



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

February 20, 2003

Mr. Gordon Bowman  
Assistant County Attorney  
Travis County  
P.O. Box 1748  
Austin, Texas 78767

OR2003-1132

Dear Mr. Bowman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 176773.

The Travis County District Attorney's Office (the "TCAO") and the Travis County Sheriff's Office (the "TCSO") received the same request for information pertaining to an incident that occurred on June 29, 2002 and involved TCSO peace officers and Ian Taylor. You inform us you have released the medical records of Ian Taylor to the requestor; however, you assert the remainder of the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.111, 552.117, and 552.130 of the Government Code. We have reviewed the representative sample of information you submitted and we have considered the exceptions you claim.<sup>1</sup>

Initially, we note that the submitted information is made expressly public under section 552.022 of the Government Code. Section 552.022 provides, in relevant part, as follows:

---

<sup>1</sup> 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). 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.

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

The submitted information consists of a completed investigation, made expressly public by section 552.022(a)(1). You claim some of the responsive documents are excepted under section 552.108.

Section 552.108 of the Government Code provides in pertinent part as follows:

(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[.]

Gov't Code § 552.108(b)(1). This office has stated a governmental body may withhold certain procedural information under section 552.108 of the Government Code, or its statutory predecessors. *See, e.g.*, Open Records Decision Nos. 531 (1989) (detailed use of force guidelines), 456 (1987) (forms indicating location of off-duty police officers), 413 (1984) (security measures to be used at next execution), 143 (1976) (specific operations or specialized equipment directly related to investigation or detection of crime). However, to claim protection under this aspect of section 552.108, a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). Further, a governmental body may not withhold commonly known policies and techniques under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common-law rules, and constitutional limitations on use of force are not protected under section 552.108), 252 at 3 (1980) (governmental body did not meet its burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known). Also, this office has concluded that section 552.108 excepts from public disclosure information that relates to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (holding that section 552.108 excepts detailed guidelines regarding a police department's use of force policy), 508 (1988) (holding that release of dates of prison transfer could impair security), 413 (1984) (holding that section 552.108 excepts sketch showing security measures for execution).

Referencing the information marked "Jail Records" and the document labeled Tab D, you state, "[The] information is related to jail security and illustrates the procedures used in investigations of incidents in the jail." However, after reviewing the records in issue, we find the documents do not contain information relating to investigatory procedures. Further, you have not demonstrated how the disclosure of this information would interfere with law enforcement. Therefore, we conclude the TCAO and TCSO may not withhold this information based on section 552.108(b)(1).

In your argument to except the information marked "law enforcement exception" and the document identified as Tab E, you refer to the TCSO's use of force policy and you contend "[t]he release of the policy would interfere with law enforcement[.]" However, after reviewing the memoranda pertaining to disciplinary action recommendations and training exercise incidents, we find these documents do not reveal the specifics of the TCSO's use of force policy. Therefore, we conclude you have not met your burden of establishing how and why release of these memoranda would interfere with law enforcement and crime prevention. Thus, the TCAO and the TCSO may not withhold information pursuant to section 552.108(b)(1) of the Government Code.

Next, section 552.022(a)(1) provides that the TCAO and TCSO may withhold the submitted information if it is made confidential under other law. *See* Gov't Code § 552.022. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses common-law privacy. When a governmental entity compiles criminal history information pertaining to a particular individual, the compiled information takes on a character that implicates the individual's right of privacy in a manner that the same information in an uncompiled state does not. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); *see also* Open Records Decision No. 616 at 2-3 (1993). You assert the information you have marked "CHRI" and labeled Tab A constitutes criminal history record information ("CHRI"). While we agree with your characterization of some of the information, we find the requestor has a special right of access to this document. Section 552.023 gives a person or a person's authorized representative a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from disclosure by laws intended to protect that person's privacy interest.<sup>2</sup> In this instance, as the requestor represents the subject of the document in issue, he has a special right of access to this information. Therefore, though the release of CHRI implicates a person's privacy interest, the requestor has a special right of access to the documents labeled Tab A pursuant to section 552.023 of the Government Code. Further, we agree the information marked "130" and labeled Tab G is subject to section 552.130 of the Government Code. Section 552.130 excepts from public disclosure

---

<sup>2</sup> Because the information to be released under section 552.023 is confidential with respect to the general public, if either the TCAO or the TCSO receives a future request for this information from an individual other than the requestor or his authorized representative, the TCAO and TCSO should again seek our decision.

information relating to a driver's license, license plate, or motor vehicle title or registration issued by an agency of this state. Gov't Code § 552.130. However, as this provision also exists to protect a person's privacy interest, the requestor has a special right of access to information subject to section 552.130. *See* Gov't Code § 552.023(a). Therefore, the TCAO and TCSO must release the information marked "CHRI" and "130" or labeled Tabs A and G.

