



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 15, 2005

Ms. Lisa Villarreal  
Assistant Attorney General  
Assistant Public Information Coordinator  
Office of the Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

OR2005-08432

Dear Ms. Villarreal:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 232289.

The Office of the Attorney General (the "OAG") received a request for all information pertaining to Attorney General Opinion JM-266 and the requestor. The OAG has released some information but claims that the remainder is excepted from disclosure under sections 552.107, 552.108, 552.111, and 552.147 of the Government Code. In addition, the OAG asserts it may not release some of the information pursuant to section 552.3035 of the Government Code. We have considered the OAG's claimed exceptions to disclosure and have reviewed the submitted information.<sup>1</sup> We have also received and considered comments from the Harris County District Attorney's Office (the "D.A.'s Office"). See Gov't Code § 552.304 (person may submit written comments stating reasons why information should or should not be released).

First, the OAG argues section 552.3035 prohibits it from releasing Exhibit B. Exhibit B-1 contains the 1985 and 1989 briefs from the D.A.'s Office seeking an attorney general

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<sup>1</sup>The OAG states Exhibits C-F are representative samples of some of the requested information. We assume that 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 that those records contain substantially different types of information than that submitted to this office.

decision to withhold information sought by the requestor in 1984. Exhibit B-2 is the requested information the D.A.'s Office wanted to withhold. When a governmental body seeks an attorney general decision to withhold information, it is required to submit to this office comments stating the reasons why the information should be withheld and a copy of the specific information requested. *Id.* § 552.301(e)(1)(A), (D). The attorney general may not disclose any information submitted under section 552.301(e)(1)(D). *Id.* § 552.3035. Thus, pursuant to section 552.3035, the OAG must withhold Exhibit B-2. Exhibit B-1 is not information submitted pursuant to section 552.301(e)(1)(D); therefore, it is not subject to section 552.3035. Moreover, the D.A.'s Office only argues that information responsive to the 1984 request should be withheld. The D.A.'s Office does not seek to withhold its briefs from public disclosure. Accordingly, the OAG must release Exhibit B-1.

Section 552.107(1) 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* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that 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 Texas 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 communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). 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.* 503(b)(1), 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, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that 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).

The OAG explains the communications in Exhibit C are confidential communications among OAG attorneys, executive management, and staff that were made in furtherance of the rendition of professional legal services. The OAG states these communications were intended to be confidential and that their confidentiality has been maintained. After reviewing the OAG's arguments and the submitted information, we agree that Exhibit C constitutes privileged attorney-client communications that the OAG may withhold under section 552.107. Because section 552.107 is dispositive, we do not address the OAG's other claimed exception for Exhibit C.

Next, the OAG contends Exhibits E and F constitute attorney work product excepted from disclosure under section 552.111. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." 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

(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.

A governmental body seeking to withhold information under this exception bears the burden of demonstrating that 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 that 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. In *Curry v.*

*Walker*, 873 S.W.2d 379 (Tex. 1994), the Texas Supreme Court held that a request for a district attorney's "entire litigation file" was "too broad" and, quoting *National Union Fire Insurance Company v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993, orig. proceeding), held that "the decision as to what to include in [the file] necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case." *Curry*, 873 S.W.2d at 380. The OAG explains the file, submitted as Exhibits E and F, was created in its representation of the state in *Holmes v. Morales*, 924 S.W.2d 920 (Tex. 1996). Because the present request encompasses an attorney's entire litigation file and the OAG has demonstrated that the file was created in anticipation of litigation, we conclude the OAG may withhold Exhibits E and F from disclosure under section 552.111 of the Government Code as attorney work product.

Lastly, the OAG asserts a social security number in Exhibit D is excepted from disclosure pursuant to section 552.147. Section 552.147 of the Government Code<sup>2</sup> provides that "[t]he social security number of a living person is excepted from" required public disclosure. Therefore, the OAG must withhold the social security number in Exhibit D under section 552.147.<sup>3</sup> We note Exhibit D also contains fingerprints that are confidential under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. A biometric identifier is exempt from disclosure under chapter 552. Gov't Code § 560.003. "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry. *Id.* § 560.001. Therefore, the OAG must withhold the fingerprints in Exhibit D under section 560.003.

In summary, section 552.3035 prohibits the OAG from releasing Exhibit B-2. The OAG may withhold Exhibit C under section 552.107 and Exhibits E and F under section 552.111. The OAG must withhold the social security number under section 552.147 and the fingerprints under section 560.003 of the Government Code. The remaining information 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

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<sup>2</sup>Added by Act of May 23, 2005, 79th Leg., R.S., S.B. 1485, § 1, sec. 552.147(a) (to be codified at Tex. Gov't Code § 552.147).

<sup>3</sup>We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Dep't of Pub. 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 Office of the Attorney General 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. 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,



Yen-Ha Le  
Assistant Attorney General  
Open Records Division

YHL/sdk

Ref: ID# 232289

Enc: Submitted documents

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