



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 16, 2017

Ms. P. Armstrong
Assistant City Attorney
Criminal Law and Police Section
City of Dallas
1400 South Lamar Street
Dallas, Texas 75215

OR2017-13348

Dear Ms. Armstrong:

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# 660232 (ORR# 2017-04340, #2017-05296, C002015-031617, & C001980-031517).

The City of Dallas (the "city") received three requests from two requestors for communications among specified individuals and other records pertaining to specified incidents.¹ You state the city will release some information to the requestors. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.108 of the Government Code.² Additionally, you state release of the submitted

¹You state the city sought and received clarifications of the information requested from both requestors. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed).

²We note in a letter dated May 24, 2017, we asked the city to provide additional information pursuant to section 552.303 of the Government Code. *See* Gov't Code § 552.303(c)-(d) (if attorney general determines that information in addition to that required by section 552.301 is necessary to render decision, written notice of that fact shall be given to governmental body and requestor, and governmental body shall submit necessary additional information to attorney general not later than seventh calendar day after date of receipt of notice). We have received and considered the information submitted by the city on June 6, 2017, pursuant to that request.

information may implicate the proprietary interests of T-Mobile, USA, Inc. (“T-Mobile”). Accordingly, you state and provide documentation showing, the city notified T-Mobile of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov’t Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from T-Mobile. We have reviewed the submitted arguments and the submitted representative sample of information.³

Initially, we must address the city’s obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. *See* Gov’t Code § 552.301. Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). The city received the requests for information at issue on March 15 and March 16, 2017. You do not inform us the city was closed for any business days between March 15, 2017, and April 6, 2017. Accordingly, the city was required to provide the information required by section 552.301(e) by April 5 and April 6, 2017 for each request, respectively. The city timely submitted some of the requested information at issue. However, the city provided additional responsive information required by section 552.301(e) through this office’s electronic filing system on April 27, 2017. Although the city stated its original submission was a representative sample of the requested information, we find that information is not representative of all the types of information to which the requestor seeks access. Accordingly, we conclude the city failed to comply with the procedural requirements mandated by section 552.301 of the Government Code with respect to the information submitted on April 27, 2017.

Pursuant to section 552.302 of the Government Code, a governmental body’s failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ). The need of a third party

³We 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 those records contain substantially different types of information than that submitted to this office.

to withhold information can provide a compelling reason sufficient to overcome the presumption of openness. *See* Open Records Decision No. 586 (1991). Because you inform us T-Mobile objects to the release of the information at issue, we will consider whether the city may withhold the information at issue on behalf of T-Mobile. We will also consider the submitted arguments against disclosure of the information that was submitted timely.

Section 552.101 of the Government Code exempts 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 section 261.201(a) of the Family Code, which provides:

(a) Except as provided by Section 261.203, the following information is confidential, is not subject to public release under chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). Upon review, we find some of the submitted information was used or developed in an investigation of alleged or suspected child abuse or neglect. *See id.* § 261.001(1), (4) (defining “abuse” and “neglect” for purposes of Family Code chapter 261); *see also id.* § 101.003(a) (defining “child” for purposes of this section as person under 18 years of age who is not and has not been married or who has not had disabilities of minority removed for general purposes). Therefore, we conclude the information you marked under section 261.201 is confidential pursuant to section 261.201(a) of the Family Code and must be withheld under section 552.101 of the Government Code.⁴ *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute).

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov’t Code § 552.107(1). 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

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

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 state some of the submitted information, which you marked, consists of communications among city attorneys and city employees and officials in their capacities as clients. You state these communications were made in furtherance of the rendition of professional legal services to the city. You state these communications were intended to be, and have remained, confidential. Based on these representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the city may withhold the information you marked under section 552.107(1) of the Government Code.⁵

Section 552.101 of the Government Code also encompasses information made confidential by other statutes. We understand the city and T-Mobile claim the submitted information is confidential under section 771.061 of the Health and Safety Code. Section 771.061 makes confidential “[i]nformation that a service provider of telecommunications service is required to furnish to a governmental entity in providing computerized 9-1-1 service” and information

⁵As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

“that a service provider, third party, or other entity voluntarily furnishes at the request of a governmental entity in providing 9-1-1 service[.]” Health & Safety Code § 771.061(a). The city indicates it operates a 9-1-1 system. The city and T-Mobile argue the submitted information was used for the purpose of providing computerized 9-1-1 service and was obtained from third-party telecommunications services providers. Based upon these representations and our review, we find some of the submitted information consists of information that was required to be furnished to the city by a telecommunications service provider or information that was voluntarily furnished by a service provider at the request of the city in providing computerized 9-1-1 service. This information, which we marked, is confidential under section 771.061 of the Health and Safety Code and the city must withhold it under section 552.101 of the Government Code.⁶ However, upon review, we find the city and T-Mobile have failed to demonstrate any portion of the remaining information was furnished to the city by a telecommunications service provider in providing computerized 9-1-1 service. Accordingly, the remaining information is not confidential under section 771.061 of the Health and Safety Code and the city may not withhold the remaining information under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses chapter 772 of the Health and Safety Code, which authorizes the development of local emergency communication districts. Sections 772.118, 772.218, and 772.318 of the Health and Safety Code are applicable to emergency 9-1-1 districts established in accordance with chapter 772. *See* Open Records Decision No. 649 (1996). These sections make the originating telephone numbers and addresses of 9-1-1 callers furnished by a service supplier confidential. *Id.* at 2. Section 772.118 applies to an emergency communication district for a county with a population of more than 3.3 million. Section 772.218 applies to an emergency communication district for a county with a population of more than 1.5 million. Section 772.318 applies to an emergency communication district for a county with a population of more than 20,000.

