



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

December 11, 2002

Ms. Diane C. Wetherbee
City Attorney
City of Plano
P.O. Box 860358
Plano, Texas 75086-0358

OR2002-7063

Dear Ms. Wetherbee:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 173459.

The City of Plano (the "city") received a request for information relating to the "excessive damage to and/or clearing of trees by Pate Brothers Construction, Inc. and subsequent litigation concerning the Kings Gate Project." You state that the city has released some of the requested information. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.¹

We begin with your claim with regard to part A of the submitted information under section 552.107 of the Government Code. Section 552.107(1) excepts from public disclosure

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[.]

¹This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the city to withhold any information that is substantially different from the submitted information. See Gov't Code § 552.301(e)(1)(D): Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Gov't Code § 552.107(1). Section 552.107(1) protects information that comes within the attorney-client privilege. In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and the client's communications made in confidence to the attorney. *See* Open Records Decision No. 574 (1990). Accordingly, these two classes of information are the only information that may be withheld pursuant to the attorney-client privilege under section 552.107(1).

You state that part A of the submitted information consists of communications involving the city, its attorneys, and representatives of the city and its attorneys. You also inform us that these communications were made in furtherance of the rendition of professional legal services to the city. Based on your representations and our review of the information in part A, we conclude that you may withhold most of this information under section 552.107(1).² *See also* TEX. R. EVID. 503(b)(1). The remaining information in part A consists of copies of communications to an attorney for an opposing party. You have not demonstrated that this information is excepted from disclosure under section 552.107. *See* Open Records Decision No. 676 at 6-11 (2002) (addressing demonstration required of governmental body that claims attorney-client privilege).

Next, we address your claim under the attorney work product aspect of section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intragency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 647 (1996), this office held that a governmental body may withhold an attorney's work product under section 552.111 if the governmental body demonstrates (1) that the information was created for trial or in anticipation of litigation under the test articulated in *National Tank Company v. Brotherton*, 851 S.W.2d 193 (Tex. 1993), or after litigation is filed, and (2) that the information consists of or tends to reveal an attorney's "mental processes, conclusions, and legal theories." *See* Open Records Decision No. 647 at 5. The first element of the work product test has two parts. The governmental body must demonstrate (1) that 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) that 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* Open Records Decision No. 647 at 4. 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." *See National Tank Co.*, 851 S.W.2d at 204. The second element of the work product test requires a showing that the information at issue tends to reveal the attorney's mental processes, conclusions, and legal theories. *See* Open Records Decision No.

²We note that the information in part A includes a document that also appears in part B of the submitted information. We have marked that document. As we have concluded that you may withhold the marked document under section 552.107(1), we will not also consider whether this same document is protected by the attorney work product aspect of section 552.111.

647 at 4. The governmental body must demonstrate that the information consists of or tends to reveal the thought processes of an attorney in the civil litigation process. *Id.* The attorney work product privilege generally does not extend to facts obtained by the attorney. *Id.*

You inform us that part B of the submitted information consists of notes and memoranda that contain an attorney's thought processes, conclusions, and legal theories. You state that this information is related to concluded litigation to which the city was a party. You also state that this information was created during the litigation or at a time when a reasonable person would have concluded from the totality of the circumstances that there was a substantial chance that litigation would ensue. Based on your representations and our review of the information at issue, we conclude that you have shown that part B of the submitted information is excepted from disclosure under the work product aspect of section 552.111.

You also raise section 552.101 of the Government Code in conjunction with section 101.104 of the Texas Civil Practice and Remedies Code. Section 101.104 provides as follows:

- (a) Neither the existence nor the amount of insurance held by a governmental unit is admissible in the trial of a suit under [the Texas Tort Claims Act].
- (b) Neither the existence nor the amount of the insurance is subject to discovery.

Tex. Civ. Prac. & Rem. Code § 101.104. You assert that the information submitted as part C is protected by section 101.104 and thus is excepted from disclosure under section 552.101 of the Government Code. Section 101.104 prohibits the discovery and admission of insurance information during a trial under the Texas Tort Claims Act, chapter 101 of the Civil Practice and Remedies Code. *See City of Bedford v. Schattman*, 776 S.W.2d 812, 813-14 (Tex. App.--Fort Worth 1989, orig. proceeding) (protection from producing evidence of insurance coverage under section 101.104 is limited to actions brought under the Tort Claims Act). However, section 101.104 does not make insurance information confidential for purposes of section 552.101 of the Government Code. *See Open Records Decision No. 551 at 3 (1990)* (provisions of section 101.104 "are not relevant to the availability of the information to the public"). Chapter 552 of the Government Code differs in purpose from statutes and procedural rules providing for discovery in judicial proceedings. *See Gov't Code §§ 552.005* (chapter 552 does not affect scope of civil discovery), *.006* (chapter 552 does not authorize withholding public information or limit availability of public information to public except as expressly provided by chapter 552); *see also* Attorney General Opinion JM-1048 (1989); *Open Records Decision No. 575 (1990)* (*overruled in part by Open Records Decision No. 647 (1996)*) (section 552.101 does not encompass discovery privileges). Thus, we find that section 101.104 of the Civil Practice and Remedies Code does not make any of the information in part C confidential for purposes of section 552.101 of the Government Code. Therefore, you may not withhold any of that information under section 552.101 in conjunction with section 101.104.

We note, however, that the information in part C includes an e-mail address. Section 552.137 of the Government Code provides as follows:

(a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. Two of the documents in part C contain a private individual's e-mail address. This e-mail address also appears in the same documents, submitted in part A, that are not excepted from disclosure under section 552.107(1). You do not inform us that the individual to whom this e-mail address belongs has affirmatively consented to its public disclosure. Therefore, you must withhold the e-mail address that we have marked in parts A and C of the submitted information under section 552.137.

In summary, you may withhold most of part A of the submitted information under section 552.107(1) of the Government Code. You may withhold all of part B under section 552.111. You must withhold the marked e-mail address in parts A and C under section 552.137. The rest of the information in parts A and C must be released.

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

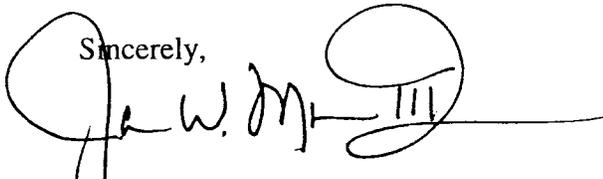
will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure 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).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is stylized with a large, circular flourish at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 173459

Enc: Marked documents

c: Mr. James R. Schnurr
Winstead Sechrest & Minick
1201 Elm Street
Dallas, Texas 75270
(w/o enclosures)