



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 16, 1998

Mr. Jerry E. Drake, Jr.
Assistant City Attorney
City of Denton
215 East McKinney
Denton, Texas 76201

OR98-0172

Dear Mr. Drake:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 112649.

The City of Denton (the "city") received a request for various information. You state that the city has no objection to releasing a copy of a work order dated August 26, 1997. You assert that two documents are excepted from required public disclosure by sections 552.101 and 552.107 of the Government Code.

Section 552.101 of the Government Code excepts from required public disclosure information that is deemed confidential by law, either constitutional, statutory or by judicial decision. You assert that the documents "are privileged under the work product, attorney-client, party communications and investigative privileges." Section 552.101 does not cover discovery privileges. Open Records Decision No. 575 (1990) at 2. However, the attorney-client privilege is specifically covered under section 552.107(1) of the Government Code.

This exception states that information is excepted from required public disclosure if

it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.

Although section 552.107(1) appears to except information within rule 1.05 of the Texas State Bar Disciplinary Rules of Professional Conduct, the rule cannot be applied as broadly as written to information that is requested under the Open Records Act. Open Records Decision No. 574 (1990) at 5. To prevent governmental bodies from circumventing the Open Records Act by transferring information to their attorneys, section 552.107(1) is limited to material within the attorney-client privilege for confidential communications; "unprivileged information" as defined by rule 1.05 is not excepted under section 552.107(1). Open Records Decision Nos. 574 (1990) at 5, 462 (1987) at 13-14. Thus, section 552.107(1) protects only information that reveals attorney advice and opinion or client confidences. See Open Records Decision No. 574 (1990).

We have reviewed the documents. We conclude that section 552.107(1) is inapplicable.

Attorney work product may be excepted from required public disclosure by section 552.111 of the Government Code if the information was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. See Open Records Decision No. 647 (1996). Information is created in anticipation of litigation when 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 conducted the investigation for the purpose of preparing for such litigation. See *id.* (citing *National Tank v. Brotherton*, 851 S.W.2d 193 (Tex. 1993)).

We conclude that the city has not established that the two documents at issue were created in anticipation of litigation under the *National Tank* test. See *id.* at 4 (governmental body must show applicability of attorney work product). Accordingly, the city may not withhold the documents from the requestor under section 552.111 of the Government Code as attorney work product.

We are resolving this matter with this 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 may 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,



Kay Hastings
Assistant Attorney General
Open Records Division

KHH/rho

Ref.: ID# 112649

Enclosures: Submitted documents

cc: Mr. Art Brender
600 Eighth Avenue
Fort Worth, Texas 76104
(w/o enclosures)