



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 5, 2010

Ms. Evelyn W. Njuguna
Assistant City Attorney
Legal Department
City of Houston
P.O. Box 368
Houston, Texas 77001

OR2010-00095

Dear Ms. Njuguna:

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# 366397.

The City of Houston (the "city") received a request for the complainant's name, contact information, and a copy of the complaint form pertaining to three specified deed restriction complaints, as well as information pertaining to a document entitled "6120 Maxie Deed Restriction Protest[.]" You claim the submitted information is excepted from disclosure under sections 552.101, 552.111, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information protected by the common-law informer's privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with

civil or criminal penalties to “administrative officials having a duty of inspection or of law enforcement within their particular spheres.” Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. See Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). The privilege excepts the informer’s statement only to the extent necessary to protect that informer’s identity. Open Records Decision No. 549 at 5 (1990).

You marked information you state identifies individuals who reported the deed restriction violations. Upon review, we agree most of the identifying information you marked in Exhibit 2 pertains to the individual who reported the deed restriction violations at issue to the city. You explain the city has jurisdiction to enforce compliance with deed restrictions pursuant to the city’s Code of Ordinances. Further, the city ordinances you provide reflect that violations of deed restrictions result in a minimum civil penalty to the property owner of \$1,000 per day the owner is in violation. Accordingly, we agree the city may withhold most of the identifying information you marked, as well as the information we marked, under section 552.101 of the Government Code in conjunction with the informer’s privilege. However, the submitted documents reflect one individual whose identity you marked only asked a neighborhood civic association about certain deed restrictions. This individual does not actually report a violation of deed restrictions. Further, neighborhood civic associations are not administrative officials with a duty of inspection or of law enforcement with respect to deed restriction violations. Thus, because this individual, whose identifying information we marked for release, did not report a violation to the city, her information may not be withheld pursuant to the informer’s privilege.

You claim some of the remaining information in Exhibit 2 is excepted from disclosure under section 552.137, which generally requires a governmental body to withhold the e-mail address of a member of the general public. Gov’t Code § 552.137(a). You inform this office the e-mail addresses you marked are not specifically excluded by section 552.137(c). You also state that the city has not received consent for these e-mail addresses’ release. Accordingly, the city must withhold the e-mail addresses you marked under section 552.137 of the Government Code.¹

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:

¹We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

(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.

You state the charts in Exhibit 3 were created by city attorneys, paralegals, and investigators after deed restriction violations were reported pertaining to certain properties. You represent the city has authority to enforce compliance with deed restrictions by filing suit to enjoin use of the properties in violation, and, in initiating the investigation, the city reasonably assumed it would file suit if violations were found. You explain the submitted charts are part of the city's process of investigating and enforcing deed restrictions. Thus, based on your representations and our review, we agree the charts in Exhibit 3 were created in anticipation of litigation by the city and its representatives. We therefore conclude the charts may be withheld as attorney work product under section 552.111.

In summary, with the exception of the information we marked for release, the city may withhold the identifying information you marked in Exhibit 2, as well as the identifying information we marked, under section 552.101 in conjunction with the informer's privilege. The city must withhold the e-mail addresses you marked in Exhibit 2 under section 552.137 of the Government Code. The remaining information in Exhibit 2 must be released. The city may withhold Exhibit 3 under section 552.111 of the Government Code.

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, 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, toll free, at (888) 672-6787.

Sincerely,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/cc

Ref: ID# 366397

Enc. Submitted documents

cc: Requestor
(w/o enclosures)