



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 16, 2012

Ms. Lucie S. Tredennick
Counsel for West-Orange Cove Consolidated Independent School District
Thompson & Horton, L.L.P.
Phoenix Tower, Suite 2000
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Houston, Texas 77027

OR2012-10958

Dear Ms. Tredennick:

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# 459844.

The West-Orange Cove Consolidated Independent School District (the "district"), which you represent, received a request for 1) e-mails, letters, or notes from district administrators during a specified period of time containing the requestor's name, 2) the names of former employees of the district who resigned or were terminated at mid-term during the last ten years, 3) the names of former employees of the district who resigned or were terminated at the end of the year during the last ten years, and 4) an explanation of the monies deposited in the requestor's account.¹ You state you have released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.107

¹We note the district sought and received clarification of the request for information. See Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); see also *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

and 552.111 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

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. ORD 676 at 6-7. 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). 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.*, 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).

²Although you also raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, rule 192.5 of the Texas Rules of Civil Procedure, and rule 26(b)(3) of the Federal Rules of Civil Procedure, this office has concluded that section 552.101 of the Government Code does not encompass discovery privileges. *See Open Records Decision No. 676* at 1-2 (2000). Thus, we will not address your claim that the submitted information is confidential under section 552.101 in conjunction with these rules. We note that, in this instance, the proper exceptions to raise when asserting the attorney-client privilege or work product privilege for information not subject to section 552.022 of the Government Code are sections 552.107 and 552.111, respectively. *See id.*, *Open Records Decision No. 677* (2002).

You state the e-mails in Exhibit B consist of attorney-client privileged communications made between the district's outside counsel and district employees. We understand you to assert the information you have highlighted in Exhibit C also consists of attorney-client communications, and you state the notes in Exhibit D memorialize attorney-client communications. You state these communications were made for the purpose of the provision of professional legal services to the district. You state the communications at issue were intended to be, and have remained, confidential. Based on these representations and our review, we find the district has demonstrated the attorney-client privilege for the information at issue. Thus, the district may withhold this information under section 552.107(1) of the Government Code. We note, however, some of these e-mail strings include e-mails received from non-privileged parties or attachments that were sent to non-privileged parties. If these non-privileged e-mails and attachments, which we have marked, exist separate and apart from the otherwise privileged e-mail strings in which they appear, then the district may not withhold these non-privileged e-mails and attachments under section 552.107(1) of the Government Code.

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

(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-mails and attachments not excepted under section 552.107. Once again, we note this information was received from or sent to non-privileged parties. Thus, to the extent this information exists separate and apart from the otherwise privileged e-mails, we conclude these e-mails and attachments may not be withheld on the basis of the attorney work product privilege under section 552.111 of the Government Code.

In summary, the district may generally withhold the e-mails in Exhibit B, the information you have highlighted in Exhibit C, and the notes in Exhibit D under section 552.107 of the Government Code. However, to the extent the non-privileged e-mails and attachments we marked exist separate and apart from the otherwise privileged e-mails, they may not be withheld under section 552.107, and must be released.

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,



Kristi L. Wilkins
Assistant Attorney General
Open Records Division

KLW/eb

Ref: ID# 459844

Enc. Submitted documents

c: Requestor
(w/o enclosures)