



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 8, 2013

Mr. Read Cook  
Miller Mentzer Walker, P.C.  
P.O. Box 130  
Palmer, Texas 75152

OR2013-02270

Dear Mr. Cook:

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# 478366.

The Mountain Peak Special Utility District (the "district"), which you represent, received a request for all records pertaining to emergency preparedness and response plans developed by district personnel, agents, or consultants. You claim that the submitted information is exempted from disclosure under sections 552.101, 552.107, 552.111, and 552.117 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information, a portion of which consists of a representative sample.<sup>2</sup>

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<sup>1</sup>Although you also raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Further, we note the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107(1) of the Government Code. *See* ORD 676 at 1-2.

<sup>2</sup>We 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.

Initially, the district acknowledges the requestor has seen the requested emergency response plan. Thus, the district has previously released some of the submitted information to the public. The Act does not permit the selective disclosure of information to the public. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). Information that has been voluntarily released to a member of the public may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988). Accordingly, the district may not withhold previously released information unless its release is expressly prohibited by law or the information is confidential under law. You raise sections 552.101 and 552.117 of the Government Code for the information at issue, which make information confidential under law. Therefore, we will consider your arguments under these sections with respect to information that was previously released.

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. You raise section 552.101 in conjunction with provisions of the Texas Homeland Security Act (the "HSA"), chapter 418 of the Government Code. Sections 418.176, 418.177, and 418.181 were added to chapter 418 as part of the HSA. These provisions make certain information related to terrorism confidential. 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:

(1) relates to staffing requirements of an emergency response provider, including a law enforcement agency, a fire-fighting agency, or an emergency services agency;

(2) relates to a tactical plan of the provider; or

(3) consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers, of the provider.

*Id.* § 418.176(a). Section 418.177 provides as follows:

Information is confidential if the information

(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:

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.

*Id.* § 418.181. The fact that information may generally be related to emergency preparedness does not make the information *per se* confidential under the provisions of the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provisions controls scope of its protection). As with any confidentiality statute, a governmental body asserting one of these sections must adequately explain how the responsive information falls within the scope of the provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You state Exhibits 1 and 4 consist of "information collected, assembled, and maintained by [the district] for the purposes of detecting, responding to, investigating, and preventing natural or man-made emergency situations, including terrorism and criminal activity, and mitigating the damage caused by same." You state the emergency response plan submitted as Exhibit 1 includes information related to the district's emergency management staffing requirements and a compilation of the contact information for the district's emergency management response staff. You argue disclosure of any portion of the plan would compromise the district's ability to effectively respond to an emergency situation and would provide those who would commit criminal or terroristic acts with the information which would increase the amount and degree of harm they could cause while at the same time removing barriers to the completion of their deeds. Based on these representations and our review, we find you have established Exhibit 1 relates to the staffing requirements of an emergency response provider, relates to a tactical plan of the provider, or consists of a list of telephone numbers of the provider under section 418.176 of the Government Code. Therefore, we find Exhibit 1 is confidential under section 418.176 of the Government Code and must be withheld under section 552.101 of the Government Code.<sup>3</sup> However, the guidelines submitted as Exhibit 4 relate to elements included in the emergency plan but do

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<sup>3</sup>As our ruling is dispositive for this information, we do not address your remaining arguments against its disclosure.

not reveal information about any specific emergency plan. We note the guidelines at issue have been published on the websites of state and federal agencies. We find the district has failed to establish how this information either (1) relates to the staffing requirements of an emergency response provider or to a tactical plan of the provider or consists of a list of telephone numbers of the provider for purposes of section 418.176 or (2) relates to an assessment of the risk or vulnerability of persons or property to an act of terrorism or related criminal activity for purposes of section 418.177. Consequently, we conclude the district may not withhold Exhibit 4 under section 552.101 of the Government Code in conjunction with section 418.176 or 418.177 of the Government Code.

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. ORD 676 at 6-7. 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). 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). 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 state Exhibits 2 and 3 consist of communications sent between a district employee and attorneys representing the district in order to facilitate the rendition of legal services to the

district. You have identified the parties to the communications. You state these communications were intended to be, and have remained, confidential. Based on your representations and our review, we agree the district may withhold Exhibits 2 and 3 under section 552.107(1) of the Government Code.

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. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of this privilege 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 that 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. *See id.*; *see also City of Garland v. The 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).

You assert the guidelines submitted as Exhibit 4 were collected by the district in researching and preparing its emergency response plan. You state Exhibit 4 contains advice, opinions, and recommendations from other agencies on how emergency response and management plans should be crafted. As previously noted, these agencies have published the guidelines at issue on their websites. In addition, upon review, we find the information at issue either does not relate to policymaking or is purely factual in nature. You have failed to adequately explain how this information consists of advice, opinions, or recommendations pertaining to policymaking processes of the district. Therefore, as you have failed to demonstrate that

the deliberative process privilege applies to Exhibit 4, none of this information may be withheld under section 552.111.

In summary, the district must withhold Exhibit 1 under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code. The district may withhold Exhibits 2 and 3 under section 552.107(1) of the Government Code. The district must release Exhibit 4.

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,



Sarah Casterline  
Assistant Attorney General  
Open Records Division

SEC/tch

Ref: ID# 478366

Enc. Submitted documents

c: Requestor  
(w/o enclosures)