, the proper exceptions to raise when asserting the attorney-client and attorney work product privileges for information not subject to section 552.022 are sections 552.107 and 552.111. See Open Records Decision Nos. 677 (2002), 676 at 6 (2002).

information is prepared in the future. Rather, the Act applies only to information that a governmental body possesses or has access to at the time it is requested.²

Next, we must address the port's obligations under section 552.301 of the Government Code. Subsections (a) and (b) of section 552.301 require a governmental body requesting an open records ruling from this office to "ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request." Gov't Code § 552.301(a), (b). While you raised sections 552.107 and 552.111 of the Government Code within the ten-business-day time period as required by subsection 552.301(b), you did not raise section 552.103 within the ten-business-day deadline. Section 552.103 is a discretionary exception that protects a governmental body's interests and may be waived by a governmental body's failure to comply with the procedural requirements of the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas, no pet.) (governmental body may waive section 552.103). Thus, because you have failed to comply with the procedural requirements of section 552.301, the port has waived its claim under section 552.103. Therefore, the port may not withhold any of the submitted information under section 552.103 of the Government Code. We will consider your timely raised arguments.

We first address your argument under section 552.107 of the Government Code, as this is the most encompassing exception you claim. Section 552.107(1) 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. Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate 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. *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

²It is implicit in several provisions of the Act that the Act applies only to information already in existence. *See* Gov't Code §§ 552.002, .021, .227, .351.

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 assert that some of the submitted information constitutes confidential communications between attorneys for the port and outside legal counsel. You state these communications were made for the purpose of rendering or seeking professional legal services to the port. You also indicate these communications were confidential when made and have remained confidential. Based on your representations and our review of the information at issue, we find the information we have marked constitutes privileged attorney-client communications. Therefore, the port may withhold the marked information pursuant to section 552.107 of the Government Code. We address your arguments under section 552.111 for the remaining information.

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.” 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.

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.

Upon review, we find the port has not demonstrated that any of the information at issue 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, the port has not sufficiently shown that any of the information at issue consists of communications 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. Therefore, we conclude the port may not withhold any of the information at issue on the basis of the attorney work product privilege under section 552.111 of the Government Code.

In summary, the port may withhold the information we have marked pursuant to section 552.107 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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/cc

Ref: ID# 354848

Enc. Submitted documents

c: Requestor
(w/o enclosures)