



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 20, 2010

Ms. Karen Stead
Assistant City Attorney
City of Tyler, Legal Department
P.O. Box 2039
Tyler, Texas 75710

OR2010-05644

Dear Ms. Stead:

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# 376333 (Legal Desk #ZOX-234083).

The City of Tyler (the "city") received a request for 1) all written complaints concerning ordinance violations during a specified time period pertaining to a specified address, individual, and/or company; and 2) all internal documents and e-mails to and from the city concerning the same complaints. You state the city has released some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.111, 552.130, and 552.147 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.²

¹Although you also raise Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, we note that, in this instance, the proper exceptions to raise when asserting the attorney-client and attorney work product privileges for information not subject to section 552.022 are sections 552.107 and 552.111. *See* Open Records Decision Nos. 677 (2002), 676 at 6 (2002).

²We 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.

Initially, we must address the city's obligations under section 552.301 of the Government Code. Subsections (a) and (b) of section 552.301 require a governmental body requesting an open records ruling from this office to "ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request." Gov't Code § 552.301(a), (b). While you raised sections 552.101, 552.107, 552.108, and 552.111 within the ten-business-day time period as required by subsection 552.301(b), you did not raise sections 552.103 or 552.130 within the ten-business-day deadline.³ A governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). The presumption that information is public under section 552.302 can generally be overcome by demonstrating the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Section 552.103 is a discretionary exception that protects a governmental body's interests and may be waived by a governmental body's failure to comply with the procedural requirements of the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas, no pet.) (governmental body may waive section 552.103). In failing to comply with section 552.301, the city has waived its claim under section 552.103. Therefore, the city may not withhold any of the submitted information under section 552.103. However, section 552.130 of the Government Code can provide a compelling reason to overcome this presumption; therefore, we will consider the applicability of this section to the submitted information. We will also consider the applicability of your timely-raised exceptions.

Section 552.107(1) of the Government Code protects information coming 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

³We note 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. Gov't Code § 552.147(b).

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. 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, *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. *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 indicate that the submitted e-mails constitute communications between city attorneys and city officials made in furtherance of providing legal services to the city. You have identified the parties to the communications. You state that these communications were intended to be confidential and have remained confidential. Based on your representations and our review, we agree that the submitted e-mails constitute privileged attorney-client communications. Accordingly, the city generally may withhold this information under section 552.107 of the Government Code.⁴ We note, however, information shared with or seen by non-privileged parties is attached to a portion of the privileged e-mails. To the extent those non-privileged attachments, which we have marked, exist separate and apart from the e-mails to which they are attached, we conclude these attachments may not be withheld under section 552.107(1) of the Government Code.

Next, you claim some of the remaining information is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from disclosure “an interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. This exception 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); ORD 677 at 4-8. Rule 192.5 defines work product as

⁴As our ruling is dispositive, we need not address your claim under section 552.147 for this information.

(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 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 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 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.

We note you raise the work product privilege for the non-privileged e-mail attachments not excepted under section 552.107. Once again, we note this information has been shared with or seen by non-privileged parties. Thus, to the extent this information exists separate and apart from the e-mails at issue, we conclude these attachments may not be withheld on the basis of the attorney work product privilege under section 552.111 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. The section encompasses 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); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The informer's privilege 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). 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 seek to withhold a portion of the remaining information that identifies individuals who you state made complaints regarding alleged city ordinance violations. You explain that various city employees have authority to enforce ordinances under section 18-4 of the Tyler City Code. You also indicate that the complainants reported violations to the city departments responsible for enforcing certain ordinances. You state that there are criminal penalties for violations of certain ordinances under section 1-4 of the Tyler City Code. However, you have not identified any of the ordinances that were allegedly violated. Accordingly, the city has failed to demonstrate that the informer's privilege is applicable to the information at issue. Thus, we conclude that the city may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with the informer's privilege.

Next, you claim ticket number T240000 is excepted from disclosure under section 552.108 of the Government Code. Section 552.108 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 the requirements of Section 552.021 if:

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

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

Gov't Code § 552.108(a)(1), (b)(1). A governmental body claiming subsection 552.108(a)(1) or subsection 552.108(b)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706

(Tex. 1977). Subsection 552.108(a)(1) protects information, the release of which would interfere with a particular criminal investigation or prosecution, while subsection 552.108(b)(1) encompasses internal law enforcement and prosecution records, the release of which would interfere with on-going law enforcement and prosecution efforts in general. You state ticket number T240000 is related to a pending criminal prosecution. However, we note this information consists of a copy of a citation. Because the copy of the citation has been provided to the individual who was cited, we find release of the citation will not interfere with the detection, investigation, or prosecution of crime. Therefore, the city may not withhold ticket number T240000 under section 552.108(a)(1) or section 552.108(b)(1).

Section 552.130 of the Government Code provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency. Gov't Code § 552.130(a)(1), (2). We have marked the information that is subject to section 552.130. We note, however, that section 552.130 protects personal privacy, and the requestor may be the authorized representative of one of the individuals whose Texas motor vehicle information is at issue. Thus, if the requestor is the authorized representative of this individual, the requestor would have a right of access to his Texas motor vehicle information under section 552.023 of the Government Code. *See* Gov't Code § 552.023(a) (person or person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to that person and is protected from public disclosure by laws intended to protect person's privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Information to which the requestor has a right of access under section 552.023 may not be withheld from her under section 552.130. The city must withhold the Texas motor vehicle information pertaining to the other individual under section 552.130.⁵

In summary, the city may generally withhold the submitted e-mails under section 552.107 of the Government Code. However, to the extent the non-privileged attachments we marked exist separate and apart from the submitted e-mails, they may not be withheld under section 552.107. The city must withhold the information we have marked under section 552.130 of the Government Code, unless the requestor has a right of access to one of the individual's Texas motor vehicle information. The remaining information must be released.

⁵We 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 Texas driver's license and license plate numbers under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

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,



Tamara H. Holland
Assistant Attorney General
Open Records Division

THH/jb

Ref: ID# 376333

Enc. Submitted documents

c: Requestor
(w/o enclosures)