



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 5, 2017

Ms. Meredith Riede
City Attorney
City of Sugar Land
2700 Town Center Boulevard North
Sugar Land, Texas 77479-0110

OR2017-00336

Dear Ms. Riede:

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# 640513.

The City of Sugar Land (the "city") received a request for certain information pertaining to a specified facility, as well as all city policies regarding the notification and inspection of hazardous materials stored in any facility within the city limits. You state the city will release some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.108 and 552.111 of the Government Code.¹ We have also received and reviewed comments submitted by the Texas Department of State Health Services (the "department"). *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information). We have considered the claimed exceptions and reviewed the submitted representative sample of information.

Initially, we note you have not submitted the specified policies. Although you state you have submitted a representative sample of the requested information, we find the submitted information is not representative of all the types of information to which the requestor seeks access. Please be advised, this open records letter ruling applies only to the types of

¹Although you raise Texas Rule of Civil Procedure 192.5, we note the proper exception to raise when asserting the attorney work product privilege for information not subject to section 552.022 of the Government Code is section 552.111 of the Government Code. *See* Open Records Decision Nos. 677 (2002), 676 at 6.

information you have submitted for our review. This ruling does not authorize the city to withhold any information that is substantially different from the types of information you submitted to this office. *See id.* § 552.302 (where request for attorney general decision does not comply with requirements of Gov't Code § 552.301, information at issue is presumed to be public). Thus, to the extent this information existed and was maintained by the city on the date it received the request for information, we presume the city has released it. If not, the city must do so at this time. *See id.* §§ 552.301, .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to the requested information, it must release the information as soon as possible).

Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime.” Gov't Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108(a)(1) must explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977). You state Exhibit C relates to a pending criminal investigation and prosecution by the city. Based upon this representation, we conclude the release of 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). Accordingly, the city may withhold Exhibit C under section 552.108(a)(1) of the Government Code.²

Section 552.111 of the Government Code excepts 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); ORD 677 at 4-8. 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,

²As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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 claim the attorney work-product privilege of section 552.111 of the Government Code for Exhibit B. You inform us the information at issue consists of materials prepared by attorneys and outside counsel for the city in anticipation of criminal litigation pursuant to section 11-51 of the city's Development Code. Based on your representations and our review, we find the city has demonstrated the applicability of the attorney work product privilege to the information we have marked. Accordingly, the city may withhold the information we have marked under the attorney work product privilege of section 552.111 of the Government Code.³ However, upon review, we find some of the remaining information in Exhibit B consists of communications with the opposing party to the litigation at issue. Therefore, because this party has had access to the information at issue, the city has waived the work product privilege under section 552.111 for it. Further, we find you have failed to demonstrate the remaining information in Exhibit B consists of material prepared, mental impressions developed, or a communication made in anticipation of litigation or for trial for the purposes of section 552.111. Thus, the city may not withhold the remaining information at issue as attorney work product under section 552.111.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 of the Government Code encompasses information protected by other statutes. As part of the Texas Homeland Security Act, sections 418.176

³As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

through 418.182 were added to chapter 418 of the Government Code. These provisions make confidential certain information related to terrorism. The department contends the information at issue is confidential under section 552.101 in conjunction with section 418.178 and section 418.181 of the Government Code. Section 418.178 provides as follows:

(a) In this section, "explosive weapon" has the meaning assigned by Section 46.01, Penal Code.

(b) Information is confidential if it is information collected, assembled, or maintained by or for a governmental entity and:

(1) is more than likely to assist in the construction or assembly of an explosive weapon or a chemical, biological, radiological, or nuclear weapon of mass destruction; or

(2) indicates the specific location of:

(A) a chemical, biological agent, toxin, or radioactive material that is more than likely to be used in the construction or assembly of such a weapon; or

(B) unpublished information relating to a potential vaccine or to a device that detects biological agents or toxins.

Id. § 418.178. 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 relate to biological toxins or security concerns does not make the information *per se* confidential under section 418.178 or section 418.181. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). As with any confidentiality statute, a governmental body asserting section 418.178 or section 418.181 must adequately explain how the responsive records fall within the scope of the provision at issue. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

The department states the remaining information reveals the specific location of radioactive material. Upon review, we find the information we have marked is confidential under section 418.178 of the Government Code. Therefore, the city must withhold the information

we have marked under section 552.101 of the Government Code in conjunction with section 418.178 of the Government Code.⁴ However, we find the department has not demonstrated the remaining information is confidential under section 418.178 of the Government Code, and the city may not withhold this information under section 552.101 on that basis.

The department seeks to withhold the remaining information within Exhibit B under section 418.181. The department states the information “identifies technical details of the facility, including details of vulnerabilities to acts of terrorism.” However, we find the department has not demonstrated the information at issue identifies the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. *See 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”). Consequently, we find the city may not withhold the information at issue under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.

Section 552.137 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).⁵ *See id.* § 552.137(a)-(c). Section 552.137 does not apply to an institutional e-mail address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). Upon review, we find the city must withhold the submitted e-mail addresses under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure or subsection (c) applies.

In summary, the city may withhold Exhibit C under section 552.108(a)(1) of the Government Code. The city may withhold the information we have marked under the attorney work product privilege of section 552.111 of the Government Code. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.178 of the Government Code. The city must withhold the submitted e-mail addresses under section 552.137 of the Government Code, unless their owners affirmatively

⁴As our ruling is dispositive, we need not address the department’s remaining argument against disclosure of this information.

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).*

consent to their public disclosure or subsection (c) applies. The city 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,

A handwritten signature in black ink that reads "Cole Hutchison". The signature is written in a cursive, slightly slanted style.

Cole Hutchison
Assistant Attorney General
Open Records Division

CH/eb

Ref: ID# 640513

Enc. Submitted documents

c: Requestor
(w/o enclosures)