ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 13, 2011

Ms. Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
P.O. Box 12847
Austin, Texas 78711

OR2011-09974

Dear Ms. Hibbs:

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# 423907 (TDA PIR# 11-472).

The Texas Department of Agriculture (the "department") received a request for all e-mails regarding "Tri-City Dog Park Association" and the requestor. You state some of the requested information will be released to the requestor upon payment of charges. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code.[1] We have considered the exceptions you claim and reviewed the submitted representative sample of information.[2]

Section 552.103 of the Government Code provides, in relevant part:

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[1]Although you raise Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, we note sections 552.107 and 552.111 of the Government Code are the proper exceptions to raise when asserting the attorney-client privilege and the attorney work product privilege in this instance. *See* Open Records Decision Nos. 676 (2002), 677 (2002).

[2]We 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 those records contain substantially different types of information than that submitted to this office.

> (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.
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> . . .
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> (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body claiming section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information, and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

You argue Exhibits B and D are excepted from disclosure by section 552.103 of the Government Code. You state a lawsuit styled *Tri-City Dog Park Association v. Texas Department of Agriculture*, Cause No. D-1-GN-10-003938, was filed and is currently pending against the department in the 419th District Court of Travis County, Texas. We note this lawsuit was filed prior to the department's receipt of the instant request. Therefore, we agree litigation was pending on the date the department received the present request for information. You also state the information at issue pertains to the substance of the lawsuit claims. Based on your representations and our review, we find Exhibits B and D are related to the pending litigation. Therefore, section 552.103 is generally applicable to this information.

We note, however, it appears the opposing party has seen or had access to some of the information at issue. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5 (1990). Thus, once the opposing party in pending litigation has seen or had access to information that is related to the litigation, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision

Nos. 349 (1982), 320 (1982). Accordingly, the portions of Exhibits B and D that the opposing party to the litigation has not seen or had access to may be withheld under section 552.103 of the Government Code.[3] We note the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). To the extent the opposing party has seen or had access to the information in Exhibits B and D, we will address the applicability of your other claimed exceptions to disclosure of this information.

Section 552.107(1) of the Government Code protects information that comes 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. *See* 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. *See* 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. *See 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 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 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. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain 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.*

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[3]As our ruling is dispositive with respect to the information at issue, we need not address your remaining arguments against its disclosure.

DeShazo, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You claim section 552.107(1) of the Government Code for the information in Exhibit F and the remaining information in Exhibits B and D. You state the information at issue consists of communications involving the department's attorneys and staff. You state the communications at issue were made in connection with the rendition of professional legal services to the department. You also state these communications were intended to be and have remained confidential. You have identified most of the parties to the communications. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to most of the information in Exhibit F. However, one of the e-mails in Exhibit F, which we have marked, was shared with an individual whom you have not demonstrated to be a privileged party. This e-mail does not consist of a confidential attorney-client communication and may not be withheld under section 552.107(1) on that basis. Accordingly, with the exception of the information we have marked for release, the department may withhold the information in Exhibit F under section 552.107(1) of the Government Code. However, the remaining information in Exhibits B and D consists of communications between the department and the requestor, a non-privileged party. Thus, we find you have failed to demonstrate the applicability of the attorney-client privilege to the remaining information in Exhibits B and D, and the department may not withhold that information under section 552.107(1) of the Government Code.

You also claim the remaining information in Exhibits B and D 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. Section 552.111 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
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> (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.

You claim the remaining information in Exhibits B and D discloses attorney work product. However, as previously noted, the remaining information was communicated with the requestor, a non-privileged party. Because this information has been shared with a non-privileged party, we find the work product privilege under section 552.111 has been waived. Accordingly, the department may not withhold any of the remaining information in Exhibits B and D under the work product privilege of section 552.111 of the Government Code.

In summary, the portions of Exhibits B and D that the opposing party to the litigation has not seen or had access to may be withheld under section 552.103 of the Government Code. With the exception of the information we have marked for release in Exhibit F, the department may withhold the information in Exhibit F under section 552.107(1) of the Government Code. The remaining information must be released.[4]

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

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[4]We note the information being released contains the requestor's e-mail address, to which the requestor has a right of access under section 552.137(b) of the Government Code. *See* Gov't Code § 552.137(b). We also note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. Thus, if the department receives another request for this information from a requestor without such a right of access, the department is authorized to withhold this e-mail address under section 552.137 of the Government Code without the necessity of requesting an attorney general decision. *See* Open Records Decision No. 684.

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,

Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/em

Ref: ID# 423907

Enc. Submitted documents

c: Requestor
(w/o enclosures)