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ATTORNEY GENERAL OF TEXAS

May 9, 2022

Mr. David J. Klein
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Lloyd, Gosselink, Rochelle & Townsend, P.C.
816 Congress Avenue, Suite 1900
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OR2022-13243

Dear Mr. Klein:

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# 944368.

The Springhills Water Management District (the "district"), which you represent, received a request for several categories of information related to communications and meeting between certain individuals pertaining to certain topics or from a particular time period. You state the district has released some information. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you note the requestor asks the district to answer questions. The Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). However, a governmental body must make a good-faith effort to relate a request to any responsive information that is within its possession or control. Open Records Decision Nos. 561 at 8-9 (1990), 555 at 102. We assume the district has made a good-faith effort to do so.

Next, we note some of the submitted information is not responsive to the present request because it was created after the date of the present request. This ruling does not address the public availability of the non-responsive information, which we have marked, and the district need not release it in response to this request.

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 section 418.181 of the Texas Homeland Security Act (the “HSA”), chapter 418 of the Government Code. Section 418.181 provides as follows:

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 be related to a governmental body’s security-concerns or emergency preparedness does not make such 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 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).

You state the information in Exhibit B reveals technical details of layouts of the district’s public water system, “including the location of water pipelines and connections, as well as specifications of the size of each line.” The district asserts, and we agree, these district utilities are part of the district’s critical infrastructure for purposes of section 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”). You explain the information at issue “could be used by criminals or terrorists to target critical points in [the district’s water] system[,]” and that “[a]ny damage to [the district’s] lines or connections would affect public health and safety by contaminating drinking water and disrupting water service to [the district’s] member-customers.” Based on these representations and our review, we find the district has demonstrated release of some of the information at issue would identify the technical details of particular vulnerabilities of the district’s critical infrastructure to an act of terrorism. Therefore, the district 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 the district has failed to demonstrate the remaining information at issue identifies the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism, and the district may not withhold any of the remaining information under section 552.101 on the basis of section 418.181.

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. *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 “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 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). 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: (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. *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 responsive information in Exhibit C consists of communications between attorneys for the district and district employees that were made for the purpose of providing legal services to the district. You indicate the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find some of the responsive information at issue consists of privileged attorney-client communications. Therefore, the district may generally withhold the information we have marked under section 552.107(1) of the Government Code. We note, however, some of these otherwise privileged e-mail strings include e-mails and attachments received from parties you have not demonstrated are privileged. Furthermore, if the e-mails and attachments received from the non-privileged parties are removed from the otherwise privileged e-mail strings in which they appear and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails and attachments, which we have marked, are maintained by the district separate and apart from the otherwise privileged e-mail strings in which they appear, the district may not withhold these non-privileged e-mails and attachments under section 552.107(1). Further, you have failed to establish the remaining responsive information at issue constitutes privileged attorney-client communications for the purposes of section 552.107(1). Accordingly, the district may not withhold the remaining responsive information at issue under section 552.107(1) of the Government Code.

In summary, the district 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 district may generally withhold the information we have marked under section 552.107(1) of the Government Code; however, if the non-privileged e-mails and

attachments we have marked are maintained by the district separate and apart from the otherwise privileged e-mail strings in which they appear, the district may not withhold these non-privileged e-mails and attachments under section 552.107(1) of the Government Code. The district must release the remaining responsive 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Erin Groff
Assistant Attorney General
Open Records Division

EMG/jxd

Ref: ID# 944368

Enc. Submitted documents

c: Requestor
(w/o enclosures)