



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

June 26, 2017

Ms. Faith Johnson  
Criminal District Attorney  
Dallas County  
133 North Riverfront Boulevard LB-19  
Dallas, Texas 75207-4399

OR2017-14184

Dear Ms. Johnson:

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# 663574.

The Dallas County District Attorney's Office (the "district attorney's office") received a request for all versions of the Brady list since a specific date, and all communications pertaining to the list. The district attorney's office claims the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.108, and 552.111 of the Government Code. We have considered the exceptions the district attorney's office claims and reviewed the submitted representative sample of information.<sup>1</sup>

Section 552.111 of the Government Code 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:

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<sup>1</sup>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.

(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.

The district attorney's office asserts the submitted information is attorney work product protected under section 552.111. The district attorney's office states the submitted information was prepared by attorneys representing the state in anticipation of or in the course of preparing for criminal litigation. The district attorney's office states the information at issue reflects the mental impressions, conclusions, and legal theories of attorneys representing the state. Based on these representations and our review, we conclude the district attorney's office may withhold most of the information under the work product privilege encompassed by section 552.111 of the Government Code.<sup>2</sup> However, we find the district attorney's office has not demonstrated the remaining information, which we have marked, consists of mental impressions, opinions, conclusions, or legal theories of a party or party's representative prepared in anticipation of litigation or for trial. Therefore, we find the district attorney's office has failed to demonstrate the applicability of the work product privilege to the remaining information. Accordingly, the district attorney's office may not

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<sup>2</sup>As our ruling is dispositive, we need not address the district attorney's office's remaining arguments against disclosure of this information.

withhold any of the remaining information, which we have marked, under the work product privilege of section 552.111 of the Government Code.

Section 552.107(1) of the Government Code protects information coming 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. 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).

The district attorney’s office states the remaining information consists of confidential communications involving district attorney’s office attorneys and employees. The district attorney’s office states these communications were made in furtherance of the rendition of professional legal services to the district attorney’s office. The district attorney’s office states the confidentiality of these communications has been maintained. Based on these representations and our review, we find the district attorney’s office has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the district

attorney's office may withhold the remaining information, which we have marked, under section 552.107(1) of the Government Code.<sup>3</sup>

In summary, the district attorney's office may withhold the information we have marked under section 552.107(1) of the Government Code. The district attorney's office may withhold the remaining information under the 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/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/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,



Rahat Huq  
Assistant Attorney General  
Open Records Division

RSH/tdw

Ref: ID# 663574

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>3</sup>As our ruling is dispositive, we need not address the district attorney's office's remaining arguments against disclosure of this information.