Also, the doctrine of common-law privacy protects information from public disclosure that meets the criteria established by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information is protected under the common-law right to privacy when (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). This office has determined some personal financial information is highly intimate or embarrassing and thus, meets the first part of the *Industrial Foundation* test. Open Records Decision Nos. 600 (1992) (Employee's Withholding Allowance Certificate; designation of beneficiary of employee's retirement benefits; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, healthcare, or dependent care), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history), 523 (1989) (credit reports, financial statements, and other personal financial information), 373 (1983) (assets and income source information). We believe some of the submitted documents contain personal financial information in which the public has no legitimate interest. Accordingly, the TCAO and TCSO must withhold the information we have marked under section 552.101 in conjunction with common-law privacy.

Additionally, you assert sections 552.103, 552.107, and 552.111 of the Government Code except all or some of the submitted information from disclosure. Because these are discretionary exceptions that protect the governmental body's interests, they are not other law that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the TCAO and TCSO may not withhold information pertaining to the completed investigation under sections 552.103, 552.107, and 552.111 of the Government Code.

However, we also find the attorney-client privilege in Rule 503 of the Texas Rules of Evidence. The Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). This office has determined that when a

governmental body claims the attorney-client privilege for information subject to release under section 552.022, the proper analysis is whether the information at issue is excepted under Texas Rule of Evidence 503 (attorney-client communications). Open Records Decision No. 676 at 5-6 (2002). Therefore, we will consider whether the submitted information is excepted under Rule 503 of the Texas Rules of Evidence.

Rule 503 of the Texas Rules of Evidence provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

A communication is "confidential" if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. Tex. R. Evid. 503(a)(5). Accordingly, to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body: 1) must show the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) must identify the parties involved in the communication; and 3) must show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the entire communication is confidential under Rule 503, provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 4527 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1998, no pet.)

(privilege attaches to complete communication, including factual information). You inform us the documents marked "552.107" and identified as Tab B "were created during an investigation of excessive force . . . for the purpose of facilitating advice from the [TCAO]." After reviewing your arguments and the documents in issue, we agree that the document labeled Tab B consists of a communication between privileged parties, unintended for disclosure to third parties, made for the purpose of the rendition of professional legal services. Therefore, the TCAO and TCSO may withhold the e-mail communication labeled Tab B pursuant to Texas Rule of Evidence 503. However, the TCAO and TCSO must release the handwritten notes found in the same document as they are not part of the actual communication and thus, do not meet the Rule 503 test.

Also, the submitted documents contain information subject to section 552.117 of the Government Code. Specifically, section 552.117(2) excepts from public disclosure information that reveals a peace officer's home address, home telephone number, social security number, and whether the officer has family members. "Peace officer" is defined by article 2.12 of the Code of Criminal Procedure. Thus, we agree with some of your redactions and we have marked additional information the TCAO and TCSO must withhold under section 552.117(2).

Finally, we note the submitted information contains a videotape that relates to the completed investigation. Section 552.119 excepts from public disclosure a photograph of a peace officer that, if released, would endanger the life or physical safety of the officer, unless one of three exceptions applies.<sup>3</sup> The three exceptions are: (1) the officer is under indictment or charged with an offense by information; (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or (3) the photograph is introduced as evidence in a judicial proceeding. This section also provides that a photograph exempt from disclosure under this section may be made public only if the peace officer gives written consent to the disclosure. Open Records Decision No. 502 (1988). The videotape in issue contains images of peace officers. Because none of the exceptions apply and as you have not informed us that any of the peace officers depicted in the videotape have executed a written consent for disclosure of their pictures, the TCAO and TCSO must redact from the videotape all images of peace officers pursuant to section 552.119 of the Government Code. The TCAO and TCSO must release the remainder of the videotape.

In summary, as the submitted information pertains to a completed investigation, it is expressly public under section 552.022(a)(1) of the Government Code. Accordingly, the TCAO and TCSO must release most of the information to the requestor. However, with the exception of the handwritten notes, the TCAO and TCSO may withhold the e-mail communication identified as Tab B under Texas Rule of Evidence 503. The TCAO and TCSO must redact: 1) certain marked information under sections 552.101 in conjunction

---

<sup>3</sup>"Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

with common-law privacy and 552.117 of the Government Code and 2) the images of peace officers in the videotape pursuant to section 552.119 of the Government Code.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this

ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Christen Sorrell  
Assistant Attorney General  
Open Records Division

CHS/seg

Ref: ID# 176773

Enc: Submitted documents

c: Mr. Robert Swafford  
1513 West 6<sup>th</sup> Street, Suite B  
Austin, Texas 78703  
(w/o enclosures)