



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 28, 2010

Mr. Duane F. Keating  
Attorney & Counselor at Law  
Attorney for Sabine County Hospital District  
P.O. Box 1127  
Hemphill, Texas 75948

OR2010-06058

Dear Mr. Keating:

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# 377460.

The Sabine County Hospital District (the "district"), which you represent, received a request for documents relating to specified litigation in which the district is involved. You claim the requested information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code.<sup>1</sup> We have considered your arguments and reviewed the submitted representative sample of information.<sup>2</sup> We have also received and considered

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<sup>1</sup>Although you also raise section 552.022 of the Government Code, that provision is not an exception to disclosure. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are expressly confidential under other law. *See* Gov't Code § 552.022. Additionally, although you 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, respectively. *See* Open Records Decision Nos. 677 (2002), 676 at 6 (2002).

<sup>2</sup>We 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.

comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we address the requestor's contention that the district did not comply with the procedural requirements of section 552.301(e-1) of the Government Code. Section 552.301(e-1) requires a governmental body that submits written comments to the attorney general under subsection (e)(1)(A) to send a copy of those comments to the person who requested the information from the governmental body within fifteen business days of receiving the request for information. *Id.* § 552.301(e-1). The district received the request for information on February 2, 2010. The district informs us that it is only open for business two days a week, on Tuesdays and Thursdays. Consequently, the fifteen-business-day deadline to provide information to the requestor pursuant to section 552.301(e-1) was March 25, 2010.

Although the requestor asserts that the district did not timely comply with the requirements of section 552.301(e-1), the district indicates from its correspondence that it timely sent its notice of the request for a decision on February 22, 2010. Whether the district timely sent a copy of the written comments to the requestor is a question of fact. This office cannot resolve disputes of fact in its decisional process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where a fact issue cannot be resolved as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernible from the documents submitted for our inspection. *Id.* Therefore, based on the district's representations and our review, we conclude that the district complied with the procedural requirements of section 552.301 in requesting this ruling, and we will address the district's arguments against disclosure of the submitted information.

We understand the district to assert that the submitted information is confidential under section 551.071 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 This section encompasses information protected by other statutes. Section 551.071 permits a governmental body to consult with its attorney in a closed meeting. *See id.* §§ 551.071. This provision does not make information confidential for purposes of section 552.101 of the Government Code. *See* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Thus, the district may not withhold any of the submitted information under section 552.101 in conjunction with section 551.071 of the Government Code.

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." Gov't Code § 552.111. Section 552.111 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 inform us that the district is a defendant in ongoing litigation. You assert the submitted information consists of work product developed by the district's attorneys in preparing for this litigation. Based on your representations and our review, we find that the district may withhold Exhibits C and D as attorney work product under section 552.111 of the Government Code. However, some of the remaining information has been provided to the opposing party in the litigation. Therefore, because a non-privileged party has had access to this information, the work product privilege under section 552.111 has been waived. Additionally, we find you have failed to demonstrate a portion of the remaining information consists of material prepared or mental impressions developed in anticipation of litigation or for trial by a party or a representative of a party. Accordingly, the district may not withhold any of the remaining information under section 552.111.

Next, you raise section 552.107 of the Government Code for the remaining information. Section 552.107(1) 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 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). 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, lawyer representatives, and a lawyer representing another party or its representative, in a pending action and concerning a matter of common interest therein. *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. *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 seek to withhold the remaining information under section 552.107 of the Government Code. You indicate the information at issue consists of confidential communications between attorneys for the district and district staff. We understand you to assert these communications were made for the purpose of facilitating the rendition of professional legal advice pertaining to the district. Upon review, we find you have established that some of the remaining information constitutes privileged attorney-client communications. Therefore, the district may withhold the information we have marked in Exhibit F under section 552.107

of the Government Code. However, the remaining information you seek to withhold was communicated to or from the opposing party in the litigation. Consequently, we find you have failed to demonstrate the applicability of section 552.107 to the remaining information, and it may not be withheld on that basis.

In summary, the district may withhold Exhibits C and D on the basis of the attorney work product privilege under section 552.111 of the Government Code. The district may withhold the information we have marked in Exhibit F under section 552.107 of the Government Code. The remaining information must be released to the requestor.

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

Sincerely,



Amy L.S. Shipp  
Assistant Attorney General  
Open Records Division

ALS/rl

Ref: ID# 377460

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)