



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 16, 2013

Ms. Jordan Hale
Assistant Attorney General
Public Information Coordinator
General Counsel Division
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2013-06188

Dear Ms. Hale:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 484451 (PIR No. 13-35389).

The Office of the Attorney General (the "OAG") received a request for information regarding the investigation of Monsanto. The OAG released most of the information and asserts the remainder is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the OAG's claimed exceptions to disclosure and have reviewed the submitted sample of information.¹

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 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

¹We 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 those records contain substantially different types of information than that submitted to this office.

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), (B), (C), (D), (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).

The OAG explains the communications it marked are between OAG attorneys and other parties with whom the OAG shares a matter of common interest. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 74 cmt. b (2000) (persons who have common interests may coordinate their positions without destroying privileged status of their communications with their lawyers). Moreover, the OAG explains the communications were made in furtherance of the rendition of professional legal services, they were intended to be confidential, and their confidentiality has been maintained. Upon review, we find the OAG may withhold the information it marked under section 552.107 of the Government Code.

Next, the OAG asserts the document it marked is excepted from disclosure as work product 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 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. However, the work product privilege generally does not extend to facts obtained by the attorney. *Owens-Corning Fiberglass v. Caldwell*, 818 S.W.2d 749, 750 (Tex. 1991); *Leede Oil & Gas, Inc. v. McCorkle*, 789 S.W.2d 686, 687 (Tex. App.—Houston [1st Dist.] 1990, no writ) (work product privilege did not protect memoranda prepared by attorney that contained only “neutral recitals” of fact); Open Records Decision No. 647 at 4 (1996). The OAG explains it created the document in anticipation of litigation against Monsanto should its investigation unearth any violations of antitrust law. We agree the OAG may withhold the document it marked under section 552.111 as work product.

Lastly, the OAG argues the remaining information is confidential under section 552.101 of the Government Code in conjunction with section 553.9 of the Iowa Code. Section 552.101 excepts from public disclosure information that another statute makes confidential. Gov't Code § 552.101. Section 553.9 of the Iowa Code provides:

1. If the attorney general has reasonable cause to believe that a person has engaged in or is engaging in conduct prohibited by this chapter, the attorney general shall make such investigation as is deemed necessary and may, prior to the commencement of a suit against this person under this chapter:

...

b. Issue written demand to produce, examine, and copy a document or tangible item in the possession of this person or its officers, directors, partners, or fiduciaries [.]

...

3. Any procedure, testimony taken, or material produced under this section shall be sealed by the court and be kept confidential by the attorney general, until an action is filed against a person under this chapter for the violation under investigation, unless . . . disclosure is authorized by the court for the purposes of interstate cooperation in enforcing this chapter and similar state and federal laws.

Iowa Code § 553.9. Thus, this provision makes confidential materials the Iowa attorney general obtains pursuant to a written investigative demand. The OAG explains the Iowa Attorney General's Office (“Iowa”) obtained the remaining information pursuant to its

authority granted by section 553.9. After a review of the information, we agree most of the remaining information is subject to section 553.9. Next, we must determine whether the OAG must withhold the information pursuant to section 553.9, an Iowa law. The OAG informs this office Iowa provided the information to the OAG to assist in the multi-state investigation of Monsanto and asserts the transfer of confidential information between governmental entities does not violate its confidential character.

In Open Records Decision No. 661 (1999), this office concluded whether a governmental entity may release information to another governmental entity is not a question under the Public Information Act (the "Act") as the Act is concerned with the required release of information to the *public*. Gov't Code §§ 552.001, .002, .021; *see* Attorney General Opinions H-683 (1975), H-242 (1974), M-713 (1970); Open Records Decision No. 655 (1997). For many years, this office has recognized it is the public policy of this state that governmental bodies should cooperate with each other in the interest of the efficient and economical administration of statutory duties. *See, e. g.*, Attorney General Opinion H-836 (1976); Open Records Decision No. 655 (1997). *But see* Attorney General Opinions DM-353 at 4 n. 6 (1995) (interagency transfer prohibited where confidentiality statute enumerates specific entities to which release of confidential information is authorized and where receiving agency is not among statute's enumerated entities), JM-590 (1986) (same); Open Records Decision No. 655 (1997) (same), 650 (1996) (transfer of confidential information to federal agency impermissible unless federal law requires its disclosure). In adherence to this policy, this office has acknowledged that information may be transferred between governmental bodies within the state without violating its confidential character on the basis of a recognized need to maintain an unrestricted flow of information between governmental bodies. *See* Attorney General Opinions H-836 (1976), H-242 (1974), M-713 (1970); Open Records Decision Nos. 655 (1997), 561 (1990), 414 (1984). Moreover, the release of information by one state agency to another state agency is not a release to the public for the purposes of section 552.007 of the Government Code, which prohibits the selective disclosure of information, or for purposes of section 552.352, which provides criminal penalties for the release of information that is considered to be confidential. Open Records Decision No. 516 (1989).

In this case, the public policy that encourages the exchange of information between Iowa and the OAG is as strong as when the exchange is between Texas agencies. *See* Open Records Decision No. 561 at 7 (1990). Public policy advocates continued cooperation between governmental bodies in making information available, particularly in relation to enforcement actions, as here. *See id.* Accordingly, we find the confidentiality of the information was not waived when transferred from Iowa to the OAG. Therefore, the OAG must withhold the information it marked under section 552.101 in conjunction with section 553.9 of the Iowa Code.

In summary, the OAG may withhold the privileged communications it marked pursuant to section 552.107 and the document it marked as work product under section 552.111. In addition, the OAG must withhold the information it marked that was transferred from Iowa

to the OAG under section 552.101 in conjunction with section 553.9 of the Iowa Code. The OAG must release the remainder.

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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/sdk

Ref: ID# 484451

Enc: Submitted documents

c: Requestor
(w/o enclosures)