



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 13, 2017

Mr. Robert Martinez
Director
Environmental Law Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2017-03142

Dear Mr. Martinez:

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# 645887 (ORR# 17-30624).

The Texas Commission on Environmental Quality (the "commission") received a request for information regarding landfill permitting within floodplain locations, including a specified location. You state the commission is withholding motor vehicle record information pursuant to section 552.130(c) of the Government Code and access device numbers pursuant to section 552.136(c) of the Government Code.¹ You further state the commission is withholding certain information pursuant to Open Records Decision No. 684 (2009).² You

¹Section 552.130(c) of the Government Code allows a governmental body to redact the information described in section 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). Section 552.136(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See id.* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e).

²Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information without the necessity of requesting an attorney general decision.

state the commission will release some of the requested information 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.³ We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, the requestor contends the commission failed to comply with the procedural requirements of the Act in requesting a ruling from this office. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request for information. *See id.* § 552.301(b). We note the Act requires a request for public information sent by electronic mail be submitted to the officer for public information or that person's designee. *Id.* § 552.301(c). In this instance, the requestor claims he first submitted his request for information by e-mail on November 16, 2016. The commission informs this office the first request was not e-mailed to the commission's public information officer or the officer's designee. *See id.* (written request includes a request in writing that is sent to the officer for public information, or the person designated by that officer, by e-mail or facsimile). Thus, we find the requestor's e-mailed request of November 16, 2016, was not a valid request for purposes of the Act, and the commission did not violate the procedural requirements of section 552.301 of the Government Code with respect to that request. The commission informs us the requestor also submitted his request by mail, which the commission treated as received on November 17, 2016. The commission states it operated as a skeleton crew on November 23, 2016, and was closed for business on November 24, 2016, and November 25, 2016. This office does not count holidays, including skeleton crew days observed by a governmental body, as business days for the purposes of calculating a governmental body's deadlines under the Act. Therefore, the commission's ten-business-day deadline under section 552.301(b) of the Government Code was December 6, 2016. The commission informs us it deposited the information required by section 552.301(b) in interagency mail on December 6, 2016. *See id.* § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Therefore, upon review, we find the commission complied with the procedural requirements of section 552.301 of the Government Code in requesting a decision from our office.

³Although you also raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Further, although you raise Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, we note the proper exceptions to raise when asserting the attorney-client privilege and the attorney work product privilege for information not subject to section 552.022 of the Government Code are sections 552.107 and 552.111 of the Government Code, respectively. *See* Open Records Decision Nos. 676 at 1-2 (2002), 677 (2002).

Next, we address the requestor's contention that the commission has previously released some of the information at issue to the public and the requested information is "already in the public domain." The requestor argues landfill "applications, permits, and the composition of the authorized landfill" are available for public inspection. The Act does not permit the selective disclosure of information. *See id.* §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). If information has been voluntarily released to any member of the public, then that exact same information may not subsequently be withheld from another member of the public, unless public disclosure of the information 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), 490 at 2 (1988); *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). However, section 552.007 does not prohibit an agency from withholding similar types of information that are not the exact information that has been previously released. We note the commission states it has not released any of the submitted information. We also note the information the commission seeks to withhold is not of the types of information the requestor argues are available for public inspection. Nevertheless, whether the information at issue was previously released to the public is a question of fact that this office cannot resolve through the open records ruling process. *See* Open Records Decision Nos. 554 (1990), 552 (1990). Therefore, we rely on the commission's representations in this matter. Accordingly, we will consider the commission's arguments against release of the submitted information.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* 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 "to facilitate 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, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (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: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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, orig. proceeding). 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 information submitted as Attachments C, D, and E consists of communications involving attorneys for the commission and commission employees and officials in their capacities as clients. You state these communications were made in furtherance of the rendition of professional legal services to the commission. You state these communications were intended to be, and have remained, confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the commission may withhold Attachments C, D, and E under section 552.107(1) of the Government Code.⁴

Next, you claim the remaining information is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from disclosure “[a]n 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 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.

⁴As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

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 attorney work product privilege of section 552.111 of the Government Code for the information submitted as Attachment F. You state the information at issue consists of materials created by and revealing the strategy decisions and mental processes of attorneys for the commission. You state the commission reasonably anticipated litigation pertaining to the submitted information at the time it created the information at issue. Based on your representations and our review, we find the commission has demonstrated the applicability of the attorney work product privilege to the information at issue. Accordingly, the commission may withhold Attachment F under the attorney work product privilege of section 552.111 of the Government Code.⁵

In summary, the commission may withhold Attachments C, D, and E under section 552.107(1) of the Government Code and may withhold Attachment F under the attorney work product privilege of section 552.111 of the Government Code.

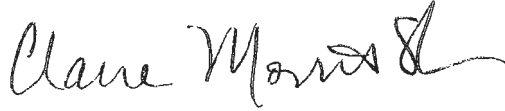
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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.texasattorneygeneral.gov/open/>

⁵As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

[orl_ruling_info.shtml](#), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink that reads "Claire Morris Sloan". The signature is written in a cursive style with a large, stylized initial "C".

Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 645887

Enc. Submitted documents

c: Requestor
(w/o enclosures)