



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 21, 2014

Ms. Kerri L. Butcher
Chief Counsel
Capital Metropolitan Transportation Authority
2910 East Fifth Street
Austin, Texas 78702

OR2014-12622

Dear Ms. Butcher:

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# 530487.

The Capital Metropolitan Transportation Authority (the “authority”) received a request for four categories of information regarding the authority’s signalization, crossing gates, and other control systems for the Giddings-to-Llano rail line since January 1, 2013.¹ You state the authority does not have information responsive to a portion of the request.² You state the authority released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code.³ We have considered the exceptions you claim and reviewed the submitted information.

¹We note the authority sought and received clarification of the request. *See* Gov’t Code § 552.222(b) (providing that if request for information is unclear, governmental body may ask requestor to clarify the request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad 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).

²The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267–68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

³Although you also raise sections 552.301 and 552.303 of the Government Code, these are not exceptions to disclosure under the Act. *See* Gov’t Code §§ 552.301 (providing procedural requirements for requesting ruling), .303 (pertaining to delivery of requested information to Attorney General, disclosure of requested information, and Attorney General request for submission of additional 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 made confidential by other statutes. You raise section 552.101 in conjunction with section 418.181 of the Government Code, which was added to chapter 418 of the Government Code as part of the Texas Homeland Security Act (the “HSA”). Section 418.181 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.” *Id.* § 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, economy, or morale of the state or the nation”). The fact that information may relate to a governmental body’s security measures 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 of a statute’s key terms is not sufficient to demonstrate the applicability of the claimed provision. As with any exception to disclosure, a claim under section 418.181 must be accompanied by an adequate explanation of 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 the submitted information consists of e-mails, documents, and drawings that “depict the technical specifications and programming calculations for electrical and other technical and operational components of the system [that] controls the operation of the railroad crossings and arms.” You also state some of this information identifies “the schematics of the internal and external components of the crossing and signal systems for the Giddings-to-Llano rail line.” You argue release of this information could allow a crossing to be disabled, reprogrammed, or altered. Upon review of the arguments and the information at issue, we find the authority has demonstrated the railroad crossings at issue constitute critical infrastructure and that the information we have marked identifies the technical details of particular vulnerabilities of that critical infrastructure to an act of terrorism. Therefore, the authority must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. However, we find you have failed to establish the remaining information at issue reveals the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Thus, the authority may not withhold the remaining information at issue under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.

Section 552.103 of the Government Code provides in part as follows:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Id. § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

To establish litigation is reasonably anticipated for the purposes of section 552.103, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *See* Open Records Decision No. 452 at 4 (1986). In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect litigation is “realistically contemplated.” *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (finding investigatory file may be withheld if governmental body attorney determines it should be withheld pursuant to section 552.103 and litigation is “reasonably likely to result”). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* ORD 452 at 4.

You explain the authority discovered a defect in one of its rail maintenance facilities that may result in a claim for a construction defect. You state that, prior to the authority’s receipt of the present request for information, the authority engaged the law firm of Gruber, Hurst, Johansen, Hail & Shank, L.L.P., to pursue litigation on this matter. Further, you state the matter is still being investigated to determine the appropriate claims and responsible parties. Based on your representations and our review, we conclude the authority reasonably anticipated litigation when it received the request for information. Additionally, we agree the information at issue is related to the anticipated litigation. Therefore, the authority may withhold the information we have marked under section 552.103 of the Government Code.⁴

You state the remaining information relates to pending litigation against the authority in relation to an incident that occurred on the authority’s rail line. However, you state the

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

lawsuit was filed on May 13, 2014, which is after the date the authority received the requestor's clarification of the present request for information. Furthermore, we find you have not explained that, at the time the authority received the requestor's clarification, anyone had taken any concrete steps toward initiation of litigation regarding this matter. Thus, we find you have failed to establish the authority reasonably anticipated litigation when it received the requestor's clarification. Thus, the authority may not withhold any of the remaining information at issue under section 552.103 of the Government Code.

Generally, however, once information has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

Section 552.107(1) of the Government Code protects information that comes 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. *See* 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. *See* 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. *See 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 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. *See 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 state the remaining information you have indicated consists of communications between legal counsel for the authority and authority employees and consultants. You state these communications were made in furtherance of the rendition of professional legal services to the authority. You state the communications were intended to be, and have remained, confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to this information. Accordingly, the authority may withhold the information we have marked under section 552.107(1) of the Government Code.

We note some of the remaining information may be subject to section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home address, home telephone number, emergency contact information, social security number, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code.⁵ *See Gov't Code § 552.117(a)(1)*. Section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See Open Records Decision No. 506 at 5-6 (1988)* (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See Open Records Decision No. 530 at 5 (1989)*. Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. We have marked cellular telephone numbers of authority employees. Therefore, if the employees at issue timely requested confidentiality under section 552.024 of the Government Code, the authority must withhold the information we have marked under section 552.117(a)(1) of the Government Code but only if a governmental body does not pay for the cellular telephone service. If the employees at issue did not timely request confidentiality under section 552.024 or if the cellular telephone service is paid for by a governmental body, the authority may not withhold the information we marked under section 552.117(a)(1).

⁵The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)*.

In summary, the authority must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. The authority may withhold the information we have marked under section 552.103 of the Government Code. The authority may withhold the information we have marked under section 552.107(1) of the Government Code. If the employees at issue timely requested confidentiality under section 552.024 of the Government Code, the authority must withhold the information we have marked under section 552.117(a)(1) of the Government Code. However, the authority must withhold the cellular telephone numbers we have marked only if a governmental body does not pay for the cellular telephone service. The authority must release the remaining information.

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,



Cristian Rosas-Grillet
Assistant Attorney General
Open Records Division

CRG/dls

Ref: ID# 530487

Enc. Submitted documents

c: Requestor
(w/o enclosures)