



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 11, 2009

Ms. Angela H. Robinson  
Law, Snakard & Gambill, P.C.  
1600 West Seventh Street, Suite 500  
Fort Worth, Texas 76102

OR2009-12870

Dear Ms. Robinson:

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# 354968.

The Tarrant County College District (the "district"), which you represent, received a request for a specified indemnification agreement to include drafts of the agreement, all documents initiated by specified parties regarding deferred compensation, and a copy of a specified succession plan. You state that you have released some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code.<sup>1</sup> We have considered your arguments and reviewed the submitted information. We have also considered comments submitted by the requestor. Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

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

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<sup>1</sup> Although you raise Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, we note that, in this instance, sections 552.107 and 552.111 are the proper exceptions. See Open Records Decision Nos. 677 (2002), 676 at 6 (2002).

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)-(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).

You state that Exhibits 2 and 4 consist of confidential communications between parties who share a common interest concerning the legal matters at issue. You have identified those parties. Further, you assert that these communications were made for the purpose of facilitating the rendition of professional legal services pertaining to issues in which the parties share a common interest and have provided this office with a Common Interest and Confidentiality Agreement entered into between the parties. You further explain that these documents were not intended to be disclosed to third persons other than those to whom disclosure was made in furtherance of the rendition of legal services. However, our review of the submitted information indicates that the district has interests adverse or potentially adverse to the other party named in the agreement. Thus, in this situation, the parties do not share a common interest that would allow the attorney-client privilege to apply to information both parties have seen. *See In re Monsanto*, 998 S.W.2d 917, 922 (Tex. App.—Waco 1999, no pet.) (discussing the “joint-defense” privilege incorporated by rule 503(b)(1)(C)). Based on your representations and our review of the submitted documents, we find that the information in Exhibit 2 and the information we have marked

in Exhibit 4 consists of privileged attorney-client communications that the district may withhold under section 552.107(1) of the Government Code. However, we find that the district has failed to demonstrate that the remaining information at issue constitutes or documents privileged attorney-client communications that were made in connection with the rendition of professional legal services to the district. Thus, the remaining information in Exhibit 4 may not be withheld under section 552.107. We next address your arguments under sections 552.103 and 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.” 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.

TEX. R. CIV. P. 192.5(a)(1), (2). 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. 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.

You state that Exhibit 6 and the remaining information in Exhibit 4 consist of attorney work product created in anticipation of litigation. We understand that at the time the information at issue was drafted, the district was anticipating litigation to resolve the matter to which the memoranda relate. Based on your representations and our review, we find the portions of Exhibit 6 that we have marked to be attorney work product. Therefore, the district may withhold the information we have marked in Exhibit 6 under section 552.111 of the Government Code. However, the remaining information in Exhibits 4 and 6 has been seen by the potential opposing party, and, thus the work product privilege has been waived. Therefore, the district may not withhold any of the remaining information under section 552.111 of the Government Code.

You seek to withhold the remaining submitted information under section 552.103 of the Government Code, which provides in part the following:

(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.

...

(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 is pending or reasonably anticipated on the date 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.*, 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.); 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).

You state, and provide documentation showing, that the remaining information relates to a dispute regarding deferred compensation between the district and a named individual. Based on your arguments and our review of the information at issue, we find that litigation is currently anticipated and that the submitted information is related to that litigation. However, we note that the information at issue has been seen by the potential opposing party.

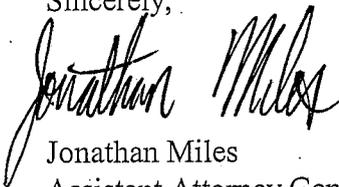
If a potential opposing party has seen or had access to information that is related to anticipated litigation, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the district may not withhold any of the remaining information under section 552.103 of the Government Code.

In summary, the district may withhold Exhibit 2 and the information we have marked in Exhibit 4 under section 552.107 of the Government Code. The district may withhold the information we have marked in Exhibit 6 under section 552.111 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, toll free, at (888) 672-6787.

Sincerely,



Jonathan Miles  
Assistant Attorney General  
Open Records Division

JM/cc

Ref: ID# 354968

Enc. Submitted documents

c: Requestor  
(w/o enclosures)