



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 9, 2011

Ms. Jacqueline E. Hojem  
Public Information Coordinator  
Metropolitan Transit Authority of Harris County  
P.O. Box 61429  
Houston, Texas 77208-1429

OR2011-06388

Dear Ms. Hojem:

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# 416953 (MTA No. 2011-0131).

The Metropolitan Transit Authority of Harris County (the "authority") received a request for five categories of information pertaining to a specified settlement proceeding. You state the authority 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 information.

Initially, you inform us that the authority has previously released some information contained in Exhibit 2. Section 552.007 of the Government Code provides that if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989); see also Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law).* Thus, pursuant to section 552.007 of the Government Code, the authority may not now withhold the previously released information in Exhibit 2 unless its release is expressly prohibited by law or the information is confidential under law. Although you now raise section 552.111 of the

Government Code for the previously released information in Exhibit 2, this section is a general exception to disclosure that does not prohibit the release of information or make information confidential. *See* Open Records Decision Nos. 677 at 8 (2002) (attorney work product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, to the extent the submitted information in Exhibit 2 is identical to the information previously released, the authority may not now withhold this information under section 552.111 of the Government Code. To the extent the submitted information in Exhibit 2 was not previously released by the authority, we will consider the authority's arguments against disclosure.

Next, we note some of the submitted information in Exhibit 2 is made expressly public under section 552.022 of the Government Code, which provides in relevant part as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). In this instance, the submitted information in Exhibit 2 includes a completed report of investigation subject to section 552.022(a)(1) and excerpts of contracts relating to the expenditure of public funds by the authority that are subject to section 552.022(a)(3). The authority may only withhold the information subject to section 552.022(a)(1) if it is excepted from disclosure under section 552.108 of the Government Code or is expressly made confidential under other law. The authority may only withhold the information subject to section 552.022(a)(3) if it is confidential under other law. As previously noted, section 552.111 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 665 at 2 n.5 (discretionary exceptions generally). As such, section 552.111 is not "other law" that make information confidential for the purposes of section 552.022. Therefore, the authority may not withhold any of the information subject to section 552.022, which we have indicated, under section 552.111 of the Government Code. As you raise no further exceptions to disclosure of this information, it must be released. However, we will consider your argument under section 552.111 for the remaining information in Exhibit 2 not

subject to section 552.022 and the submitted information in Exhibit 3. Additionally, we will consider your argument under section 552.107 for Exhibit 6.

You raise section 552.107 of the Government Code for the submitted e-mails in Exhibit 6. Section 552.107 protects information coming 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). 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, 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.*, 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).

Most of the e-mails in Exhibit 6 reflect they are communications between and among individuals identified as authority board members, employees, attorneys who represent the authority, and representatives of those attorneys. You represent these e-mails were made for the purpose of facilitating the rendition of legal services, and were intended to be, and have remained, confidential. Thus, based on your representations and our review, we conclude most of the e-mails in Exhibit 6, which we have marked, are protected by the attorney-client

privilege and may be withheld under section under section 552.107 of the Government Code.<sup>1</sup> However, the remaining e-mails reflect they were sent from or received by non-privileged parties or individuals who are not identified. Accordingly, you failed to show how these remaining e-mails, which we have marked as non-privileged, fall within the attorney-client privilege. However, some of these non-privileged e-mails are submitted in otherwise privileged e-mail strings. If these e-mails do not exist separate and apart from the privileged strings in which they were submitted, they may be withheld along with the attached e-mail string as a privileged attorney-client communication. If these non-privileged e-mails exist separate and apart from the e-mail strings in which they are submitted, they may not be withheld under section 552.107. The remaining non-privileged e-mail, which we have marked for release may not be withheld under section 552.107.

Next, we will address your claim under section 552.111 of the Government Code for the remaining information in Exhibit 2 not subject to section 552.022 and the submitted information in Exhibit 3. 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); 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. 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.

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<sup>1</sup>As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

*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. In the case of a communication, a governmental body must show the communication was between a party and the party's representatives. ORD 677 at 7-8. 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.

You claim the work product privilege for the remaining information in Exhibit 2 not subject to section 552.022 and the submitted information in Exhibit 3. You state this information was prepared for mediation in such a way that it would reveal the authority's attorney's strategy, mental thought processes and mental impressions as it relates to how the authority would present its claim in mediation. You further state that had the mediation not been successful, the authority reasonably anticipated litigation. Based on your representations and our review, we agree the remaining information in Exhibit 2 not subject to section 552.022 and the submitted information in Exhibit 3 consists of material prepared and mental impressions developed in anticipation of litigation by the authority's attorneys. Accordingly, the authority may withhold the remaining information in Exhibit 2 not subject to section 552.022 and the submitted information in Exhibit 3 on the basis of the work product privilege under section 552.111 of the Government Code.

In summary, with the exception of the e-mails we have marked as non-privileged, the authority may withhold most of the e-mails in Exhibit 6, which we have marked, under section 552.107 of the Government Code. If the e-mails we have marked as non-privileged do not exist separate and apart from the privileged strings in which they were submitted, they may be withheld along with the attached e-mail string as a privileged attorney-client communication. If these non-privileged e-mails exist separate and apart from the e-mail strings in which they are submitted, they may not be withheld under section 552.107. The authority may withhold the remaining information in Exhibit 2 not subject to section 552.022 as well as the submitted information in Exhibit 3 under the work product privilege of section 552.111 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,

A handwritten signature in black ink, appearing to read "Sean Nottingham". The signature is fluid and cursive, with the first name "Sean" being more prominent than the last name "Nottingham".

Sean Nottingham  
Assistant Attorney General  
Open Records Division

SN/eeg

Ref: ID# 416953

Enc. Submitted documents

c: Requestor  
(w/o enclosures)