

### Let it Snowden!

or,  
Knowing what you know, can you ethically use  
your cell phone to practice law?

Thomas A. Gwosdz  
City Attorney  
Victoria, Texas

---

---

---

---

---

---

---

---

It's not just a phone anymore.



---

---

---

---

---

---

---

---

### Endless Possibilities



---

---

---

---

---

---

---

---

## Not here to discuss TPIA

- 552.107 –
  - Information is excepted from the requirements of Section 552.021 if: (1) it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct; or (2) a court by order has prohibited disclosure of the information.
  - Protection of communications within attorney-client privilege from disclosure under Open Records Act extends to factual information or requests for legal advice communicated by client to attorney, as well as to legal advice or opinion rendered by attorney to client or associated attorney in furtherance of rendition of legal services to client. Tex. Atty. Gen. Op., ORD-574 (1991).
  - Attorney's notes in case file are protected from disclosure under Open Records Act to extent they document client confidences or legal advice or opinion communicated to client, but mere factual notations or notations concerning information garnered from third parties are not protected. Tex. Atty. Gen. Op., ORD-574 (1990).

---

---

---

---

---

---

---

---

## Not here to discuss TPIA

- 552.107 –
  - Information is excepted from the requirements of Section 552.021 if: (1) it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct; or (2) a court by order has prohibited disclosure of the information.
  - Protection of communications within attorney-client privilege from disclosure under Open Records Act extends to factual information or requests for legal advice communicated by client to attorney, as well as to legal advice or opinion rendered by attorney to client or associated attorney in furtherance of rendition of legal services to client. Tex. Atty. Gen. Op., ORD-574 (1991).
  - Attorney's notes in case file are protected from disclosure under Open Records Act to extent they document client confidences or legal advice or opinion communicated to client, but mere factual notations or notations concerning information garnered from third parties are not protected. Tex. Atty. Gen. Op., ORD-574 (1990).

---

---

---

---

---

---

---

---

## Not here to discuss TPIA

- 552.107 –
  - Information is excepted from the requirements of Section 552.021 if: (1) it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct; or (2) a court by order has prohibited disclosure of the information.
  - Protection of communications within attorney-client privilege from disclosure under Open Records Act extends to factual information or requests for legal advice communicated by client to attorney, as well as to legal advice or opinion rendered by attorney to client or associated attorney in furtherance of rendition of legal services to client. Tex. Atty. Gen. Op., ORD-574 (1991).
  - Attorney's notes in case file are protected from disclosure under Open Records Act to extent they document client confidences or legal advice or opinion communicated to client, but mere factual notations or notations concerning information garnered from third parties are not protected. Tex. Atty. Gen. Op., ORD-574 (1990).

---

---

---

---

---

---

---

---

## Not here to discuss TPIA

- 552.107 –
  - Information is exempted from the requirements of Section 552.021 if: (1) it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct; or (2) a court by order has prohibited disclosure of the information.
  - Protection of communications within attorney-client privilege from disclosure under Open Records Act extends to factual information or requests for legal advice communicated by client to attorney, as well as to legal advice or opinion rendered by attorney to client or associated attorney in furtherance of rendition of legal services to client. Tex. Atty. Gen. Op., ORD-574 (1991).
  - Attorney's notes in case file are protected from disclosure under Open Records Act to extent they document client confidences or legal advice or opinion communicated to client, but mere factual notations or notations concerning information garnered from third parties are not protected. Tex. Atty. Gen. Op., ORD-574 (1990).

---

---

---

---

---

---

---

---

## Thank you, Brian Williams




---

---

---

---

---

---

---

---

## Who is Edward Snowden?

- 2007 -- CIA assigned Snowden to Geneva Switzerland with diplomatic cover to maintain computer network security.
  - Considered the top technical and cyber security expert in the region.
- 2009 -- Dell employee under NSA contract to manage computer system or instruct military officers how to defend networks.
- 2013 – Transferred to Booz Allen

---

---

---

---

---

---

---

---

### The Road to Disclosure

- Snowden claims multiple internal complaints about constitutional violations.
  - -- made "tremendous efforts" to report.
  - -- to ten separate supervisors.
- Officials claim only one email from Snowden objects to programs.

---

---

---

---

---

---

---

---

### The Disclosures

- First contacted media in late 2012, culminating in media stories published in May 2013.
- Extent of Disclosure:
  - 15,000 Australian files
  - 58,000 British files
  - 1,700,000 US files
  - Media claims less than 1% of documents have been published.
- Collectively reveal systematic surveillance by multiple government entities.

---

---

---

---

---

---

---

---

### Five Eyes

*A "supra-national intelligence organization that doesn't answer to the laws of its own countries."*

- An international alliance of Anglophonic countries, including Australia, Canada, New Zealand, the United Kingdom and the United States of America.
  - ECHELON revealed in 1990s

---

---

---


---

---

---

---

---



- Originated in 1970s
- Expanded after 9-11
- In-depth surveillance of live communications and stored information.
  - Court-approved search terms
  - Email, Video, Voice chat, Photos, VOIP, Social media
- Prior to encryption
- 3-degrees of separation

---

---

---


---

---

---

---

---



- Front-end search engine.
- Not for collection of data.

