



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 28, 1996

Ms. Lan P. Nguyen
Assistant City Attorney
City of Houston
Legal Department
P. O. Box 1562
Houston, Texas 77251-1562

OR96-0457

Dear Ms. Nguyen:

In Open Records Letter No. 95-554 (1995), this office asked you to provide certain information within seven days in order to evaluate your claim that a particular memorandum is excepted from disclosure under chapter 552 of the Government Code. You have submitted the requested information to this office. We have assigned your request for a decision ID# 34868.

The City of Houston ("the city") received a request for information concerning an investigation of certain city inspectors. The document at issue is a memorandum that you asserted was inadvertently released to Channel 13. You sought to withhold this document from required public disclosure under section 552.107(1) of the Government Code. Section 552.107(1) excepts from disclosure communications that reveal client confidences or the attorney's legal opinion or advice. Open Records Decision Nos. 589 (1991) at 1, 574 (1990) at 3, 462 (1987) at 9-11.

We agreed with your assertion that the memorandum at issue would be protected from disclosure under section 552.107(1), unless the city waived the privilege by inadvertently releasing the memorandum. Rule 511 of the Texas Rules of Civil Evidence, which concerns waiver of a privilege, provides in part as follows:

A person whom these rules confer a privilege against disclosure waives the privilege if (1) he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any

significant part of the privileged matter unless such disclosure itself is privileged.¹ (footnote added).

In *Granada Corporation v. Honorable First Court of Appeals*, 844 S.W.2d 223, 226 (Tex. 1992), the Texas Supreme Court stated that a party seeking to preserve the attorney-client privilege after disclosure must first establish that the disclosure of the documents was *involuntary* rather than inadvertent:

Inadvertent production is distinguishable from involuntary production. A party who permits access to unscreened documents may, due to inattention, unwittingly-- but nonetheless voluntarily-- disclose a privileged document. Disclosure is involuntary only if efforts reasonably calculated to prevent the disclosure were unavailing. Thus, although disclosure does not necessarily waive privileges, a party claiming involuntary disclosure has the burden of showing, with specificity, that the circumstances confirm the involuntariness of the disclosure.

See also *Freeman v. Bianchi*, 820 S.W.2d 853, 861 (Tex. App.--Houston [1st Dist.] 1991, no writ).

Factors to be considered in determining whether a disclosure is involuntary include the precautionary measures taken to prevent disclosure, the delay in rectifying the error of disclosure, the extent of any inadvertent disclosure, and the scope of discovery. *Granada Corporation*, 844 S.W.2d at 226. In Open Records Letter No. 95-554 (1995), we explained that you had not provided this office sufficient information about the circumstances of the release of the memorandum to determine whether it was actually an involuntary disclosure.

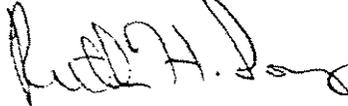
You have provided this office detailed information concerning the release of the memorandum. Channel 13 requested a number of documents and during the "mass copying process of a file box containing over 700 pages of documents" in response to that request, an employee also copied the memorandum. The memorandum, along with all of the other copied documents, was then released to Channel 13. You state that the documents that were copied came from an attorney's office, without that attorney's knowledge. The city's internal guidelines apparently provide that attorneys must review copied records prior to release, but this did not occur in this situation. However, you assert that when the release was discovered, you immediately sought a decision from this office to prevent further disclosure.

¹As we stated in Open Records Letter No. 95-554 (1995), it is our understanding that the disclosure to Channel 13 was not privileged. See Tex. Rule Civ. Evid. 503(b).

Although this appears to have been an inadvertent disclosure, under the circumstances described, we cannot say that this was an involuntary disclosure. Thus, section 552.107(1) is not applicable to the memorandum at issue.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/ch

Ref.: ID# 34868

Enclosures: Submitted document

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(w/o enclosures)