



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

June 19, 2003

Mr. David B. Casas  
Assistant City Attorney  
Administrative and Financial Services Division  
City of San Antonio  
P.O. Box 839966  
San Antonio, Texas 78283-3966

OR2003-4228

Dear Mr. Casas:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 182987.

The City of San Antonio (the "city") received a request for information pertaining to four investigations conducted by the city regarding the requestor. The requestor also asks the city questions in her request. We note that the Public Information Act (the "Act") does not require a governmental body to prepare answers to questions posed by a requestor. *See* Open Records Decision Nos. 563 at 8 (1990) (considering request for federal and state laws and regulations), 555 at 1-2 (1990) (considering request for answers to fact questions). You state that you have provided the requestor with some responsive information. You also state that the city has withheld some responsive information pursuant to a previous determination that our office granted all governmental bodies in Open Records Decision No. 670 (2001). You claim, however, that the remaining requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.101, 552.107, and 552.130 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we note that some of the information at issue is subject to section 552.022 of the Government Code. Section 552.022 provides that

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[.]

Gov't Code § 552.022(a)(1). As you acknowledge, the information that you have submitted to us as Exhibits A and B is part of completed investigation MI2002-046. Thus, these two exhibits must be released pursuant to section 552.022(a)(1) unless they are expressly confidential under other law or are excepted from disclosure pursuant to section 552.108 of the Government Code. Although the city claims that Exhibit B is excepted from disclosure under section 552.107 of the Government Code, we note that this exception to disclosure is a discretionary exception to disclosure under the Act that protects a governmental body's interests and may be waived.<sup>1</sup> Accordingly, we conclude that the city may not withhold any portion of Exhibit B under section 552.107 of the Government Code. We note, however, that the Texas Supreme Court recently held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will determine whether any portion of Exhibit B is confidential under rule 503 of the Texas Rules of Evidence. *See Open Records Decision No. 676 at 6 (2002)* ("appropriate law for a claim of attorney-client privilege for section 552.022 information is Texas Rule of Evidence 503"). Since the city also claims that portions of Exhibit A are excepted from disclosure pursuant to section 552.130 of the Government Code, we will also address that claim.

Rule 503(b)(1) 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;

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<sup>1</sup> Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, *Open Records Decision Nos. 630 at 4 (1994)* (governmental body may waive attorney-client privilege, section 552.107(1)), *551 (1990)* (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), *522 at 4 (1989)* (discretionary exceptions in general), *473 (1987)* (governmental body may waive statutory predecessor to section 552.111); *see also Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

(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.

TEX. R. EVID. 503. A communication is "confidential" if 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. *See id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). You indicate that Exhibit B comprises confidential communications exchanged between privileged parties for the purpose of facilitating the rendition of professional legal services in connection with completed investigation MI2002-046. Based on our review of your arguments and Exhibit B, we find that rule 503 is applicable to the entirety of this information. Accordingly, we conclude that the city may withhold Exhibit B in its entirety pursuant to rule 503 of the Texas Rules of Evidence.

You also claim that portions of Exhibit A, as well as portions of the information that you submitted to us as Exhibit E, are excepted from disclosure pursuant to section 552.130 of the Government Code. Section 552.130 excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *See Gov't Code* § 552.130. Accordingly, we conclude that the city must withhold the Texas motor vehicle information that we have marked within Exhibits A and E pursuant to section 552.130 of the Government Code.

You also claim that the information that you submitted to us as Exhibit F is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with federal law.<sup>2</sup> We note that the Aviation and Transportation Security Act (the "ATSA") created the Transportation Security Administration (the "TSA"), a new agency within the Department of Transportation (the "DOT") headed by the Under Secretary of Transportation for Security (the "Under Secretary"). See 49 U.S.C. § 114(a), (b)(1) (effective November 19, 2001). The ATSA provides that, by November 19, 2002, the responsibility for inspecting persons and property carried by aircraft operators and foreign air carriers will be transferred from the Federal Aviation Administration's (the "FAA") Administrator to the Under Secretary as head of the TSA. These responsibilities include carrying out the requirements of chapter 449 of title 49 of the United States Code, which pertain to civil aviation security. See 49 U.S.C. § 114(d)(1). Section 40119 of title 49, a provision that formerly applied to the FAA Administrator, now states:

Notwithstanding [the Federal Freedom of Information Act (the "FOIA"),] section 552 of title 5, the Under Secretary shall prescribe regulations prohibiting disclosure of information obtained or developed in carrying out security or research and development activities . . . if the Under Secretary decides disclosing the information would--

- (A) be an unwarranted invasion of personal privacy;
- (B) reveal a trade secret or privileged or confidential commercial or financial information; or
- (C) be detrimental to the safety of passengers in transportation.