---

---

---

---

---

---

---

---



Where is X-KEYSCORE?

Approximately 150 sites  
Over 700 servers

TOP SECRET//COMINT//REL TO USA, AUS, CAN, GBR, NZL

---

---

---

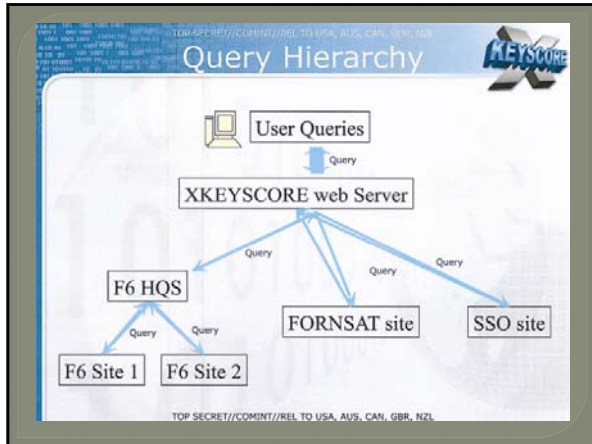
---

---

---

---

---



---

---

---

---

---

---

---

---

- 
- Front-end search engine.
  - Not for collection of data.
  - Allows “strong selector” and “soft selector” searches.
  - Deep analysis
    - Track author of document; show usage of VPN, detect nationality of foreigners
    - attractive to foreign partners (Germany and Sweden)

---

---

---

---

---

---

---

---



---

---

---

---

---

---

---

---

## Tempora

- GCHQ gathers telephone calls, email, facebook entries, and personal internet history for both targeted suspects and private citizens.
- All fibre onto the island, captures up to 21 petabytes/day.
- British law allows the foreign secretary to sign a certificate to intercept broad categories of information, so long as one end of the communication is abroad.

---

---

---

---

---

---

---

---

## Muscular

**MUSCULAR (DS-200B)**  
TOP SECRET//COMINT//REL-USA,GBR

- Operational July 2009
- (S//REL USA,GBR) Large international access located in United Kingdom
- Four TURMOIL T16s at 2.5Gb each - total ingest 10Gb
- LPTs installed May 2010 increase ingest to 20Gb
- Tasking worked cooperatively with GCHQ counterparts
- Partner to assume total control/responsibility for systems
- IP Subnet promotion in place, VoIP in the works

TOP SECRET//COMINT//REL-USA,GBR

---

---

---

---

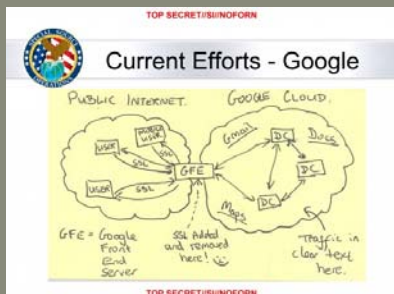
---

---

---

---

## Muscular




---

---

---

---

---

---

---

---



## Ethical Rules

### Rule 1.05

- (b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e) and (f), a lawyer shall not knowingly: (1) Reveal confidential information of a client or a former client to: (i) a person that the client has instructed is not to receive the information; or (ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.

---

---

---

---

---

---

---

---

## Disclosure of Privileged Client Information

• Can be revealed under paragraph (c):

- (1) When the lawyer has been expressly authorized to do so in order to carry out the representation.
- (2) When the client consents after consultation.
- (3) To the client, the client's representatives, or the members, associates, and employees of the lawyer's firm, except when otherwise instructed by the client.
- (4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rules of Professional Conduct, or other law.

---

---

---

---

---

---

---

---

## Disclosure of Privileged Client Information

• Can be revealed under paragraph (c):

- (1) When the lawyer has been expressly authorized to do so in order to carry out the representation.
- (2) When the client consents after consultation.
- (3) To the client, the client's representatives, or the members, associates, and employees of the lawyer's firm, except when otherwise instructed by the client.
- (4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rules of Professional Conduct, or other law.

---

---

---

---

---

---

---

---



### Disclosure of Privileged Client Information

- Can be revealed under paragraph (c):
- (1) When the lawyer has been expressly authorized to do so in order to carry out the representation.
- (2) When the client consents after consultation.
- (3) To the client, the client's representatives, or the members, associates, and employees of the lawyer's firm, except when otherwise instructed by the client.
- (4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law.

