



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 15, 2013

Ms. Danielle R. Folsom
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2013-02658

Dear Ms. Folsom:

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# 478908 (GC No. 20153).

The City of Houston (the "city") received a request for information pertaining to the requestor's client's property during a specified time period. We understand you have released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 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 submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released).

Initially, we will address the requestor's assertion that the city did not comply with the procedural requirements of section 552.301 of the Government Code. The requestor states the copy of the written comments sent to the requestor did not include exhibits that provided the substance of the city's arguments. The requestor argues that without the exhibits, the copy of the written comments sent to the requestor was not sufficient and omits some of the arguments the city has made to this office. Section 552.301(e-1) requires a governmental body that submits written comments to the attorney general under subsection (e)(1)(A) to send a copy of those comments to the person who requested the information from the governmental body within fifteen business days of receiving the request for information. *Id.* § 552.301(e-1). We find the requestor's receipt of the city's December 5, 2012 brief, which provides the substance of the city's arguments under sections 552.101, 552.107, and 552.111,

satisfies the statutory requirement under section 552.301(e-1). Thus, we find the city complied with the procedural requirements set out in section 552.301(e-1) of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. You raise section 552.101 in conjunction with the common-law informer's privilege, which Texas courts have long recognized. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided the subject of the information does not already know the informer's identity. *See Open Records Decision No. 208 at 1-2 (1978)*. The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." *Open Records Decision No. 279 at 1-2 (1981)* (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. McNaughton Rev. Ed. 1961)). The report must be of a violation of a criminal or civil statute. *See Open Records Decision Nos. 582 at 2 (1990), 515 at 4 (1988)*. However, individuals who provide information in the course of an investigation but do not make the initial report of the violation are not informants for the purposes of claiming the informer's privilege. The privilege excepts the informer's statement only to the extent necessary to protect that informer's identity. *Open Records Decision No. 549 at 5 (1990)*. We note the informer's privilege does not apply where the informant's identity is known to the individual who is the subject of the complaint. *See ORD 208 at 1-2*.

You seek to withhold Exhibit 2, which consists of audio recordings, in its entirety under the common-law informer's privilege. In some circumstances, where an oral statement is captured on tape and the voice of the informant is recognizable, it may be necessary to withhold the entire statement to protect the informant's identity. *Open Records Decision No. 434 at 2 (1986)*. You state the audio recordings reveal the identity of an individual reporting alleged violations of the city's ordinances related to deed restrictions. You explain the city's Legal Department has authority to enforce these ordinances and investigate alleged violations. You state violation of these ordinances may result in civil penalties, and provide city ordinances reflecting that violations of deed restrictions result in a minimum civil penalty to the property owner of \$1,000 per day the owner is in violation. Accordingly, we agree the city may withhold the audio recordings in Exhibit 2 in their entirety under section 552.101 in conjunction with the common-law informer's privilege.

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 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, 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. See *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain 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 claim the information in Exhibit 3 is protected by section 552.107(1) of the Government Code. You state the information at issue consists of communications involving the city’s attorneys and city employees in their roles as clients. You state the communications were made in confidence for the purpose of facilitating the rendition of professional legal services to the city and that these communications have remained confidential. Based on your representations and our review, we find you have generally demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the city may generally withhold Exhibit 3 under section 552.107(1) of the Government Code. However, we note two of the e-mails at issue were received from or sent to non-privileged parties. If one of the e-mails received from or sent to a non-privileged party is removed from the e-mail string and stands alone, it is responsive to the request for information. Therefore, if the non-privileged e-mail, which we have marked, is maintained by the city separate and apart from the otherwise privileged e-mail string in which it appears, then the city may not withhold the non-privileged e-mail under section 552.107(1) of the Government Code. Furthermore, the remaining e-mail at issue has been shared with an individual whom you have not demonstrated is a privileged party. Therefore, we conclude you have failed to establish how this information, which we have marked for release, constitutes a communication between

or among privileged parties for the purposes of section 552.107(1). Thus, the city may not withhold the information at issue on that basis.

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 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

- (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.”¹ *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. ORD 647 at 5; *see Nat’l Union*, 863 S.W.2d at 461 (organization of attorney’s litigation file necessarily reflects attorney’s thought processes).

You state the information in Exhibit 4 encompasses the city’s entire file concerning alleged deed restrictions of the property at issue. You inform us that the information in Exhibit 4 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. 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 4 as attorney work-product under section 552.111 of the Government Code.

To the extent the non-privileged e-mail in Exhibit 3 exists separate and apart from the otherwise privileged e-mail string, we note some of the information at issue may be 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). Gov’t Code § 552.137(a)-(c). The e-mail address we have marked is not of the types specifically excluded by section 552.137(c). Accordingly, the city must withhold the e-mail address we have marked in Exhibit 3 under section 552.137 of the Government Code unless the owner of the address affirmatively consents to its release.

In summary, the city may withhold the submitted audio recordings in Exhibit 2 in their entirety under section 552.101 of the Government Code in conjunction with the common-law informer’s privilege. With the exception of the e-mail we have marked for release, the city may generally withhold the e-mails in Exhibit 3 under section 552.107(1) of the Government Code; however, if the marked non-privileged e-mail is maintained by the city separate and apart from the otherwise privileged e-mail string in which it appears, then the city may not withhold the marked non-privileged e-mail under section 552.107(1) of the Government Code. The city may withhold the information in Exhibit 4 under section 552.111 of the

¹We 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).

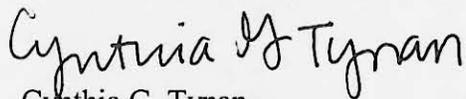
²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Government Code. The city must withhold the e-mail address we have marked in Exhibit 3 under section 552.137 of the Government Code, unless the owner affirmative consents to release.³ The city must release the remaining information.

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,



Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/akg

Ref: ID# 478908

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³We note the information being released contains the requestor's e-mail address, to which he has a right of access pursuant to section 552.137(b) of the Government Code. *See* Gov't Code § 552.137(b). Should the city receive another request for this information from a different requestor, we note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold certain 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. *See* ORD 684.