



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 15, 2010

Mr. Andrew S. Miller
Kemp Smith LLP
816 Congress, Suite 1150
Austin, Texas 78701-2443

OR2010-03675

Dear Mr. Miller:

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# 372565.

The Hemphill County Underground Water Conservation District (the "district"), which you represent, received two requests from the same requestor for a specified notary public record book, information pertaining to submissions by the district to the Texas Water Development Board (the "board") in connection with two specified petitions, specified draft e-mails and presentations, information regarding meter registrations and meter readings, records reflecting annual production from wells during a specified time period, all permits issued by the district for municipal and agricultural use, documents related to denial of production permits, expenditures of the district, and information concerning the district's board of directors. 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. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See Gov't Code § 552.304* (interested party may submit written comments regarding availability of requested information).

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. *See* 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 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 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. *See* 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. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). 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 information you have marked under this exception consists of confidential communications between counsel for the district, technical consultants for the district, district officials, and district staff that were made for the purpose of facilitating the rendition of professional legal services to the district. You indicate the communications at issue were intended to be and have remained confidential. Based on your representations and our review, we find the district has established the applicability of section 552.107(1) to the information you have marked. Therefore, the district may withhold the marked information under section 552.107 of the Government Code.¹

You claim the remaining information is excepted under section 552.111 of the Government Code. 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.” This

¹As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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.

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 inform us that two companies are appealing the desired future conditions ("DFCs") adopted by the district with respect to the management of an aquifer to the board. You state that the petitioners are asserting that the district's adoption of the DFCs lacks statutory authority, violates constitutional due process and due course of law guarantees, and will result in the drainage of groundwater which, the petitioners claim, constitutes an unconstitutional taking of private property. You assert these claims made against the district are legal challenges under the Texas Constitution that can not be resolved by an administrative agency and will likely be presented to a court with proper jurisdiction to decide such claims. Thus, you inform us that the remaining information was created by district staff and agents of the district in preparation for the appeal to the board and for the anticipated future civil litigation. Based on your representations, we conclude the district may withhold the remaining information as work product under section 552.111 of the Government Code.²

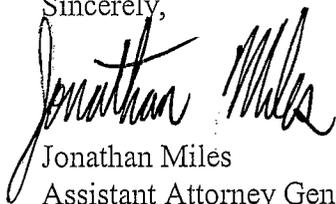
²As our ruling is dispositive, we need not address your remaining argument.

In summary, the district may withhold the information you have marked as attorney-client communications under section 552.107 of the Government Code. The district may withhold the remaining information as attorney work product under section 552.111 of the Government Code.

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# 372565

Enc. Submitted documents

c: Requestor
(w/o enclosures)