



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 24, 2014

Ms. Cathy Cunningham
Boyle & Lowry, L.L.P.
4201 Wingren Drive, Suite 108
Irving, Texas 75062-2763

OR2014-03324

Dear Ms. Cunningham:

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# 516129.

The Town of Westlake (the "town"), which you represent, received a request for specified categories of information pertaining to Trophy Club Municipal Utility District 1 and communications with named individuals.¹ The town states it does not have some of the requested information.² The town also states it is producing some of the requested information to the requestor but claims the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code.³ We have

¹The town sought and received clarification of the information requested. See Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified).

²The Act does not require a governmental body to disclose information that did not exist when the request for information was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

³Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure, this office has concluded section 552.101 does not encompass discovery privileges. See Open Records Decision Nos. 677 (2002), 676 (2002). The proper exceptions to raise when asserting the attorney client and work product privileges for information not subject to section 552.022 of the Government Code are sections 552.107 and 552.111 of the Government Code, respectively. See ORDs 677, 676.

considered the claimed exceptions and reviewed the submitted representative sample of information.⁴

Initially, we note some of the information you have submitted to us for review is not responsive to the request for information because it was created after the town received the request. This ruling does not address the public availability of any information that is not responsive to the request, and the town is not required to release this information, which we have marked, in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed).

Next, you inform us some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2014-01520 (2014). In Open Records Letter No. 2014-01520, we determined the town may withhold the requested information under section 552.107(1) of the Government Code, with the exception of any non-privileged e-mails that are maintained by the town separate and apart from the otherwise privileged e-mail strings in which they appear, which the town must release. We have no indication the law, facts, and circumstances on which the prior ruling was based have changed. Accordingly, to the extent the information in the current request is identical to the information previously requested and ruled upon by this office, we conclude the town may continue to rely on Open Records Letter No. 2014-01520 as a previous determination and withhold or release the information in accordance with that ruling. To the extent the submitted information is not subject to Open Records Letter No. 2014-01520, we will address your arguments against disclosure.

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* ORD 676 at 6-7. 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

⁴We 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.

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). 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.*, 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 submitted information is protected by section 552.107(1) of the Government Code. You assert the information at issue consists of communications involving the attorneys for the town and town employees and officials in their capacities as clients. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the town and these communications have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the town may generally withhold the submitted information under section 552.107(1) of the Government Code.⁵ However, we note some of the e-mail strings include e-mails received from or sent to parties whom you have not identified and have not demonstrated are privileged parties. Furthermore, if the e-mails received from or sent to non-privileged parties are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails, which we have marked, are maintained by the town separate and apart from the otherwise privileged e-mail strings in which they appear, then the town may not withhold them under section 552.107(1) of the Government Code.

Section 552.111 of the Government Code excepts from disclosure “[a]n 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

⁵As our ruling is dispositive, we do not address your other arguments to withhold this information.

(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). A governmental body seeking to withhold information under this exception bears the burden of demonstrating 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 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 raise the attorney work product privilege for the non-privileged information. However, as noted above, this information was sent from or received by parties you have not identified as privileged. Accordingly, we find you have failed to establish the non-privileged e-mails and attachments are privileged pursuant to the attorney work product privilege. Therefore, the town may not withhold that information under section 552.111 of the Government Code.

We note some of the non-privileged e-mails contain addresses of members of the public. Section 552.137 of the Government Code 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).⁶ See Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail

⁶The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. See Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987); see, e.g., Open Records Decision No. 470 at 2 (1987).

address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, the town must withhold the e-mail addresses we have marked under section 552.137.⁷

To conclude, to the extent the information in the current request is identical to the information previously requested and ruled upon by this office, we conclude the town may continue to rely on Open Records Letter No. 2014-01520 as a previous determination and withhold or release the information in accordance with that ruling. The town may withhold the submitted responsive information under section 552.107(1) of the Government Code. However, if the non-privileged e-mails we have marked are maintained by the town separate and apart from the otherwise privileged e-mail strings in which they appear, then, with the exception of the information we have marked under section 552.137 of the Government Code, which the town must withhold, the town must release this information to the requestor.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,


James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/tch

⁷This office issued Open Records Decision No. 684 (2009), 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 opinion.

Ref: ID# 516129

Enc. Submitted documents

c: Requestor
(w/o enclosures)