



March 24, 2000

Mr. Bernardo J. Garcia  
Senior Assistant County Attorney  
Harris County  
1019 Congress, 15<sup>th</sup> Floor  
Houston, Texas 77002-1700

OR2000-1166

Dear Mr. Garcia:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 133299.

Harris County (the "county") received a request for four items of information pertaining to a specific person, his family, his associates, or any organization with which he is associated. You assert that you located eight Harris County files that satisfy this request. You have divided the responsive information into eight exhibits, B-1 - B-8. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.109, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You assert that the requested information is excepted from disclosure based on section 552.108 of the Government Code. Section 552.108 of the Government Code states that information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from required public disclosure "if release of the information would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a)(1). You inform us that the requested information pertains to a pending criminal case that is on appeal. You have included an affidavit, Exhibit C, from the prosecuting attorney affirming that a criminal case is pending and requesting that the requested information be withheld in its entirety as release would interfere with the prosecution of the pending case. We have marked the submitted documents the release of which we have concluded would interfere with the prosecution of the case. These marked documents may be withheld from public disclosure pursuant to section 552.108 of the

Government Code.

Next we look to the application of section 552.107 of the Government Code. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only “privileged information,” that is, information that reflects either confidential communications from the client to the attorney or the attorney’s legal advice or opinions; it does not apply to all client information held by a governmental body’s attorney. *Id.* at 5. When communications from attorney to client do not reveal the client’s communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney’s legal opinion or advice. *Id.* at 3. In addition, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.* We have marked the information that this office concludes is excepted from public disclosure pursuant to section 552.107 of the Government Code.

You additionally claim that the requested information is excepted from public disclosure under section 552.101 of the Government Code. Section 552.101 of the Government Code states that information is excepted from public disclosure “if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Although you raise section 552.101 for the requested information, you do not explain how the release of the information would implicate a person’s common law or constitutional privacy. Furthermore, we are not aware of, nor have you raised or referred us to, any law that would make the requested information confidential. Therefore, we conclude that the requested information may not be withheld under section 552.101 of the Government Code.

Furthermore, you assert that the requested information is excepted from public disclosure pursuant to section 552.103 of the Government Code. Section 552.103(a), reads as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin, 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref’d n.r.e.); Open Records Decision No. 588 (1991). The governmental body must meet both prongs of this test for information to be excepted pursuant to 552.103(a).

You have submitted the affidavit of the prosecuting attorney stating that Cause No. H-99-31039 is currently on appeal. You have met the first prong of the test. However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). After reviewing the submitted information, this office concludes that the opposing party has had access to most of the requested information. Additionally, the county has not explained how the requested information relates to the appealed case. Therefore, section 552.103(a) is inapplicable to the submitted information. Thus, the requested information may not be withheld from public disclosure under section 552.103(a) of the Government Code.

You also assert that the requested information may be withheld under section 552.109. Section 552.109 provides that the private correspondence or communications of an elected office holder which if disclosed would constitute an invasion of privacy are excepted from public disclosure. This office has found that this section protects the same privacy issues as section 552.101 of the Government Code. *See, e.g.*, Open Records Decision Nos. 506 at 3 (1988), 241 (1980), 212 (1978). Moreover, this office has concluded that section 552.109 relies on the same tests applicable under section 552.101 of the Government Code. *See, e.g.*, Open Records Decision Nos. 506 at 3 (1988), 241 (1980), 212 (1978). This office has also concluded that section 552.109 only protects the privacy interests of the elected official not those interests of their correspondents. *See* Open Records Decision Nos. 473 at 3 (1987), 332 at 2 (1982). As we apply the same test to the requested information under section 552.109 as we do with section 552.101, and as we concluded earlier, you have not explained how the release of the information would implicate a person's common law or constitutional privacy. Therefore, the requested information may not be withheld from public disclosure pursuant to section 552.109 of the Government Code.

Finally, you assert that the requested information may be withheld pursuant to section 552.111 of the Government Code. Section 552.111 of the Government Code excepts interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. Open Records Decision No. 615 (1993). The purpose of this section is "to protect from public disclosure advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W. 2d 391, 394 (Tex. App. – San Antonio 1982, writ ref'd n.r.e). In Open Records Decision No. 429 (1985), this office indicated that information protected by section 552.111 must be prepared by a person or entity with an official reason or duty to provide the information in question. *See* Open Records Decision No. 464 (1987). *See also Wu v. National Endowment of the Humanities*, 460 F.2d 1030 (5th Cir.). *cert denied*, 410 U.S. 926 (1972). Section 552.111 does not protect facts and written recommendation. Open Records Decision No. 615 (1993). If, however, the factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make separation of the factual data impractical, that information may be withheld. Open

Records Decision No. 313 (1982). In this instance, this office concludes that the requested information does not fall within the purview of section 552.111 of the Government Code. Thus the requested information may not be withheld from public disclosure under section 552.111.

Additionally, you assert that the requested information is excepted from public disclosure pursuant to the attorney work product privilege recognized by this office under section 552.111 of the Government Code. This office has stated that if a governmental body wishes to withhold attorney work product under section 552.111, it must show that the material 1) was created for trial or in anticipation of litigation under the test articulated in *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex.1993), and 2) consists of or tends to reveal an attorney's mental processes, conclusions, and legal theories. *See id.* When showing that the documents at issue were created in anticipation of litigation for the first prong of the work product test, a governmental body's task is twofold. The governmental body must demonstrate that 1) 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 2) 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.* at 5. Based on your arguments and our review of the documents, we conclude that you have demonstrated that the documents were prepared in anticipation of litigation. We find, however, that the information does not consist of or reveal an attorney's mental impressions, conclusions, or legal theories. Therefore, we find that the requested information does not fall within the attorney work product privilege encompassed in section 552.111 of the Government Code.

You have also asserted that the request is essentially asking for the prosecuting attorney's entire files, and therefore, the information is excepted from public disclosure under the attorney work product privilege as established in *National Union Fire Ins. Co. v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993). In order to be protected as attorney work product, the attorney's file must be organized in anticipation of litigation and reflect the lawyer's mental impressions regarding the prosecution of the case. *Id.* at 461. In *National Union*, the court stated that a request for an attorney's files is "objectionable under the attorney work product exemption from discovery." *Id.* However, the court concluded that a specific document is not automatically considered to be privileged simply because it is part of an attorney's file. *Id.* The court held that an opposing party may request specific documents or categories of documents that are relevant to the pending case without implicating the attorney work product privilege. *Id.*; Open Records Decision No. 647 at 5 (1996). The requestor specifically asked for documents that contained his and his associates' names. He did not specifically ask for the prosecuting attorney's entire file, although, in response to the request, you assert that the entire file contains responsive information. Thus, we find that *National Union* is inapplicable to the documents at issue. Therefore, we conclude that the documents are not excepted under the attorney work product privilege as established in *National Union*. Thus, except as noted above, you must release the requested information.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.–Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

***Open Records Division  
Office of the Attorney General***

Ref: ID# 133299

Encl. Submitted documents

cc: Mr. Harry L. Bowles  
306 Big Hollow Lane  
Houston, Texas 77042  
(w/o enclosures)