



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 23, 2012

Ms. Rebecca Brewer
Abernathy, Roeder, Boyd & Joplin, P.C.
P.O. Box 1210
McKinney, Texas 75070-1210

OR2012-11377

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# 460011 (PIR 2012_0278 through PIR 2012_0282).

The City of Frisco (the "city"), which you represent, received five requests from the same requestor for communications, including e-mails from city and personal accounts and text messages from city and personal telephones, between and among the mayor, city council, and other named individuals.¹ You state the city has provided the requestor with a cost estimate regarding release of some of the requested information. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code.² 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

¹We note the city sought and received clarification from the requestor regarding the requests. See Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if 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); see also *City of Dallas v. Abbott*, 304 S.W. 3d 380 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²We note the proper exceptions to raise when asserting the attorney-client privilege and the work product privilege for information not subject to section 552.022 of the Government Code are sections 552.107 and 552.111 of the Government Code, respectively. See Open Records Decision Nos. 676 (2002), 677 (2002).

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 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.

Gov’t Code § 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”). Section 418.182 of the Government Code provides as follows:

(a) Except as provided by Subsections (b) and (c), information, including access codes and passwords, in the possession of a governmental entity that relates to the specifications, operating procedures, or location of a security system used to protect public or private property from an act of terrorism or related criminal activity is confidential.

Id. § 418.182. 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 assert the submitted information in Exhibit B-1, which includes the locations of cellular telephone towers, would identify particular vulnerabilities of critical infrastructure. You further argue the information at issue “includes facilities that are critical to [the city’s] security and operations which are used to protect and defend [the city’s] citizens and others located in or near the critical infrastructure.” You claim this information is “key to protecting and aiding law enforcement in their duties to protect public and private communication facilities[.]” However, the Federal Communications Commission makes the physical addresses of cellular telephone towers available to the public on its website. Such address information is also publicly available on other internet websites. You do not explain how the release of such publicly available information would expose the towers to an act of terrorism. Additionally, you have failed to demonstrate how the information at issue constitutes “technical details of particular vulnerabilities” in the cellular telephone tower system. Thus, upon review of your arguments and the information at issue, we find the city

has failed to explain how any portion of the information submitted in Exhibit B-1 falls within the scope of section 418.181 of the HSA. Therefore, none of the information in Exhibit B-1 may be withheld under section 552.101 of the Government Code on that basis.

We note that section 418.182 of the HSA pertains to security systems used to protect public or private property from terrorism or related criminal activity. You have made no arguments explaining how the information in Exhibit B-1 relates to the specifications, operating procedures, or location of a security system used to protect public or private property from terrorism or related criminal activity. Accordingly, you have failed to demonstrate the applicability of section 418.182 to the information at issue. Therefore, the city may not withhold any of the information in Exhibit B-1 under section 552.101 of the Government Code in conjunction with section 418.182 of the HSA.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 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. ORD 676 at 6–7. First, a governmental body must demonstrate 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 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). 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).

Although you have failed to identify the specific parties to the communications, we are able to discern from the face of the documents that certain individuals are privileged parties. Therefore, upon careful review of the documents, we agree that some of the information you have marked in Exhibit B-2 falls within the protections of the attorney-client privilege and may be withheld under section 552.107(1) of the Government Code.

We note some of the e-mails in Exhibit B-2 consist of communications with parties you have failed to identify and we cannot discern as privileged parties. Thus, as you have failed to establish the information we have marked in Exhibit B-2 is privileged under section 552.107(1) of the Government Code, it may not be withheld on that basis.

Section 552.111 of the Government Code 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.” 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); 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 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 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.

Upon review, we find the city has failed to demonstrate that any of the remaining information in Exhibit B-2 constitutes material prepared, mental impressions developed, or a communication made in anticipation of litigation or for trial by or for a party or a party's representatives. *See* TEX. R. CIV. P. 192.5. Accordingly, the city may not withhold any of the remaining information at issue under section 552.111 of the Government Code.

In summary, except for the information we have marked for release, the city may withhold the information you have marked in Exhibit B-2 under section 552.107(1) 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, 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# 460011

Enc. Submitted documents

c: Requestor
(w/o enclosures)