



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

January 26, 2010

Ms. Neera Chatterjee
Public Information Coordinator
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2010-01215

Dear Ms. Chatterjee:

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# 368214.

The University of Texas at Dallas (the "university") received a request for eighteen categories of information pertaining to specific patents; the university's relationship with Research Applications, Inc.; a specified trademark application; research, sale, and use of diamond-like carbon, amorphous carbon, or nanophase carbon; and specified litigation. You state the university has released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

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." Gov't Code § 552.111. This section encompasses the attorney work product privilege found in rule 192.5

¹We assume 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.

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. OF CIV. P. 192.5. A governmental body seeking to withhold information on this basis 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 that (1) 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) 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.

If a requestor seeks an attorney's entire litigation file, and a governmental body seeks to withhold the entire file and demonstrates the file was created in anticipation of litigation, we will presume the entire file is excepted from disclosure under the attorney work product aspect of section 552.111 of the Government Code. Open Records Decision No. 647 at 5 (1996) (citing *Nat'l Union Fire Ins. Co. v. Valdez*, 863 S.W.2d 458, 461 (Tex. 1993)) (organization of attorney's litigation file necessarily reflects attorney's thought processes).

In this instance, the requestor seeks all documents related to specified litigations involving the university. You state the submitted information contains the entire patent prosecution file created by the university's outside counsel in preparation for one of the specified litigations. Based on your representations and our review of the information at issue, we conclude the university may withhold the litigation file you have marked as attorney work product under section 552.111. See *Curry v. Walker*, 873 S.W.2d 379, 381 (Tex. 1994) (citing *United States v. Nobles*, 422 U.S. 225, 236 (1975)) (the work product doctrine under section 552.111 is applicable to civil litigation files).

You also state the remaining documents you have marked consist of the mental impressions, opinions, conclusions, and legal theories of the university's counsel, including the university's outside counsel created for the university in anticipation and preparation of the patent disputes at issue. Based on your representations and our review, we find the university may withhold the information you have marked under the attorney work product exception of section 552.111. However, the remaining information, which we have marked for release, does not constitute material prepared or mental impressions developed, or communications made, in anticipation of litigation or for trial. Thus, the university has failed to demonstrate the work product privilege is applicable to this information and none of it may be withheld under section 552.111 on such basis.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. Gov't Code § 552.107(1). 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 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 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 pet.). 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 the remaining information consists of communications between the employees of the university, employees of the University of Texas System, and outside counsel. You state these communications were made in furtherance of the rendition of legal services to the

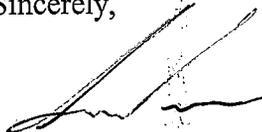
university, and you inform this office these communications have remained confidential. Based on your representations and our review, we agree portions of the remaining information constitute privileged attorney-client communications. Therefore, the university may withhold most of the remaining information under section 552.107 of the Government Code. However, we find you have failed to demonstrate how the remaining documents we have marked consist of communications between privileged parties made for the purpose of facilitating the rendition of professional legal services to the university. Accordingly, the information we have marked may not be withheld under section 552.107.

In summary, the university may withhold the patent prosecution file you have marked and some of the information you have marked under section 552.111 of the Government Code. The remaining information may be withheld under section 552.107(1) of the Government Code, with the exception of the documents we have marked for release.

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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 368214

Enc. Submitted documents

c: Requestor
(w/o enclosures)