



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 26, 2020

Ms. Christy Gilbert
Assistant City Attorney
Harris County Attorney's Office
1019 Congress, 15th Floor
Houston, Texas 77002

OR2020-14553

Dear Ms. Gilbert:

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# 829957 (C. A. File No. 20PIA0167).

The Office of the Harris County Attorney's Office (the "county attorney's office") received a request for communications sent or received by particular entities related to specified complaints filed by the requestor. You claim the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code.¹ 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. 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

¹ Although you raise Texas Rule of Civil Procedure 192.5, we note the proper exception to raise when asserting the work product privilege for information not subject to section 552.022 of the Government Code is section 552.111 of the Government Code. *See* Open Records Decision No. 677 (2002).

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). 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.*, 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 the submitted information consists of communications between attorneys and employees of the county attorney’s office and privileged parties that were made for the purpose of providing legal services to the county. You indicate the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the submitted information consists of privileged attorney-client communications the county attorney’s office may generally withhold under section 552.107(1) of the Government Code.² We note, however, some of these otherwise privileged e-mail strings include an e-mail received from a non-privileged party. Furthermore, if the e-mail received from the non-privileged party is removed from the otherwise privileged e-mail strings in which it appears and stands alone, it is responsive to the request for information. Therefore, if this non-privileged e-mail, which we have marked, is maintained by the county attorney’s office separate and apart from the otherwise privileged e-mail strings in which it appears, then the county attorney’s office may not withhold this non-privileged e-mail under section 552.107(1). In that event, we address your remaining argument against disclosure of the non-privileged e-mail.

To the extent the non-privileged e-mail exists separate and apart, we will consider your argument under section 552.111 of the Government Code. 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. Section 552.111 encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. ORD 677 at 4-8; *see City of Garland*

² As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

v. Dallas Morning News, 22 S.W.3d 351, 377 (Tex. 2000). 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)(1)-(2). 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 . . . 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 county attorney's office contends the information at issue consists of attorney work product. However, as previously noted, the information at issue consists of information that was received from a non-privileged party. Therefore, because non-privileged parties had access to this information, we find the county attorney's office has failed to demonstrate the applicability of the attorney work product privilege to the information at issue. Accordingly, the county attorney's office may not withhold any of the remaining information at issue as attorney work product under section 552.111 of the Government Code.

In summary, the county attorney's office may generally withhold the submitted information under section 552.107(1) of the Government Code. However, if the non-privileged e-mail, which we have marked, is maintained by the county attorney's office separate and apart from the otherwise privileged e-mail strings in it appears, then the county attorney's office may not withhold the marked non-privileged e-mail under section 552.107(1) of the Government Code and must release this information.

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Erin Groff
Assistant Attorney General
Open Records Division

EMG/jlbm

Ref: ID# 829957

Enc. Submitted documents

c: Requestor
(w/o enclosures)