We understand the city is part of an emergency communication district established under section 772.218 of the Health and Safety Code. Upon review, provided the information at issue was furnished by a service supplier, the city must generally withhold the telephone numbers and addresses we marked under section 552.101 of the Government Code in conjunction with section 772.218 of the Health and Safety Code. We note, however, to the extent the corresponding addresses are the addresses of a cellular telephone antenna and are not the originating addresses of 9-1-1 callers, this information is not made confidential by section 772.218 and may not be withheld under section 552.101 of the Government Code on that basis. Furthermore, we find the remaining information at issue does not contain the originating telephone number or address of a 9-1-1 caller furnished by a service supplier. Accordingly, the city may not withhold any portion of the remaining information under

⁶As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

section 552.101 of the Government Code in conjunction with chapter 772 of the Health and Safety Code.

Section 552.101 of the Government Code also 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 confidential certain information related to terrorism. The city asserts the remaining information is made confidential by the HSA. Section 418.176 of the HSA 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 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.

Gov't Code § 418.176. 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. 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 relate to a governmental body's security concerns does not make the information *per se* confidential under the HSA. *See* ORD 649 at 3 (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain 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).

The city generally argues the information it has marked is confidential under sections 418.176, 418.177, and 418.181 of the Government Code. However, the city does not explain any portion of the information at issue was collected, assembled, or is maintained by or for the city for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity and relates to staffing requirements of an emergency response provider, relates to a tactical plan of the provider, consists of a list or compilation of pager or telephone numbers of the provider, or relates to an assessment of the risk or vulnerability of persons or property to an act of terrorism or related criminal activity. Additionally, we understand the city to assert, and we agree, the city's 9-1-1 call center is critical infrastructure for the purposes of section 418.181 of the Government Code. *See id.* § 421.001 (defining "critical infrastructure" to include all public or private assets, systems, and functions vital to security, governance, public health and safety, economy, or morale of state or nation). However, the city and T-Mobile have not demonstrated the remaining information identifies the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Consequently, the city may not withhold any of the remaining information at issue under section 552.101 of the Government Code in conjunction with section 418.176, section 418.177, or section 418.181 of the Government Code.

We note some of the remaining information may be subject to section 552.117 of the Government Code.⁷ Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See Id.* § 552.117(a)(1). Section 552.117(a)(1) also applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988). 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

⁷The 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 No. 481 (1987), 480 (1987), 470 (1987).

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. Therefore, to the extent the employee at issue timely requested confidentiality under section 552.024 of the Government Code, the city must withhold the information we marked under section 552.117(a)(1) of the Government Code; however, the city may only withhold the marked cellular telephone number if the cellular telephone service is not paid for by a governmental body. Conversely, to the extent the employee at issue did not timely request confidentiality under section 552.024, the city may not withhold the information under section 552.117(a)(1).

Section 552.139 of the Government Code provides, in relevant 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;
- (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[.]

Gov't Code § 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;
- (2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or

(3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

Id. § 2059.055(b). T-Mobile contends the remaining information “concerns, at least in part,” the city’s computer systems. Upon review, we find T-Mobile has not demonstrated the remaining information at issue relates to the city’s computer network security, or to the design, operation, or defense of the city’s computer network as contemplated in section 552.139(a). Further, T-Mobile has not demonstrated the remaining information at issue consists of a computer network vulnerability report or assessment as contemplated by section 552.139(b). Accordingly, the city may not withhold any of the remaining information at issue under section 552.139 of the Government Code.

T-Mobile seeks to withhold its employees’ e-mail addresses within the remaining information at issue. 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). *Id.* § 552.137(a)-(c). The e-mail addresses at issue are not a type specifically excluded by section 552.137(c) of the Government Code. Accordingly, the city must withhold all of T-Mobile’s employees’ e-mail addresses, and the additional e-mail addresses we marked, under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure.

In summary, the city must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code. The city may withhold the information you marked under section 552.107(1) of the Government Code. The city must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 771.061 of the Health and Safety Code. To the extent the telephone numbers and addresses we marked under section 772.218 were furnished by a 9-1-1 service supplier and the addresses do not correspond to the address of a cellular telephone antenna, the city must withhold the marked telephone numbers and addresses under section 552.101 of the Government Code in conjunction with section 772.218 of the Health and Safety Code. To the extent the employee at issue timely requested confidentiality under section 552.024 of the Government Code, the city must withhold the information we marked under section 552.117(a)(1) of the Government Code; however, the city may only withhold the marked cellular telephone number if the cellular telephone service is not paid for by a governmental body. The city must withhold T-Mobile’s employees’ e-mail addresses, and the additional e-mail addresses we marked, under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure. 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,



Kieran Hillis
Assistant Attorney General
Open Records Division

KH/sb

Ref: ID# 660232

Enc. Submitted documents

c: 3 Requestors
(w/o enclosures)

1 Third Party
(w/o enclosures)