



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

December 22, 2017

Ms. Dawn Brackett  
Counsel for Town of Lakewood Village  
Messer, Rockefeller & Fort, P.L.L.C.  
6371 Preston Road, Suite 200  
Frisco, Texas 75034

OR2017-29124

Dear Ms. Brackett:

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# 692380 (ORR# LV102317EH).

The Town of Lakewood Village (the "town"), which you represent, received a request for information pertaining to lawsuits that involve the town.<sup>1</sup> The town states it will withhold information under section 552.024 of the Government Code and Open Records Decision No. 684 (2009).<sup>2</sup> The town claims the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information.

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<sup>1</sup>We note the requestor modified his initial request for information. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified).

<sup>2</sup>Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain 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 seeking a decision from this office.

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 town asserts the submitted information consists of documents or confidential e-mail communications between attorneys for and employees of the town that were made in furtherance of the rendition of professional legal services. The town also asserts these communications were intended to be confidential and their confidentiality has been maintained. Upon review, we find the town has established some of the submitted information constitutes privileged attorney-client communications. Consequently, the town may generally withhold this information, which we have marked, under section 552.107(1) of the Government Code.<sup>3</sup> However, we note this information includes e-mails received from or sent to a non-privileged party. Furthermore, if the e-mails received from or sent to

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<sup>3</sup>As our ruling is dispositive, we do not address the other argument of the town to withhold this information.

the non-privileged party are removed from the e-mail string and stand alone, they are responsive to the request for information. Therefore, if the town maintains the non-privileged e-mails, which we have marked, separate and apart from the otherwise privileged e-mail string in which they appear, then the town may not withhold them under section 552.107(1) of the Government Code. In that event, we will address the town's arguments under section 552.111 of the Government Code for such information. Nevertheless, we conclude the town has not established the remaining information consists of a privileged attorney-client communication. Therefore, the town may not withhold this information under section 552.107.

Section 552.111 of the Government Code 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. 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) 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). 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 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 town asserts the remaining information consists of materials prepared by attorneys for the town in anticipation of litigation. Upon review, we find the town has demonstrated some of the information at issue was prepared in anticipation of litigation. Therefore, the town may withhold this information, which we have marked, under section 552.111 of the Government Code as attorney work product. However, we conclude the town has not established the non-privileged information we have marked consists of privileged attorney work product. Therefore, the town may not withhold the remaining information under section 552.111.

In summary, the town may withhold the information we have marked under section 552.107(1) of the Government Code; however, the town must release the non-privileged e-mails we have marked if the town maintains them separate and apart from the otherwise privileged e-mail strings in which they appear. The town may withhold the information we have marked under 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,

  
James L. Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/tdw

Ref: ID# 692380

Enc. Submitted documents

c: Requestor  
(w/o enclosures)