---

---

---

---

---

---

---

---

### Disclosure of Privileged Client Information

- (5) To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.
- (6) To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer's associates based upon conduct involving the client or the representation of the client.
- (7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.
- (8) To the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used

---

---

---

---

---

---

---

---

### Disclosure of Privileged Client Information

- (4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law.
- In 1974, the SEC threatened to name an attorney a respondent in an injunctive proceeding if the attorney continued to assert the attorney-client privilege on behalf of his former client.
- The attorney sought an opinion from the Professional Ethics Committee

---

---

---

---

---

---

---

---

## Disclosure of Privileged Client Information

The Ethics Committee's upheld the attorney's obligation to protect privileged information:

*"The determination of whether to disclose or testify or not should not be determined by the S.E.C., but by a Court of law. In light of the various circumstances and highly-involved questions, A should not be required to pick and choose which questions are covered by the privilege—which questions may be covered by the ethical considerations, and which questions to which he should make full answer."*

*The method of approach exhibited by the S.E.C. in this instance, that is, to investigate a party by propounding questions to this attorney and then forcing the attorney to testify against his client, runs contra to the entire system of adversary jurisprudence known to the common law."*

---

---

---

---

---

---

---

---

## Disclosure of Unprivileged Client Information

A lawyer may disclose unprivileged client information:

- (1) When impliedly authorized to do so in order to carry out the representation.
- (2) When the lawyer has reason to believe it is necessary to do so in order to:
  - (i) carry out the representation effectively;
  - (ii) defend the lawyer or the lawyer's employees or associates against a claim of wrongful conduct;
  - (iii) respond to allegations in any proceeding concerning the lawyer's representation of the client; or
  - (iv) prove the services rendered to a client, or the reasonable value thereof, or both, in an action against another person or organization responsible for the payment of the fee for services rendered to the client.

---

---

---

---

---

---

---

---

## Disclosure of Unprivileged Client Information

In a 1994 claim for fees from the Texas Worker's Compensation Commission, an attorney was required to submit evidence of the representation.

- General description of the nature of conferences between the attorney and client
  - "Discussed client's medical treatment"
  - "Discussed client's weekly income benefits"
- Not specifics regarding the communications between the client and the lawyer:
  - "Client wants hernia surgery"
  - "Client complains that \$210/wk won't pay for groceries"

---

---

---

---

---

---

---

---

## Disclosure of Unprivileged Client Information

• Ethics Opinion 506

*"a disclosure that does not involve the disclosure of the substance of a communication does not involve the lawyer-client privilege and is subject to the provisions of Rule 1.05 relating to "unprivileged client information" as that term is defined in Rule 1.05(a)...."*

*"[A]n attorney may disclose unprivileged information on the general nature of attorney/client conferences when such disclosure is required by the Texas Workers' Compensation Commission in order for the attorney to obtain payment of the attorney's fee for services to the client."*

---

---

---

---

---

---

---

---

## Disclosure of Unprivileged Client Information

• A lawyer may disclose unprivileged client information:

- (1) When impliedly authorized to do so in order to carry out the representation.
- (2) When the lawyer has reason to believe it is necessary to do so in order to:
  - (i) carry out the representation effectively;
  - (ii) defend the lawyer or the lawyer's employees or associates against a claim of wrongful conduct;
  - (iii) respond to allegations in any proceeding concerning the lawyer's representation of the client; or
  - (iv) prove the services rendered to a client, or the reasonable value thereof, or both, in an action against another person or organization responsible for the payment of the fee for services rendered to the client.

---

---

---

---

---

---

---

---

## Analysis: Don't use your phone!

1.05(C) -- "PRIVILEGED"

1.05(D) -- "UNPRIVILEGED"

*(4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law.*

*(2) When the lawyer has reason to believe it is necessary to do so in order to: (i) carry out the representation effectively*

---

---

---

---

---

---

---

---

## But wait, there's more...

- In February, Edward Snowden provided the press a document describing “how Australian intelligence conducted surveillance of trade talks between Indonesia and the United States and, in the process, monitored communications between Indonesian officials and an American law firm retained by Indonesia for help with the trade dispute.”
- In response, NSA director Gen. Keith Alexander assured the American Bar Association in a letter that the U.S has policy and legal safeguards to prevent the mishandling of confidential attorney information collected during surveillance missions.

---

---

---

---

---

---

---

---

## “Minimization”

- Protections kick in when it becomes apparent that acquired communications are taking place between any person known to be under criminal indictment in the United States and an attorney representing that individual in the matter.
  1. Monitoring of that communication must halt,
  2. the communication must be segregated from other acquired information and
  3. special precautions must be taken through the DOJ's National Security Division to ensure the communications play no part in any criminal prosecution.
- As an added precaution, the NSA Office of General Counsel is also required to review all proposed disseminations of U.S. person attorney-client privileged communications prior to dissemination.

---

---

---

---

---

---

---

---

## Ethical Rules

- Rule 1.05
  - (b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e) and (f), a lawyer shall not knowingly: (1) Reveal confidential information of a client or a former client to: (i) a person that the client has instructed is not to receive the information; or (ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.

---

---

---

---

---

---

---

---

## Again: Don't use your phone!

- Or your iPad.

- Or your Laptop.

- Or your desktop...

---

---

---

---

---

---

---

---