



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

November 20, 2017

Ms. Sue Jana  
Assistant Criminal District Attorney  
Bexar County  
101 West Nueva Street, 7th Floor  
San Antonio, Texas 78205

OR2017-26573

Dear Ms. Jana:

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# 684894 (DA File No. 5983).

The Bexar County Criminal District Attorney's Office (the "district attorney's office") received a request for information pertaining to a specified disclosure list. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.108, 552.111 of the Government Code and privileged under Texas Rule of Evidence 503, Texas Rule of Civil Procedure 192.5, and rule 1.05 of the Disciplinary Rules of Professional Conduct. We have considered your arguments and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we note the requestor asks the district attorney's office to answer questions. The Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). However, a governmental body must make a good-faith effort to relate a request to any responsive information that is within its possession

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<sup>1</sup>We assume that 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 that those records contain substantially different types of information than that submitted to this office.

or control. Open Records Decision Nos. 561 at 8-9 (1990), 555 at 102. In this instance, the district attorney's office has submitted information for our review. Therefore, we assume the district attorney's office has made a good-faith effort to locate any information responsive to the request at issue, and we will address the claimed arguments against disclosure for the submitted information.

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

You state Exhibit C consists of communications between district attorney's office attorneys and Bexar County Sheriff's Office (the "sheriff's office") employees. You state these communications were made in furtherance of the rendition of professional legal services. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find Exhibit C consists of

privileged attorney-client communications. Therefore, the district attorney's office may withhold Exhibit C under section 552.107(1) of the Government Code.<sup>2</sup>

Section 552.108 of the government code provides in part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(4), (b)(3). A governmental body claiming an exception to disclosure under section 552.108 must explain how and why this exception is applicable to the information the governmental body seeks to withhold. *See id.* §§ 552.108, .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

You contend Exhibit D reflects the mental impressions or legal reasoning of an attorney representing the State of Texas. *See* Gov't Code § 552.108(a)(4), (b)(3). Upon review, we agree the information at issue was either prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or reflects the mental

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

processes or legal reasoning of an attorney representing the state. Therefore, the district attorney's office may withhold Exhibit D under sections 552.108(a)(4) and 552.108(b)(3) of the Government Code.<sup>3</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:

- (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 work product doctrine under section 552.111 of the Government Code is applicable to litigation files in criminal and civil litigation. *Curry v. Walker*, 873 S.W.2d 379, 381 (Tex. 1994); see *U.S. v. Nobles*, 422 U.S. 225, 236 (1975). The district attorney's office

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

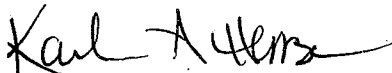
states the information at issue consists of “mental impressions and communications made in anticipation of criminal litigation and for trial.” Based on your representation and our review, we find the district attorney’s office may withhold the remaining information under section 552.111 of the Government Code as attorney work product.<sup>4</sup>

In summary, the district attorney’s office may withhold Exhibit C under section 552.107(1) of the Government Code. The district attorney’s office may withhold Exhibit D under sections 552.108(a)(4) and 552.108(b)(3) of the Government Code. The district attorney’s office may withhold the remaining information under section 552.111 of the Government Code as attorney work product.

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,



Kaelan A. Henze  
Assistant Attorney General  
Open Records Division

KAH/gw

Ref: ID# 684894

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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