



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 24, 2011

Ms. Laura Pfefferle  
Assistant General Counsel  
Texas Department of State Health Services  
P.O. Box 149347  
Austin, Texas 78714-9347

OR2011-09049

Dear Ms. Pfefferle:

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# 421727 (DSHS File 18792/2011).

The Texas Department of State Health Services (the "department") received a request for e-mails from two named individuals to three named individuals pertaining to specified subject matters during a specified time period; and copies and dates of two specified investigations during a specified time period. You state the department will release some of the requested information. You also state the department will withhold some of the requested information pursuant to the previous determination issued to the department by this office in Open Records Letter No. 2010-18849 (2010).<sup>1</sup> You claim that the remaining requested 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.<sup>2</sup>

---

<sup>1</sup>Open Records Letter No. 2010-18849 serves as a previous determination authorizing the department to withhold information furnished to or created or gathered by the department that is related to cases or suspected cases of diseases or health conditions under section 552.101 of the Government Code in conjunction with section 81.046 of the Health and Safety Code, unless the release provisions of section 81.046 are applicable or the requestor has a right of access under any other provision of law.

<sup>2</sup>This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Initially, we note you have marked e-mail messages within e-mail strings as not responsive to the present request for information because the individual e-mails were not sent to or from the named individuals. We have marked additional information that is not responsive to the present request for the same reason. This ruling does not address the public availability of any information that is not responsive to the request, and the department need not release such information.

We next address your argument under section 552.111 of the Government Code, as it is potentially the most encompassing exception you raise. 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." See Gov't Code § 552.111. This section 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) [M]aterial 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). 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. *Id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made 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 state the information you have marked constitutes communications between department staff and attorneys that were made during two specific enforcement investigations conducted by the department. You explain that in both cases, violations of the law were suspected from

the outset and both cases were handled as investigations that could very likely, and ultimately did, result in enforcement actions against the entities involved. Thus, you contend the information you have marked was made in anticipation of litigation. You also state the information at issue contains the mental impressions of the department's attorneys and staff. Based on your representations and our review, we conclude the department may withhold the information you have marked under the work product privilege encompassed by section 552.111 of the Government Code.

Section 552.107(1) of the Government Code 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 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 to only communications between or among clients, client representatives, lawyers, and lawyer representatives. 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 to only 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 state the remaining responsive information you have marked constitutes e-mail communications amongst department staff and attorneys that were made for the purpose of providing legal services to the department. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our

review, we find the department may withhold the remaining responsive information you have marked under section 552.107(1) of the Government Code.

In summary: (1) the department may withhold the information you have marked under the work product privilege encompassed by section 552.111 of the Government Code; and (2) the department may withhold the remaining responsive information you have marked under section 552.107(1) of the Government Code. The department must release the remaining responsive information at issue for which you raise no exceptions.

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,



Lindsay E. Hale  
Assistant Attorney General  
Open Records Division

LEH/em

Ref: ID# 421727

Enc. Submitted documents

c: Requestor  
(w/o enclosures)