



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 22, 2008

Ms. Cheryl K Byles
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street
Fort Worth, Texas 76102

OR2008-05303

Dear Ms. Byles:

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# 307794.

The City of Fort Worth (the "city") received a request for eleven categories of information pertaining to Oncor/TXU's electrical conduit facilities in a specific area of construction. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted information.² We have also received comments from the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

¹Although you raise the attorney-client privilege under section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, we note that section 552.107 is the proper exception to raise for your attorney-client privilege claim in this instance. *See* Open Records Decision No. 676 (1988).

²We 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.

Initially, you state that portions of the requested information are the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2007-10990 (2007). In that ruling we concluded that the city must withhold the schematics revealing water and sewer lines in the downtown area under section 552.101 in conjunction with section 418.181 of the Government Code. As we have no indication that the law, facts, and circumstances on which this prior ruling was based have changed, the city must continue to rely on this ruling as a previous determination and withhold the water and sewer line schematics in accordance with Open Records Letter No. 2007-10990. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). For the information not previously ruled upon, we will address the city's arguments.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses information protected by other statutes. As part of the Texas Homeland Security Act, sections 418.176 through 418.182 were added to chapter 418 of the Government Code. These provisions make certain information related to terrorism confidential. Section 418.181 of the Government Code provides that "[t]hose documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism." But the fact that information may relate to a governmental body's security concerns or emergency management activities does not make the information *per se* confidential under the Texas Homeland Security Act. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the Texas Homeland Security Act must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You explain that the information in Exhibit C-1 depicts the details, including locations and dimensions, of electrical cable conduits, pipelines, manholes, storm drains, gas, water, sewer lines, and traffic control systems in downtown Fort Worth. You argue that this information reveals vulnerabilities of the area infrastructure to acts of terrorism. You specifically assert the following:

A potential terrorist could use the responsive records to determine where to gain access to place explosives so as to wreak severe damage to Interstate 30 as well as City Hall and other key federal buildings nearby. The records

could also be used to determine where to attack the City's electrical and gas lines (which are vital to public health) so as to cause the most damage. A terrorist could also determine where to plant explosives in the pipes to endanger the lives of those who work downtown or use a major event to endanger the lives and safety of thousands of individuals coming to such an event. Furthermore, any action by a potential terrorist that causes a major power outage or a large gas explosion could lead to a massive evacuation, resulting in paralyzing traffic and disruption of commerce. Evacuation of downtown as a result of a terrorist attack would lead to obstruction of entrances and exits to the highway and interfere with emergency vehicles' ability to respond.

Based on your representations and our review of the submitted information, we find you have sufficiently demonstrated that a portion of the information you have submitted in Exhibit C-1 falls within the scope of section 418.181 of the Government Code. However, we note that a portion of Exhibit C-1 consists only of general communications and other administrative records, and you have failed to demonstrate that these records identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Thus, section 418.181 is not applicable to this information, which we have marked for release. The city must withhold the remaining information in Exhibit C-1 under section 552.101 of the Government Code in conjunction with section 418.181.

Next, we note that the remaining information in Exhibit C-1 also contains e-mail addresses. Section 552.137 of the Government Code requires a governmental body to withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See Gov't Code* § 552.137 (b). We note that section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public" but is instead the address of the individual as a government employee. *Id.* § 552.137. We also note that section 552.137(b) does not apply to the e-mail address of a person who has a contractual relationship with the governmental body or by the contractor's agent. *Id.* § 552.137(c)(1). We have marked the e-mail addresses of individuals who do not appear to have a contractual relationship with the city. You do not inform us that the owners of the e-mail addresses affirmatively consented to release. Therefore, the city must withhold the e-mail addresses we have marked in Exhibit C-1 under section 552.137.

Finally, you state that Exhibit C-2 is excepted from disclosure pursuant to the attorney-client privilege. Under section 552.107 of the Government Code, 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 "for the purpose of facilitating 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). 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.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of 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, no writ). 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).

In this case, Exhibit C-2 consists of communications made for the purpose of facilitating the rendition of professional legal services. The communications were between city employees and attorneys, and you state that the communications were to be kept confidential among the intended parties. Finally, you state that the city has confirmed that the communications have remained confidential. Thus, you may withhold Exhibit C-2 under section 552.107(1) of the Government Code.

In summary, with the exception of the information we have marked for release, you must withhold Exhibit C-1 under section 552.101 in conjunction with section 418.181 of the Government Code. Unless you receive consent to release, you must withhold the e-mail addresses that we have marked in Exhibit C-1 under section 552.137. You may withhold Exhibit C-2 under section 552.107. The remaining information must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the

governmental body wants to challenge this ruling, the governmental body must file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Justin D. Gordon
Assistant Attorney General
Open Records Division

JDG/jh

Ref: ID# 307794

Enc. Submitted documents

c: Mr. Murray Rossini
Miller & McCarthy, P.C.
3811 Turtle Creek Boulevard, Suite 1950
Dallas, Texas 75219
(w/o enclosures)