



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 1, 2012

Ms. Margo Kaiser
Staff Attorney
Texas Workforce Commission
101 East 15th Street
Austin, Texas 78778-0001

OR2012-17508

Dear Ms. Kaiser:

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# 469783 (TWC Tracking No. 120717-002).

The Texas Workforce Commission ("TWC") received two requests from a former TWC employee and his attorney for information related to a specified security breach incident caused by that former employee and his subsequent termination.¹ You claim the submitted information is excepted from disclosure under sections 552.107 and 552.139 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

You state TWC does not have some of the requested information. You also assert the requests for information require TWC to answer questions or do legal research. The Act

¹You inform us TWC received the requests for information on July 17, 2012 and sent the requestor an estimate of charges pursuant to section 552.2615 of the Government Code. *See* Gov't Code § 552.2615. The estimate of charges required the requestors to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.163(a). You inform us TWC received the deposit on August 20, 2012. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date that governmental body receives deposit or bond).

²We assume 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 those records contain substantially different types of information than that submitted to this office.

does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). However, a governmental body must make a good faith effort to relate a request to information held by the governmental body. *See* Open Records Decision No. 561 at 8 (1990). We assume TWC has made a good faith effort to do so.

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. 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 “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, 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, 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 explain Exhibit B-2 consists of confidential communications between an attorney and client of TWC that were made in furtherance of the rendition of professional legal services. You also assert the communications were intended to be confidential and their confidentiality has been maintained. After reviewing your arguments and the submitted information, we find you have demonstrated the applicability of the attorney-client privilege to Exhibit B-2.

Therefore, TWC may withhold Exhibit B-2 from release under section 552.107(1) of the Government Code.

You assert Exhibit B-1 is excepted from disclosure under section 552.139 of the Government Code, which provides in relevant part the following:

(a) Information is excepted from the requirements of Section 552.021 if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; and

(2) any other assessment of the extent to which data processing operations, a computer, [or] a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use.

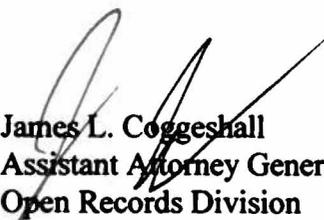
Gov't Code § 552.139(a)-(b). The information in Exhibit B-1 pertains to the investigation of a breach of computer security at TWC. You argue release of Exhibit B-1 "would facilitate the development of processes to breach security to obtain confidential data maintained by [TWC] or to interrupt services performed by [TWC]." You have also submitted a statement by the chief security officer for TWC, who asserts information regarding the actions taken by TWC to investigate the breach at issue can be used to breach security and jeopardize the operation of the TWC information systems. He also states the information at issue involves the design, operation, and defense of the TWC computer network and its would make the network vulnerable to unauthorized access, including criminal breach. After review of your arguments and the information at issue, we conclude you have established some of the information at issue is related to computer network security. Therefore, TWC must withhold this information, which we have marked, under section 552.139. However, we conclude you have not demonstrated any of the remaining information relates to computer network security, restricted information under section 2059.055, or the design, operation, or defense of a computer network as contemplated in section 552.139(a). *See id.* § 2059.055 (defining confidential network information for purposes of section 2059.055). Further, we find you have failed to demonstrate this information consists of a computer network vulnerability report or assessment as contemplated by section 552.139(b). Therefore, TWC may not withhold any of the remaining information under section 552.139.

To conclude, TWC may withhold Exhibit B-2 under section 552.107(1) of the Government Code. TWC must withhold the information we have marked under section 552.139 of the Government Code. TWC must release the remaining information to the requestor.³

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/tch

Ref: ID# 469783

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Counsel for the Requestor
(w/o enclosures)

³The requestors have a right of access to an e-mail address in the remaining information under section 552.137(b) of the Government Code. See Gov't Code § 552.137(b). However, Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. Therefore, if the city receives another request for this information from a different requestor, then the city is authorized to withhold the e-mail address at issue without requesting a ruling from this office.