



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 12, 2012

Ms. Rebecca Brewer  
Counsel for the City of Frisco  
Abernathy, Roeder, Boyd, & Joplin, P.C.  
P.O. Box 1210  
McKinney, Texas 75070-1210

OR2012-10821

Dear Ms. Brewer:

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# 458609.

The City of Frisco (the "city"), which you represent, received a request for any and all documentation during a specified time period pertaining to the transfers of real property between specified entities related to specified parcels of land.<sup>1</sup> We understand you will release some information to the requestor upon the requestor's reply to the cost estimate letter. You claim the submitted information is excepted from disclosure under

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<sup>1</sup>You state the city sought and received clarification of the request for information. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if a large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date the request is clarified or narrowed).

sections 552.101, 552.107, 552.111, and 552.131 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted information.

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 section encompasses information protected by other statutes. As part of the Texas Homeland Security Act (“HSA”), 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 “[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.”<sup>3</sup> *Id.* § 418.181. The fact that information may relate to a governmental body’s security concerns does not make the 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 the 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 release of Exhibit B-1, which consists of lists of locations of the city’s Tier II Regulated Facilities and Vulnerable Facilities, would identify the technical details of particular vulnerabilities of critical infrastructure. You state the list of Tier II Regulated Facilities include critical infrastructure because these facilities report hazardous material. In addition, you inform us the list of Vulnerable Facilities includes the locations of key public facilities. Upon review, we agree the Tier II Regulated Facilities and Vulnerable Facilities are critical infrastructure. *See id.* § 421.001 (defining “critical infrastructure” to include all public or private assets, systems, and functions vital to security, governance, public health and safety, economy, or morale of state or nation). Further, upon review of your arguments and the information at issue, we conclude the city has adequately explained how the lists in Exhibit B-1 fall within the scope of section 418.181 of the Government

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<sup>2</sup>Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002). We note, in this instance, the proper exceptions to raise when asserting the attorney-client privilege or work product privilege for information not subject to section 552.022 of the Government Code are sections 552.107 and 552.111, respectively. *See id.*, Open Records Decision No. 677 (2002).

<sup>3</sup>Although you cite section 418.182 of the Government Code, we understand you to raise section 418.181 based on the substance of your argument.

Code. However, the remaining information in Exhibit B-1 consists of e-mail communications. The city has failed to demonstrate how this information identifies the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism, and, therefore, this information, which we have marked for release, may not be withheld under section 552.101 on that basis. Therefore, with the exception of the information we have marked for release, Exhibit B-1 must be withheld from disclosure under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.

You raise section 552.107 of the Government Code for Exhibit B-2, which protects information coming within the attorney-client privilege. *Id.* § 552.107(1). 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 Texas 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). 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 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 pet.). 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 claim Exhibit B-2 is protected under the attorney-client privilege of section 552.107 of the Government Code. We note the information at issue was shared with individuals whom you have not identified. Accordingly, we find you failed to establish the applicability of the attorney-client privilege to the submitted information, and the city may not withhold any of Exhibit B-2 under section 552.107(1) of the Government Code.

You next claim the Exhibit B-2 is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 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 exception 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); ORD 677 at 4-8. 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. In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied

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. In the case of a communication, a governmental body must show the communication was between a party and the party’s representatives. ORD 677 at 7-8. 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.

You state Exhibit B-2 "contains attorney work product in light of the subject matter discussed therein and demonstrates the fact that there is a substantial chance that litigations may be pursued by Frisco." However, upon review, we find you have failed to demonstrate how any of Exhibit B-2 consists of material prepared or mental impressions developed in anticipation of litigation or for trial. We therefore conclude the city may not withhold any of Exhibit B on the basis of the attorney work product privilege under section 552.111 of the Government Code.

You assert Exhibit B-3 is protected by section 552.131(b) of the Government Code, which relates to economic development information and provides, in relevant part,

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131(b). Section 552.131(b) protects information about a financial or other incentive that is being offered to a business prospect by a governmental body or another person. *See id.* § 552.131(b). In this instance, you argue Exhibit B-3 consists of financial and/or other incentives offered to a potential business prospect in relation to a confidential economic development project. You state the negotiations did not result in an agreement between the city and the business prospect. Based on your representations and our review, we agree Exhibit B-3 consists of information about a financial or other incentive being offered to a business prospect. Accordingly, the city must withhold Exhibit B-3 under section 552.131(b) of the Government Code.

In summary, with the exception of the information we have marked for release, the city must withhold Exhibit B-1 under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. The city must withhold Exhibit B-3 under section 552.131(b) of the Government Code. 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](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,

A handwritten signature in black ink, appearing to read "Michelle R. Garza", with a long horizontal flourish extending to the right.

Michelle R. Garza  
Assistant Attorney General  
Open Records Division

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MRG/som

Ref: ID# 458609

Enc. Submitted documents

c: Requestor  
(w/o enclosures)