



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 19, 2015

Ms. Josephine Ramirez Solis
Assistant District Attorney
County of Hidalgo
100 North Closner, Room 303
Edinburgh, Texas 78539

OR2015-21858

Dear Ms. Solis:

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# 581712 (2015-0056-DA).

The Hidalgo County Criminal District Attorney's Office (the "district attorney's office") received a request for all communications, including e-mails, attachments, text messages, or phone calls, made or received by named individuals during a specified time period.¹ You state you do not have some of the requested information.² You claim portions of the requested information are not subject to the Act. You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.107, 552.108, and 552.111 of the Government Code.³ Additionally, you claim release of this information

¹ You state the district attorney's office sought and received clarification of the information requested. See Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify 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 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).

² The 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).

³ Although you raise Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, we note the proper exceptions to raise when asserting the attorney-client privilege and 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. 677 (2002), 676 at 1-2 (2002).

may implicate the interests of the South Texas High Intensity Drug Trafficking Area (“HIDTA”); accordingly, you notified HIDTA of the request for information pursuant to section 552.304 of the Government Code. *See* Gov’t Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted representative sample of truncated versions of the requested e-mails.⁴

You claim the request for information is not an appropriate request and overbroad in scope. We note a governmental body has a duty to make a good-faith effort to relate a request for information to information the governmental body holds. Open Records Decision No. 561 (1990). It is nevertheless proper for a governmental body to require a requestor to identify the records sought. Open Records Decision Nos. 304 (1982), 23 (1974). For example, where governmental bodies have been presented with broad requests for information rather than specific records we have stated the governmental body may advise the requestor of the types of information available so the requestor may properly narrow the request. Open Records Decision No. 31 (1974). A request for records made pursuant to the Act may not be disregarded simply because a citizen does not specify the exact documents he desires. ORD 87. We note if a request for information is unclear, a governmental body may ask the requestor to clarify the request. Gov’t Code § 552.222(b); *see also* Open Records Decision Nos. 561 at 8 (1990), 333 (1982). However, we note the administrative inconvenience in responding to a request for information is not grounds for refusing to comply with a request under the Act. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976); *see also* Open Records Decision No. 497 at 4 (1988) (fact that submitting copies for review may be burdensome does not relieve governmental body of its responsibility to do so). In this instance, you state the district attorney’s office has asked the requestor to clarify the request at issue. The requestor’s final clarification seeks all communications, including e-mails, attachments, text messages, or phone calls, made or received by named individuals during a specified time period. Thus, we find the requester wants all communications made or received by the named individuals. In this case, as you have submitted information responsive to the request and have raised exceptions to disclosure for this information, we will address the applicability of the claimed exceptions to this information.

Next, you assert some of the requested information is not subject to the Act. You explain the requestor did not exclude personal communications from her request. The Act is applicable only to “public information.” *See* Gov’t Code § 552.021. Section 552.002(a) defines “public information” as

⁴We 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 that those records contain substantially different types of information than that submitted to this office.

[I]nformation 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;

(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.

Id. § 552.002. Thus, virtually all the information in a governmental body's physical possession constitutes public information and is subject to the Act. *Id.*; see Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). You argue that personal text messages, phone conversations, and private emails are not subject to the Act. You explain the personal communications are not maintained by the district attorney's office in connection with the transaction of official business. Open Records Decision No. 635 at 3-4 (1995) (finding that information does not fall outside definition of "public information" in Act merely because individual member of governmental body possesses information rather than governmental body as whole). Based on your representations, we find the requested personal communications do not constitute "information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by the district attorney's office. See Gov't Code § 552.002. Therefore, the requested personal communications are not subject to the Act and need not be released in response to the present request for information.

The submitted information also contains peace officers' Texas Commission on Law Enforcement ("TCOLE") identification numbers.⁵ 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

⁵The Texas Commission on Law Enforcement Officer Standards and Education was renamed the Texas Commission on Law Enforcement by the 83rd Legislature. See Act of May 6, 2013, 83rd Leg., R.S., ch. 93, § 1.01, 2013 Tex. Gen. Laws 174, 174.

not the kind of information made public under section 552.021 of the Government Code. ORD 581 at 5. We understand an officer's TCOLE identification number is a unique computer-generated number assigned to peace officers for identification in the TCOLE electronic database, and may be used as an access device number on the TCOLE's website. Accordingly, we find the officers' TCOLE identification numbers also do not constitute public information under section 552.002 of the Government Code. Thus, the submitted TCOLE identification numbers are not subject to the Act, and the district attorney's office is not required to release them to the requestor.

You claim the information you marked is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) 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 that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "to facilitate 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)(A), (B), (C), (D), (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: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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 that 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 assert Exhibit C includes privileged attorney-client communications between the district attorney's office and various county offices, departments, and employees. You state the communications at issue were made for the purpose of the rendition of legal services by the

district attorney's office to various county offices, departments, and employees. You state the communications at issue have not been, and were not intended to be, disclosed to third parties. Based on your representations and our review of the information at issue, we find the district attorney's office has established the information we marked constitutes attorney-client communications under section 552.107(1) of the Government Code. Thus, the district attorney's office may withhold the information we marked in Exhibit C under section 552.107(1) of the Government Code. However, the remaining information at issue reflects communications with parties you have not demonstrated as privileged or does not document a privileged attorney-client communication. Therefore, we find you have failed to demonstrate how the remaining information you marked in Exhibit C consists of privileged attorney-client communications, and the district attorney's office may not withhold the remaining information you marked in Exhibit C on that basis.

