



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 18, 2009

Ms. Kathleen C. Decker  
Director  
Litigation Division  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

OR2009-06752

Dear Ms. Decker:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 343310 (PIR No. 09.02.26.15).

The Texas Commission on Environmental Quality (the "commission") received a request for all records concerned a named individual and a named business. You state that you have made some of the requested information available to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. Gov't Code § 552.107. 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

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<sup>1</sup>Although you initially raise sections 552.101, 552.102, 552.103, and 552.104 of the Government Code, you do not present any arguments against disclosure under these sections. Thus, we assume you no longer urge these exceptions. Gov't Code §§ 552.301, .302.

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 Tex. 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)-(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 commission seeks to withhold the information submitted as Folders 1 through 10 under section 552.107(1) of the Government Code. You state that the information at issue either constitutes or documents privileged attorney-client communications that were made in connection with the rendition of professional legal services to the commission. You have identified the parties to the communications. You also state that the communications were intended to be confidential, and you do not indicate that confidentiality has been waived. Based on your representations and our review of the information at issue, we conclude that the commission may withhold Folders 1 through 10 under section 552.107(1).

Section 552.111 of the Government Code encompasses the attorney work product privilege found at rule 192.5 of the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 192.5; *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 attorney work product as consisting of

- (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.

TEX. R. CIV. P. 192.5. A governmental body that seeks to withhold information on the basis of the attorney work product privilege under section 552.111 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. *See id.*; ORD 677 at 6-8. In order for this office to conclude that information was created 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.

You indicate that the commission is pursuing a cost recovery action. You also state that the information at issue consists of information prepared or developed by commission attorneys in reference to this action, and this information reveals the attorneys' mental impressions. However, we note that a portion of the information you seek to withhold under section 552.111 was released to opposing counsel. Thus, this information, which we have marked for release, may not be withheld under section 552.111 of the Government Code. Having considered your arguments and reviewed the information at issue, we find that, except for the information we have marked for release, the commission may withhold Folders 11 and 12 under section 552.111 of the Government Code.

We note that some of the remaining information consists of e-mail addresses subject to section 552.137 of the Government Code.<sup>2</sup> Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating

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<sup>2</sup>The Office of the Attorney General will raise a mandatory exception, such as section 552.137, on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

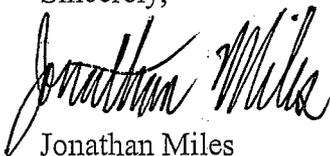
electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses at issue are not of a type specifically excluded by section 552.137(c) of the Government Code. The commission must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have consented to their release.

In summary, the commission may withhold folders 1 through 10 under section 552.107(1) of the Government Code and, with the exception of the information we have marked for release, may withhold folders 11 and 12 under section 552.111 of the Government Code. The commission must withhold the e-mail addresses we have marked under section 552.137 of the Government Code. The remaining information must be released.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Jonathan Miles  
Assistant Attorney General  
Open Records Division

JM/cc

Ref: ID# 343310

Enc. Submitted documents

c: Requestor  
(w/o enclosures)