



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 12, 2012

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

OR2012-09028

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# 456118 (PIR No. W015146).

The City of Fort Worth (the "city") received a request for certain emails and correspondence related to the city's proposed purchase of a cell phone tracking system. You claim that the requested information is excepted from disclosure under sections 552.101, 552.107, 552.108, 552.111, and 552.152 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information, some of which consists of a representative sample.²

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

¹Although you raise section 552.151 of the Government Code, we note the 82nd Texas Legislature renumbered section 552.151 as section 552.152 of the Government Code.

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.

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). 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID. 503(b)(1)(A)-(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 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, 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).

You assert the information in Exhibit C-1 constitutes communications between city employees, city officials, and city attorneys that were made for the purpose of providing legal advice to the city. You also assert these communications were made in confidence and that confidentiality has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information in Exhibit C-1. However, we note some of the individual e-mails and some of the attachments contained in an otherwise privileged e-mail string are communications with a non-privileged party. Thus, to the extent this non-privileged information, which we have marked, exists separate and apart from the otherwise privileged e-mail string, it may not be withheld under section 552.107(1). Therefore, except for the non-privileged information

that exists separate and apart from the privileged communications, the city may withhold the information in Exhibit C-1 under section 552.107(1) of the Government Code.

Section 552.108(b)(1) of the Government Code is intended to protect “information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State.” *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.) (section 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws). To demonstrate the applicability of this exception, a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. *See* Open Records Decision No. 562 at 10 (1990) (construing statutory predecessor). This office has concluded that section 552.108(b) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 508 (1988) (release of dates of prison transfer could impair security), 456 (1987) (release in advance of information regarding location of off-duty police officers would interfere with law enforcement), 413 (1984) (release of sketch showing security measures to be used at next execution would interfere with law enforcement), 409 (1984) (information regarding certain burglaries protected if it exhibits pattern that reveals investigative techniques), 341 (1982) (release of certain information from Department of Public Safety would hamper departmental efforts to detect forgeries of drivers’ licenses), 252 (1980) (statutory predecessor was designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, ORD 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

You represent the submitted information in Exhibit C pertains to city police department security equipment. You assert release of the information at issue will interfere with law enforcement by divulging internal techniques for preventing and detecting crime. Further, you state release of the information at issue will reveal law enforcement tactical strategies. You explain release of the marked information will compromise officer safety and affect the ability of the police department to detect and deter criminal activity. Upon review of your arguments and the information at issue, we find the city has demonstrated that release of the marked information would interfere with law enforcement. Therefore, the city may withhold the information you have marked in red in Exhibit C under section 552.108(b)(1) of the

Government Code.³ However, we find the city has failed to meet its burden in explaining the applicability of section 552.108(b)(1) to any portion of the remaining information at issue. *See id.* § 552.301(e)(1)(A) (governmental body has burden of proving that requested information must be withheld under stated exception). Accordingly, we conclude the city may not withhold any portion of the remaining information in Exhibit C under section 552.108(b)(1) of the Government Code.

You seek to withhold the remaining information in Exhibit C under section 552.101 of the Government Code in conjunction with sections 418.176, 418.177, and 418.181 of the Texas Homeland Security Act (the “HSA”), chapter 418 of the Government Code. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information that is made confidential by other statutes, including sections 418.176, 418.177, and 418.181 of the HSA.

Section 418.176 provides in relevant part:

(a) Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:

(2) relates to a tactical plan of the provider[.]

Gov’t Code § 418.176(a)(2). Section 418.177 provides that information is confidential if it

(1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and

(2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

Id. § 418.177. Section 418.181 provides as follows:

Those 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.

³As we are able to make this determination, we need not address your remaining arguments against disclosure of this information.

Id. § 418.181. *See generally id.* § 421.001 (defining critical infrastructure to include “all public or private assets, systems, and functions vital to the security, governance, public health and safety, and functions vital to the state or the nation”). The fact information may be related to a governmental body’s emergency response preparedness or security concerns does not make such information *per se* confidential under the HSA. *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 HSA 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 state “the information [at issue] contains a list of specific equipment, that if released, would create a vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.” You assert release of this information would “jeopardize the lives of police officers, [c]ity citizens and other individuals in the [c]ity.” However, upon review, we find the city failed to demonstrate how any of the remaining information at issue identifies the technical details of particular vulnerabilities of critical infrastructure or pertains to assessments of the risk or vulnerability of persons or property to an act of terrorism or related criminal activity. Consequently, the city may not withhold any of the remaining information in Exhibit C under section 552.101 of the Government Code in conjunction with section 418.177 or section 418.181 of the Government Code.

You raise section 418.176 for portions of the remaining information at issue in Exhibit C, which you have marked and indicated. You inform us this information relates to tactical plans of law enforcement. Upon review, however, we find you have failed to adequately explain how the marked information reveals tactical plans that are related to the prevention, detection, response, or investigation of an act of terrorism or related criminal activity. Accordingly, the city may not withhold the information you have marked in Exhibit C under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code.

You seek to withhold a draft contract in Exhibit C under section 552.111 of the Government Code, which 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.” *Id.* § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also* *City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

This office has also concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor of section 552.111). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

You state that the information you have marked consists of a draft contract. We understand the contract is intended for public release in its final form. We find that the draft pertains to the city's policymaking processes. Therefore, based on your representations, and our review of the information at issue, we agree that the city may withhold the draft contract in Exhibit C under section 552.111 of the Government Code.

We note some of the remaining information in Exhibit C is subject to section 552.117 of the Government Code.⁴ Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, emergency contact information, social security number, and family

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

member information of a peace officer, regardless of whether the peace officer complies with sections 552.024 or 552.1175 of the Government Code. Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. We note section 552.117 is also applicable to personal cellular telephone numbers and pager numbers, provided the cellular telephone and pager service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Accordingly, the city must withhold the information we have marked under section 552.117(a)(2) of the Government Code; however, the marked cellular telephone numbers may be withheld only if a governmental body did not pay for the service.

Section 552.1175 of the Government Code applies to information pertaining to peace officers that the city does not hold in an employment context and provides in part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure[.]

...

(b) Information that relates to the home address, home telephone number, emergency contact information, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a)(1), (b). Section 552.1175 is also applicable to cellular telephone and pager numbers, provided the cellular telephone or pager service is not paid for by a governmental body. *See* ORD 506 at 5-6. We determine the city must withhold the information we have marked under section 552.1175 if the individual to whom the information pertains is a licensed peace officer and elects to restrict access to the information in accordance with section 552.1175(b), provided that the cellular telephone service is not paid for with government funds. If the individual is not a licensed peace officer, no election is made, or the service is paid for with government funds, the city may not withhold the marked cellular telephone number under section 552.1175 of the Government Code.

In summary, the city may withhold the information in Exhibit C-1 under section 552.107(1) of the Government Code; however, to the extent the non-privileged information we have marked exists separate and apart from the otherwise privileged e-mail string, it may not be withheld under section 552.107(1) of the Government Code. The city may withhold the information you have marked in red in Exhibit C under section 552.108(b)(1) of the Government Code. The draft contract may be withheld under section 552.111 of the Government Code. The city must withhold the information we have marked under section 552.117(a)(2) of the Government Code; however, the marked cellular telephone numbers may be withheld only if a governmental body did not pay for the service. The city must withhold the information we have marked under section 552.1175 of the Government Code if the individual to whom the information pertains is a licensed peace officer and elects to restrict access to the information in accordance with section 552.1175(b) and if the cellular telephone service is not paid for with government funds. The remaining information must be released.

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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 456118

Enc. Submitted documents

c: Requestor
(w/o enclosures)