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. Section 552.101 encompasses information protected by other statutes. As part of the Texas Homeland Security Act (the "HSA"), sections 418.176 through 418.182 were added to chapter 418 of the Government Code. These provisions make certain information related to an act of terrorism or related criminal activity confidential. Section 418.177 provides:

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. 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 this section 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 generally state some of the information in Exhibit C relates to investigations conducted by HIDTA into drug trafficking near the border. These investigations assess the vulnerability of the border and the property of local residents. Further, you state the HIDTA's main objectives could not be accomplished without the confidentiality of its risk and vulnerability assessments of the border. However, you have provided limited portions of the remaining

e-mails at issue. We note the information provided does not contain information regarding drug trafficking or assessments of the vulnerability of the border. Thus, you failed to establish how any of the remaining information at issue in Exhibit C was collected, assembled, or is maintained by or for the district attorney's office for the purpose of preventing, detecting, or investigation an act of terrorism or related to criminal activity for purposes of section 418.177. Thus, you have failed to demonstrate the applicability of section 418.177, and the district attorney's office may not withhold any of the remaining information in Exhibit C under section 552.101 on this basis.

You claim Exhibit D is excepted from disclosure under section 552.101 in conjunction with section 1701.454 of the Occupations Code. Section 552.101 of the Government Code also encompasses section 1701.454, which governs the public availability of information submitted to TCOLE under subchapter J of chapter 1701 of the Occupations Code. Section 1701.454 provides:

(a) All information submitted to [TCOLE] under this subchapter is confidential and is not subject to disclosure under Chapter 552, Government Code, unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.

(b) Except as provided by this subchapter, a [TCOLE] member or other person may not release the contents of a report or statement submitted under this subchapter.

Occ. Code § 1701.454. You assert Exhibit D is subject to subchapter 1701.454 of the Occupations Code. However, upon review, we find you have failed to demonstrate any portion of Exhibit D was submitted to TCOLE pursuant to subchapter J of chapter 1701 of the Occupations Code. Accordingly, the district attorney's office may not withhold Exhibit D under section 552.101 in conjunction with subchapter 1701.454 of the Occupations Code.

Section 552.108 of the Government Code provides, in relevant part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime; [or]

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(1)-(2). Subsection 552.108(a)(1) is mutually exclusive of subsection 552.108(a)(2). Subsection 552.108(a)(1) protects information, the release of which would interfere with a particular pending criminal investigation or prosecution. In contrast, subsection 552.108(a)(2) protects information that relates to a concluded criminal investigation or prosecution that did not result in a conviction or deferred adjudication. A governmental body claiming an exception under section 552.108 must reasonably explain how and why the exception it claims is applicable to the information the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *see also Ex parte Pruitt* 551 S.W.2d 706 (Tex. 1977).

You state portions of the remaining information relate to pending criminal investigations. Based upon this representation, we conclude the release of the information we have marked in Exhibit C would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 186-87 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559, 560-61 (Tex. 1976). Thus, section 552.108(a)(1) is applicable to the information we have marked. Accordingly, the district attorney's office may withhold the information we have marked in Exhibit C under section 552.108(a)(1) of the Government Code.

Section 552.108(b)(1) of the Government Code provides:

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

Gov't Code § 552.108(b)(1). A governmental body claiming an exception to disclosure under section 552.108 must reasonably explain how and why the exception it claims is applicable to the information the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108(b)(1) is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 at 327 (Tex. App.—Austin 2002, no pet.). This office has concluded section 552.108(b)(1) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (section 552.108 of the Government Code is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, ORDs 531 at 2-3 (Penal Code

provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

You assert, due to the dangerous and violent nature of international drug cartels, the release of the portions of the information would interfere with investigations conducted by the High Intensity Drug Trafficking Area for Hidalgo County and threaten officer safety. As noted above, you have provided limited portions of the remaining e-mails. Thus, you have failed to demonstrate how the information at issue contains information regarding investigations conducted by the High Intensity Drug Trafficking Area for Hidalgo County. Accordingly, we find you have failed to demonstrate how the release of the remaining information you have marked would interfere with law enforcement or prosecution. Therefore, the district attorney's office may not withhold any of the remaining information at issue under section 552.108(b)(1) of the Government Code.

Section 552.111 of the Government Code exempts from disclosure “[a]n 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 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 assert the some of the remaining information is attorney work product protected under section 552.111. We note some of the information is communication with individuals you have not demonstrated are privileged. Upon review, we find you have not demonstrated any portion of the remaining information you marked in Exhibit C consist of mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney’s representative that were created for trial or in anticipation of litigation. Consequently, the district attorney’s office may not withhold the remaining information you marked in Exhibit C under section 552.111.

We note portions of the remaining information may be confidential under section 552.117 of the Government Code.⁶ Section 552.117(a)(1) excepts from disclosure the current and former home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. Gov’t Code § 552.117(a). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The district attorney’s office may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Therefore, if the individuals whose information we marked timely requested confidentiality under section 552.024, the district attorney’s office must withhold the information we have marked under section 552.117(a)(1) of the Government Code. Conversely, if the individuals at issue did not timely request confidentiality under section 552.024, then the district attorney’s office may not withhold the marked information under section 552.117(a)(1).

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov’t Code § 552.137(a)-(c). The e-mail addresses we have marked are not of the types specifically excluded by section 552.137(c). Accordingly, the district attorney’s office must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release.

⁶The 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 district attorney's office may withhold the information we have marked in Exhibit C under section 552.107(1) of the Government Code. The district attorney's office may withhold the information we have marked in Exhibit C under section 552.108(a)(1) of the Government Code. If the individuals whose information we marked timely requested confidentiality under section 552.024, the district attorney's office must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The district attorney's office must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release. The remaining information that is subject to the Act 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.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,



Cole Hutchison
Assistant Attorney General
Open Records Division

CH/som

Ref: ID# 581712

Enc. Submitted documents

c: Requestor
(w/o enclosures)