



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 9, 1998

Ms. Tamara Armstrong
Assistant County Attorney
P.O. Box 1748
Austin, Texas 78767

OR98-1631

Dear Ms. Armstrong:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 116690.

The Travis County Auditor (the "Auditor") received a request for information concerning the Travis County Clerk. You state that the Auditor is releasing to the requestor portions of the requested information. However, you assert that portions of the information are excepted from public disclosure based on sections 552.101, 552.107(1), 552.108 and 552.111 of the Government Code. You have submitted a representative sample of the information at issue.¹

We begin with exhibits A and B, which you characterize as the Auditor's working papers and law enforcement records. You contend that these records are excepted from disclosure pursuant to subsections (a)(1) and (b)(1) of section 552.108, which read as follows:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]

¹In reaching our conclusion here, we assume that 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) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

You inform us that the information in exhibit A concerns an active, ongoing audit of the Travis County Clerk's Office and the information in exhibit B concerns compliance with applicable tax laws with respect to payment of election workers. Relying on *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668 (Tex. 1995), you argue that the information in exhibit A reveals the Auditor's law enforcement techniques, methods and strategies for conducting the audit and the information in exhibit B reflects law enforcement methods and strategies regarding inquires by the Auditor into questions of compliance with applicable law. You state that the release of the information in both exhibits would interfere with effective law enforcement and make it more difficult for the Auditor to do her job.

The court in *A & T Consultants* held that former section 552.108 of the Government Code² applied to certain information of the Comptroller of Public Accounts regarding uncompleted audits of corporate franchise taxpayers. Reasoning that effective enforcement of the tax laws rests in part on a taxpayer's inability to predict the approach of a tax examination and the focus of an audit, the court found that former section 552.108 protects the Comptroller's reasons for performing an audit, the audit method and audit group,³ and assignment codes.⁴ *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668 at 678. The court also held that former section 552.108 applied to generation list dates and assignment dates for audits which had not been completed. *Id.* at 677-678. You have not identified nor have we located in exhibits A and B the type of information the court in *A & T Consultants* held to be excepted from disclosure under section 552.108. Nor do we believe you have otherwise explained how the release of the information would interfere with law enforcement. A governmental body must explain how release of investigative information would interfere with law enforcement or prosecution unless the records supply this explanation of their face. *See Open Records Decision No. 444 (1986)*. This office has held that the release of routine investigative procedures and commonly know techniques would

²Former section 552.108 excepted from disclosure "[a] record of a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime" and [a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution."

³The audit method constitutes the Comptroller's choice about the strategy that he will use in an audit. The basis for an audit's assignment to a certain group involves the Comptroller's decision on how to maximize staff resources for law enforcement. *A & T Consultants*, 904 S.W.2d 668 at 678.

⁴The code assigned to each audit out of nine possible options signifies why the Comptroller assigned the audit. *A & T Consultants*, 904 S.W.2d 668 at 680.

not unduly interfere with law enforcement and crime prevention. *See Open Records Decision No 216 (1978)*. Accordingly, we find that section 552.108 is inapplicable to the information in exhibits A and B.

You also raise section 552.111 of the Government Code for exhibit B. Section 552.111 of the Government Code excepts from required public disclosure:

An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.

This exception applies to a governmental body's internal communications consisting of advice, recommendations, or opinions reflecting the policymaking process of the governmental body at issue. *See Open Records Decision No. 615 (1993)*. This exception does not except from disclosure purely factual information that is severable from the opinion portions of the communication. *See id.* We have reviewed the information. We do not believe exhibit B contains opinion, advice or recommendation regarding the Auditor's policymaking and consequently find that section 552.111 is inapplicable.

You raise section 552.101 of the Government Code in conjunction with section 571.015 of the Health and Safety Code for exhibit C, a computer printout concerning mental commitment cases. Section 552.101 excepts from disclosure information made confidential by law, including information made confidential by statute. Section 571.015 reads as follows:

(a) Each paper in a docket for mental health proceedings in the county clerk's office, including the docket book, indexes, and judgment books, is a public record of a private nature that may be used, inspected, or copied only under a written order issued by the county judge, a judge of a court that has probate jurisdiction, or a judge of a district court having jurisdiction in the county in which the docket is located.