49 U.S.C. § 40119(b)(1). This provision authorizes the TSA Under Secretary to prescribe regulations "prohibiting disclosure of information obtained or developed in carrying out security or research and development activities." The provision also authorizes the Under Secretary to prescribe regulations that prohibit disclosure of information requested not only under the FOIA, but also under other disclosure statutes. Cf. *Public Citizen, Inc. v. Federal Aviation Administration*, 988 F.2d 186, 194 (D.C. Cir. 1993) (former section 40119 authorized FAA Administrator to prescribe regulations prohibiting disclosure of information under other statutes as well as under the FOIA). Thus, the Under Secretary is authorized by section 40119(b)(1) to prescribe regulations that prohibit disclosure of information requested under the Act.

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<sup>2</sup>Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. See Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by federal statutes and regulations.

Pursuant to the mandate and authority in section 40119, the DOT's FAA and TSA jointly proposed new regulations pertaining to civil aviation security, which are found in title 49 of the Code of Federal Regulations, and which took effect February 17, 2002. *See* 67 Fed. Reg. 8340. Section 1520.1(a) of these regulations states that the regulations govern the release, by the TSA "*and by other persons*, of records and information that has been obtained or developed during security activities or research and development activities." 49 C.F.R. § 1520.1(a) (emphasis added). Such "other persons" to which these regulations apply includes local governmental entities such as the city and the San Antonio International Airport (the "airport"). *See* 49 U.S.C. § 40102(a)(32) ("person" includes "a governmental authority"); *see also* 67 Fed. Reg. at 8342 (definition of "person" in regulations is based on 49 U.S.C. § 40102). Thus, the regulations in title 49 of the Code of Federal Regulations apply to the city and the airport.

Section 1520.3(a) provides that, notwithstanding the FOIA "or other laws," records that meet the definition of "sensitive security information" in section 1520.7 are not available for public inspection or copying, nor is information contained in those records released to the public. *See* 49 C.F.R. § 1520.3(a). Such "sensitive security information" includes, among other things, "[a]ny selection criteria used in any security screening process, including for persons, baggage, or cargo," "[a]ny information that TSA has determined may reveal a systemic vulnerability of the aviation system, or a vulnerability of aviation facilities, to attack . . . [such as] . . . details of inspections, investigations . . .," and "[s]ecurity information or data developed during TSA or FAA evaluations of the aircraft operators and airports and the implementation of the security programs, including aircraft operator and airport inspections and screening point tests or methods for evaluating such tests . . ." 49 C.F.R. § 1520.7(a), (h)(4). As to the release of sensitive security information by persons other than the TSA, section 1520.5 provides that those covered by the regulation, which, among others, includes airport and aircraft operators, their employees, contractors, and agents, "must restrict disclosure of and access to sensitive security information . . . to persons with a need to know *and must refer requests by other persons for such information to TSA* or the applicable DOT administration[.]" *Id.* § 1520.5(a) (emphasis added).

Based on this statutory scheme, we conclude that the decision to release or withhold any portion of Exhibit F is not for this office or the city to make, but rather a decision for the Under Secretary as head of the TSA. *See English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) (state law preempted to extent it actually conflicts with federal law); *see also Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986) (federal regulation enacted by agency acting within scope of its congressionally delegated authority may preempt state regulation). Therefore, in responding to this request, the city must comply with the TSA's directives on this matter.

In summary, the city may withhold Exhibit B in its entirety pursuant to rule 503 of the Texas Rules of Evidence. The city must withhold the Texas motor vehicle information that we have marked within Exhibits A and E pursuant to section 552.130 of the Government Code.

The city must comply with the TSA's directives regarding the decision to release or withhold any portion of Exhibit F. The city must release the remaining submitted information to the requestor to the extent that it has not already done so.

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,



Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/sdk

Ref: ID# 182987

Enc. Marked documents

cc: Officer Alice R. Bhirdo, Badge #9929  
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(w/o enclosures)