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ATTORNEY GENERAL OF TEXAS

April 18, 2017

Ms. Anne M. Constantine
Legal Counsel
Dallas/Fort Worth International Airport Board
P.O. Box 619428
DFW Airport, Texas 75261-9428

OR2017-08191

Dear Ms. Constantine:

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# 653876.

The Dallas/Fort Worth International Airport Board (the "board") received a request for all human resources, audit, and ethics records relating to the requestor. The board states it will release most of the requested information. The board claims some of the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.116, and 552.139 of the Government Code. We have considered the exceptions the board claims and reviewed the submitted information.

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The information we have marked in Exhibit C, and Exhibit E, consist of a completed report subject to subsection 552.022(a)(1). The board must release

the information at issue pursuant to subsection 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. *See id.* The board seeks to withhold some of the information at issue under section 552.116 of the Government Code. However, section 552.116 is discretionary in nature and does not make information confidential under the Act. *See* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the board may not withhold any of the information subject to section 552.022(a)(1), which we have marked, under section 552.116 of the Government Code. However, as sections 552.101 and 552.139 of the Government Code make information confidential under the Act, we will consider the board's arguments under these sections for the information subject to section 552.022(a)(1). We will also consider the board's arguments against disclosure of the information not subject to section 552.022.

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. 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).

The board states Exhibit D consists of confidential communications involving a board attorney and a board employee in his capacity as a client. The board states these communications were made in furtherance of the rendition of professional legal services to the board. The board states the confidentiality of these communications has been maintained. Based on these representations and our review, we find the board has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the board may withhold Exhibit D under section 552.107(1) of the Government Code.

Section 552.116 of the Government Code provides,

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. The board states it is a joint board operating under section 22.074 of the Transportation Code. The board states the remaining information in Exhibit C consists of working papers used to conduct an audit under the authority of an audit plan approved by a resolution of the board. The board has provided a copy of the resolution. Based on these representations and our review of the information at issue, we conclude the board may

withhold the remaining information in Exhibit C under section 552.116 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *See id.* § 552.101. Section 552.101 encompasses information protected by other statutes. The board asserts some of the information subject to section 552.022(a)(1) is excepted from disclosure under section 552.101 in conjunction with section 2059.055 of the Government Code as well as section 552.139 of the Government Code. We note section 552.139 encompasses restricted information made confidential by section 2059.055. *Id.* § 552.139(a). Thus, we will address the board’s arguments under these provisions together. Section 552.139 of the Government Code provides, in part:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; [and]

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body’s or contractor’s electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

Id. § 552.139(a), (b)(1)-(2). Section 2059.055 of the Government Code provides in pertinent part:

(b) Network security information is confidential under this section if the information is:

(1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency[.]

Id. § 2059.055(b)(1). The board states release of some of the information subject to section 552.022 of the Government Code “could allow unauthorized access to the board’s Access Control System and other office support services leaving the system vulnerable to unauthorized or criminal activity.” Upon review, we find the information the board has

marked is related to computer network security or reveals an assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body is vulnerable to unauthorized access or harm. Accordingly, the board must withhold the information it has marked under section 552.139 of the Government Code.

In summary, the board may withhold Exhibit D under section 552.107(1) of the Government Code. The board may withhold the information not subject to section 552.022(a)(1) of the Government Code in Exhibit C under section 552.116 of the Government Code. The board must withhold the information it has marked under section 552.139 of the Government Code. The board 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,



Rahat Huq
Assistant Attorney General
Open Records Division

RSH/som

Ref: ID# 653876

Enc. Submitted documents

c: Requestor
(w/o enclosures)