(b) A judge may not issue an order under Subsection (a) unless the judge enters a finding that:

(1) the use, inspection, or copying is justified and in the public interest;
or

(2) the paper is to be released to the person to whom it relates or to a person designated in a written release signed by the person to whom the paper relates.

(c) In addition to the finding required by Subsection (b), if a law relating to confidentiality of mental health information or physician-patient privilege applies, the judge must find that the reasons

for the use, inspection, or copying fall within the applicable statutory exemptions.

(d) The papers shall be released to an attorney representing the proposed patient in a proceeding held under this subtitle.

(e) This section does not affect access of law enforcement personnel to necessary information in execution of a writ or warrant.

You state that the Auditor gathered the information in the course of the audit. The printout contains the cause number, date incurred, amount paid and date paid for each case. As the Auditor apparently generated the information, we do not believe the information is a "paper in a docket for mental health proceedings in the county clerk's office." Accordingly, we conclude that exhibit C is not excepted from disclosure under section 552.101 of the Government Code.

We turn next to exhibit D. You state that this information is excepted from section 552.108 because it pertains to the audit. We do not believe you have established the applicability of section 552.108 to the information.

You also raise section 552.101 in conjunction with the constitutional and common-law right to privacy. The United States Constitution protects two kinds of individual privacy interests: (1) an individual's interest in independently making certain important personal decisions about matters that the United States Supreme Court has stated are within the "zones of privacy," as described in *Roe v. Wade*, 410 U.S. 113 (1976) and *Paul v. Davis*, 424 U.S. 693 (1976). The "zones of privacy" implicated in the individual's interest in independently making certain kinds of decisions include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. The second individual privacy interest that implicates constitutional privacy involves matters outside the zones of privacy. To determine whether the constitutional right to privacy applies, this office applies a balancing test, weighing the individual's interest in privacy against the public right to know the information. See Open Records Decision No. 455 at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985)). We conclude that the constitutional right to privacy does not protect the information in this instance.

Section 552.101 also excepts from required public disclosure information made confidential by judicial decision. This exception applies to information made confidential by the common-law right to privacy. *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. See *id.* A public employee's participation in a voluntary investment program or deferred compensation plan that his or

her employer offers but does not fund, is protected from disclosure based on common-law privacy. *See* Open Records Decision No. 600 (1992). We agree that the information concerning private insurance and deferred compensation is private financial information. *See id.* The federal tax information is also protected from disclosure pursuant to section 552.101 of the Government Code. 26 U.S.C. § 6103(a); *see* Open Records Decision No. 600 (1992).

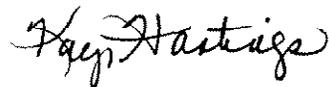
Finally, we reach exhibit E and your section 552.107(1) claim. Section 552.107(1) of the Government Code states that information is excepted from required public disclosure if:

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 Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.

Although section 552.107(1) appears to except information within rule 1.05 of the Texas State Bar Disciplinary Rules of Professional Conduct, the rule cannot be applied as broadly as written to information that is requested under the Open Records Act. Open Records Decision No. 574 (1990) at 5. To prevent governmental bodies from circumventing the Open Records Act by transferring information to their attorneys, section 552.107(1) is limited to material within the attorney-client privilege for confidential communications; "unprivileged information" as defined by rule 1.05 is not excepted under section 552.107(1). Open Records Decision Nos. 574 at 5; 462 (1987) at 13-14. Thus, section 552.107(1) protects information that reveals attorney advice and opinion or client confidences. *See* Open Records Decision No. 574 (1990). We have reviewed exhibit E and marked the information protected from disclosure under section 552.107(1).

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Hastings
Assistant Attorney General
Open Records Division

KHH/mjc

Ref.: ID# 116690

Enclosures: Submitted documents

cc: Mr. C. M. Schauerte
8501A Cima Oak Lane
Austin, Texas 78759
(w/o enclosures)