



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 16, 2016

Mr. Robert W. Patterson
Open Records Coordinator
Texas Health & Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2016-13665

Dear Mr. Patterson:

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# 614499.

The Texas Health and Human Services Commission (the "commission") received a request for (1) all "user manuals, instructions, and purchase documents/user agreements" related to the commission's use of a specified e-discovery system, and (2) all "records/logs detailing searches made in that system" during a specified time period. You state you will be releasing some information to the requestor. You claim portions of the submitted information are not subject to the Act. You claim portions of the submitted information are excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. You also state release of the submitted information may implicate the interests of Veritas Technologies, L.L.C. ("Veritas"). Accordingly, you notified Veritas of the request for information and of its right to submit arguments stating why its information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have received comments from Veritas.¹ We have considered the submitted arguments and reviewed the submitted representative sample of information.²

¹We note Veritas does not object to disclosure of the submitted information.

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.

You argue some of the submitted information is not subject to the Act. The Act applies to “public information,” which is defined in section 552.002(a) of the Government Code as

information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body; or

(2) for a governmental body and the governmental body:

(A) owns the information;

(B) has a right of access to the information; or

(C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or

(3) by an individual officer or employee of a governmental body in the officer’s or employee’s official capacity and the information pertains to official business of the governmental body.

Gov’t Code § 552.002(a). In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. You argue some of the submitted information consists of information used solely for the purpose of maintenance of electronic communications and has no other significance. Upon review, we conclude Exhibit D, which you state consists of “code that programmers utilized,” is not “public information” for purposes of the Act, and the commission is not required to release it in response to this request.³ However, the remaining information at issue has significance other than its use as a tool for the maintenance, manipulation, or protection of public property. Accordingly, we conclude the remaining information at issue is “public information” as defined by section 552.002, and it is subject to disclosure under the Act. We will address the arguments against disclosure of that information and the remaining information.

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.” *See* Gov’t Code § 552.111. This section encompasses the attorney work

³As we are able to make this determination, we need not address the arguments under the Act against disclosure of this information.

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) [M]aterial 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). 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 that 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.

You argue the information you indicated consists of attorney work product under section 552.111. You state the information at issue reflects the mental impressions and opinions of the commission's internal counsel. Upon review, we find the commission has demonstrated the information at issue was prepared in anticipation of litigation. Therefore, the commission may withhold the information you indicated under section 552.111 of the Government Code as attorney work product.⁴

We note some of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

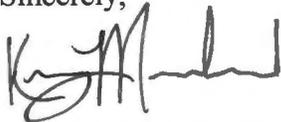
body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, Exhibit D is not “public information” for purposes of the Act, and the commission is not required to release it in response to this request. The commission may withhold the information you indicated under section 552.111 of the Government Code as attorney work product. The commission must release the remaining information; however, any information protected by copyright may only be released in accordance with copyright law.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Kenny Moreland
Assistant Attorney General
Open Records Division

KJM/som

Ref: ID# 614499

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)