



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 4, 2011

Ms. Jessica C. Eales  
Assistant City Attorney  
City of Houston  
P.O. Box 368  
Houston, Texas 77001-0368

OR2011-06054

Dear Ms. Eales:

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# 416327 (GC No. 18276).

The City of Houston (the "city") received a request for nine categories of information pertaining to the requestor's client's property and specified hearings. You state you are releasing some of the requested information to the requestor. You claim that 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 representative sample of information.<sup>1</sup> We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested 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." *Id.* § 552.111. This exception 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

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<sup>1</sup>We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(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.

The work product doctrine is applicable to litigation files in criminal and civil litigation. *Curry v. Walker*, 873 S.W.2d 379, 381 (Tex. 1994); see *U.S. v. Nobles*, 422 U.S. 225, 236 (1975). In *Curry*, the Texas Supreme Court held that a request for a district attorney's "entire file" was "too broad" and, citing *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993), held that "the decision as to what to include in [the file] necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case."<sup>2</sup> *Id.* at 380. Accordingly, if a requestor seeks an attorney's entire litigation file, and a governmental body seeks to withhold the entire file and demonstrates that the file was created in anticipation of litigation, we will presume that the entire file is excepted from disclosure under the attorney work product aspect of section 552.111. Open Records Decision No. 647 at 5 (1996); see *Nat'l Union*, 863 S.W.2d at 461 (organization of attorney's litigation file necessarily reflects attorney's thought processes).

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<sup>2</sup>We note, however, that the court in *National Union* also concluded that a specific document is not automatically considered to be privileged simply because it is part of an attorney's file. 863 S.W.2d at 461. The court held that an opposing party may request specific documents or categories of documents that are relevant to the case without implicating the attorney work product privilege. *Id.*; Open Records Decision No. 647 at 5 (1996).

You state that one of the categories of the request for information encompasses the city's entire file concerning alleged deed restrictions of the property at issue. You inform us that the information in Exhibit 2 was prepared by a city attorney in anticipation of litigation that the city may file as a result of deed restriction violations found during the city's investigation. Although the requestor argues that the city "failed to identify any manifestation of litigation on the part of the [c]ity or [the requestor's] clients," we note the standard for this office to find the information was developed in anticipation of litigation is that there is a substantial chance that litigation will ensue. *See Nat'l Tank*, 851 S.W.2d at 207. The city further argues that "there is a substantial chance that litigation will ensue should deed restrictions be found." Accordingly, based on the city's representations and our review, we conclude that the city may withhold Exhibit 2 as attorney work-product under section 552.111 of the Government Code.<sup>3</sup>

Next, you claim Exhibit 3 is excepted from disclosure under section 552.107 of the Government Code, which 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 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 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *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. *Osborne v. Johnson*, 954 S.W.2d 180, 184

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure for this information.

(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 that Exhibit 3 consists of communications sent to, from, and among city attorneys and city employees in their capacity as clients. You state that these communications were made in furtherance of the rendition of professional legal services to the city, and you inform this office that these communications have remained confidential. We note the requestor asserts the city has not met its burden under the attorney-client privilege because it has not demonstrated how the city employees are clients in the matter at issue. However, the city represents that the city employees concerned are clients and, thus, privileged individuals. Whether the city employees concerned are clients for purposes of the attorney-client privilege is a question of fact. This office cannot resolve disputes of fact in its decisional process. *See Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986)*. Where a fact issue cannot be resolved as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernible from the documents submitted for our inspection. *Id.* Accordingly, based on the city's representations and our review, we agree that Exhibit 3 constitutes privileged attorney-client communications. Thus, the city may generally withhold this information under section 552.107 of the Government Code. However, we note that some of the individual e-mails in the submitted e-mail chains and some of the attachments to memoranda are communications with non-privileged parties. Thus, to the extent these non-privileged e-mails and attachments, which we have marked, exist separate and apart from the submitted e-mail chains and memoranda, the city may not withhold them pursuant to section 552.107 of the Government Code.

We note that the information we have marked in Exhibit 3 contains information that is subject to section 552.137 of the Government Code.<sup>4</sup> Section 552.137 provides that “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). Gov't Code § 552.137(a)-(b). The e-mail address we have marked does not appear to be of a type specifically excluded by section 552.137(c). Accordingly, to the extent it is not otherwise

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<sup>4</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)*.

excepted under section 552.107, the marked e-mail address must be withheld under section 552.137 of the Government Code, unless its owner consent to its disclosure.<sup>5</sup>

In summary, the city may withhold Exhibit 2 under section 552.111 of the Government Code. The city may generally withhold Exhibit 3 under section 552.107 of the Government Code. However, to the extent the non-privileged e-mails and attachments, which we have marked, exist separate and apart from the submitted e-mail strings and memoranda, they may not be withheld under section 552.107. In releasing any non-privileged e-mails, the city must withhold the marked e-mail address under section 552.137 of the Government Code, unless the owners consent to their disclosure. 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,



Sarah Casterline  
Assistant Attorney General  
Open Records Division

SEC/tf

Ref: ID# 416327

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>5</sup>We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.