



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 26, 2022

Ms. Elizabeth Neally
Counsel for the Harlingen Consolidated Independent School District
Walsh, Gallegos, Trevino, Kyle & Robinson, P.C.
P.O. Box 460606
San Antonio, Texas 78246-0606

OR2022-33195

Dear Ms. Neally:

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# 977079 (Ref. No. 11050.1251).

The Harlingen Consolidated Independent School District (the "district"), which you represent, received a request for communications involving specified individuals and a copy of a particular draft proposal. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.111 of the Government.¹ We have considered the exceptions you claim and reviewed the submitted information.

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. This section encompasses information that is made confidential by other statutes. The district raises section 552.101 in conjunction with section 418.181 of the Homeland Security Act (the "HSA"). Sections 418.176 through 418.182 were added to chapter 418 of the Government Code as part of the HSA. Section 418.181 provides "[t]hose 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 measures does not make the 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

¹ Although you raise Texas Rule of Civil Procedure 192.5, we note the proper exception to raise when asserting the attorney work product privilege in this instance is section 552.111 of the Government Code. *See* Open Records Decision No. 677 (2002).

of a statute's key terms is not sufficient to demonstrate the applicability of the claimed provision. As with any exception to disclosure, a claim under section 418.181 must be accompanied by an adequate explanation of 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 assert, and we agree, the district's schools are critical infrastructure. *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 identifies "campus locations in which [district] police officers are stationed throughout the day for security." You state, "disclosure of this information would make employees and students vulnerable to terroristic or other criminal activity by revealing the approximate number of police officers at a campus, as well as the location of the police officers on the campus." Based on these representations and our review, we find you have demonstrated some of the submitted information identifies the technical details of particular vulnerabilities of the district's schools to an act of crime or terrorism. Accordingly, 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.² However, we find you have failed to demonstrate the remaining information identifies the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. *See* Open Records Decision Nos. 542 (stating that governmental body has burden of establishing that exception applies to requested information), 532 (1989), 515 (1988), 252 (1980). Therefore, the district may not withhold any portion of the remaining responsive information under section 552.101 in conjunction with section 418.181.

Section 552.101 of the Government Code also encompasses information that is made confidential by other statutes. Section 37.2121 of the Education Code concerns memoranda of understanding and mutual aid agreements, and the related duties of the Texas School Safety Center (the "center"). This section provides, in relevant part:

(d) Each school district that enters into a memorandum of understanding or mutual aid agreement addressing issues that affect school safety and security shall, at the center's request, provide a copy of the memorandum or agreement to the center.

(d-1) A copy of a memorandum of understanding or mutual aid agreement provided to the center under Subsection (d) is confidential and not subject to disclosure under Chapter 552, Government Code.

Educ. Code § 37.2121(d)-(d-1). You state some of the remaining information consists of a working draft copy of a proposed "Interlocal Agreement between [the district] and the City of Harlingen in developing the specific terms and conditions for a School Resource Officer Program." Accordingly, as the information at issue is a working draft, it is not a

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

memorandum of understanding or mutual aid agreement that the district has entered into and provided to the center. Further, we find none of the remaining information consists of a memorandum of understanding or mutual aid agreement. Therefore, the district may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with 37.2121(d-1) of the Education Code.

Section 552.111 of the Government Code 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 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as

(1) material 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 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 the information was made or developed in anticipation of litigation, we must be satisfied

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 remaining information consists of attorney work product. However, we find you have not demonstrated the remaining information contains the mental impressions, opinions, conclusions, or legal theories of an attorney or the attorney's representative that was developed in anticipation of litigation or for trial. Accordingly, the district may not withhold the remaining information under the work product privilege of section 552.111 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 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 <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,

Chase D. Young
Assistant Attorney General
Open Records Division

CDY/pt

Ref: ID# 977079

Enc. Submitted documents

c: Requestor
(w/o enclosures)