



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 16, 2009

Mr. Randall P. Gunter  
Fielder & Gunter  
Attorney for City of Liberty  
310 Main  
Liberty, Texas 77575

OR2009-09827

Dear Mr. Gunter:

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# 349338.

The City of Liberty (the "city"), which you represent, received a request for six categories of information relating to a named police officer. You state you have released most of the requested information. You further state you do not possess any information responsive to category four of the request.<sup>1</sup> You claim that the submitted information is excepted from disclosure under sections 552.107, 552.108, and 552.111 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information is not responsive because it was created after the date the city received the request for information. We have marked this non-responsive information. This ruling does not address the public availability of any

---

<sup>1</sup>The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

<sup>2</sup>Although you raise section 552.103 of the Government Code, you have not submitted arguments explaining how this exception applies to the submitted information. Therefore, we presume that you have withdrawn this exception. See Gov't Code §§ 552.301, 552.302.

information that is not responsive to the request and the city is not required to release that information in response to the request.

Next, we note the information in Exhibit B contains a document filed with the court, which is subject to public disclosure under section 552.022(a)(17) of the Government Code. Section 552.022(a)(17) provides for required public disclosure of "information that is also contained in a public court record," unless the information is expressly confidential under other law. Gov't Code § 552.022(a)(17). You claim the court-filed document is excepted from disclosure under section 552.108 of the Government Code. However, section 552.108 is a discretionary exception that protects a governmental body's interests and is, therefore, not "other law" for purposes of section 552.022(a)(17). *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 586 (1991) (governmental body may waive section 552.108). Therefore, the city may not withhold the court-filed document, which we have marked, under section 552.108 of the Government Code. We will address your arguments under section 552.108 for the remaining information in Exhibit B that is not subject to section 552.022.

Section 552.108 of the Government Code provides in relevant part:

(a) 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:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime; [or]

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(1)-(2). We note that section 552.108(a)(1) and section 552.108(a)(2) typically encompass two mutually exclusive types of information. Section 552.108(a)(1) protects information that pertains to a specific pending criminal investigation or prosecution. In contrast, section 552.108(a)(2) protects information that relates to a concluded criminal investigation or prosecution that did not result in conviction or deferred adjudication. A governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). A governmental body that claims section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See* Gov't Code §§ 552.108(a)(2), .301(e)(1)(A).

You claim the submitted information in Exhibit B relates to a pending investigation being conducted by the Texas Rangers. You inform us that the Texas Ranger conducting the investigation has requested the information be withheld. Based on your representations and our review, we conclude the release of the submitted information in Exhibit B would interfere with the detection, investigation, or prosecution of crime. See *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Accordingly, the city may withhold the information not subject to section 552.022 in Exhibit B under section 552.108(a)(1) of the Government Code.

You state that the submitted information in Exhibit C relates to both open and closed investigations. However, you have not identified what entries in the evidence log, if any, pertain to pending criminal investigations; therefore, the city has failed to establish that any of Exhibit C is excepted under section 552.108(a)(1). See Gov't Code § 552.301(e)(2) (governmental body must label copy of requested information to indicate which exceptions apply to which parts of the copy). You also have not identified which of the entries, if any, pertain to cases that concluded in a result other than conviction or deferred adjudication; therefore, the city has also failed to establish that any of Exhibit C is excepted under section 552.108(a)(2). See *id.* We therefore conclude that the city may not withhold the information in Exhibit C under section 552.108 of the Government Code.

Next, you claim that the information in Exhibit D is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) of the Government Code 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. 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. 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. *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 a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. See TEX. R. EVID. 503(b)(1). 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, 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. *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).

You state that the information in Exhibit D consists of communications between and among an attorney for and representatives of the city. You state that these communications were made in furtherance of the rendition of legal services to the city, and you inform this office that these communications remain confidential. Based on your representations and our review, we determine that the information we have marked under section 552.107(1) constitutes privileged attorney-client communications. Accordingly, the city may withhold this information under section 552.107(1) of the Government Code. However, we note that some of the communications are between the city and an outside party, namely the requestor. Accordingly, the remaining responsive information in Exhibit D may not be withheld under section 552.107. Further, we note that some of the individual e-mails contained in the submitted e-mail strings subject to section 552.107 consist of communications between non-privileged parties, and thus are not privileged. Accordingly, to the extent these non-privileged e-mails exist separate and apart from the submitted e-mail strings, they may not be withheld under section 552.107. We have marked these non-privileged e-mails.

You also claim the attorney work product privilege of section 552.111 of the Government Code for the remaining responsive information in Exhibit D. Section 552.111 of the Government Code 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,” and 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.

TEX. R. CIV. P. 192.5. 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. *Id.*; ORD 677 at 6-8. In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied: (a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation there was a substantial chance litigation would ensue; and (b) the party resisting discovery believed in good faith there was a substantial chance litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation. *See 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. The second prong of the work product test requires the governmental body to show the documents at issue contain the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test is confidential under rule 192.5, provided the information does not fall within the purview of the exceptions to the privilege enumerated in rule 192.5(c). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d at 427.

As previously stated, a governmental body bears the burden of establishing the applicability of the work product privilege to information it seeks to withhold under section 552.111 of the Government Code. Although the city claims the remaining responsive e-mails in Exhibit D are subject to the attorney work product privilege, we note that these e-mails were sent to opposing counsel. Thus, the remaining responsive e-mail in Exhibit D may not be withheld under section 552.111 of the Government Code.

In summary, with the exception of the information subject to section 552.022(a)(17), the city may withhold the information in Exhibit B under section 552.108(a)(1) of the Government Code. The city may also withhold the information we have marked in Exhibit D under section 552.107 of the Government Code; however, to the extent the non-privileged e-mails we have marked exist separate and apart from the submitted e-mail strings, the separate e-mails must be released. The remaining responsive 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,



Greg Henderson  
Assistant Attorney General  
Open Records Division

GH/ri

Ref: ID#349338

Enc. Submitted documents

c: Requestor  
(w/o enclosures)