



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 17, 2008

Ms. Pamela Smith
Assistant General Counsel
Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2008-05124

Dear Ms. Smith:

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# 306381.

The Department of Public Safety (the "department") received a request for interoffice memoranda for December of 2007. You state that some of the information will be made available for inspection. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.108, and 552.117 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.²

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information made confidential by other statutes. *See* Gov't Code § 552.101. You claim that Exhibit A is excepted from disclosure under section 552.101 in conjunction with section 154.073 of the Texas Civil Practice and Remedies Code, which provides in pertinent part:

¹Although the department's assertion of section 552.117 was not timely under section 552.301 of the Government Code, we will address this exception, which is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .301, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

²You inform us that the department sought and received clarification from the requestor and the requestor narrowed his request to exclude memoranda pertaining to pending criminal cases. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request). Accordingly, any such information is not responsive to the request and need not be released to the requestor.

(a) Except as provided by Subsections (c), (d), (e), and (f),³ a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

(b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

Civ. Prac. & Rem. Code § 154.073(a), (b). Section 411.0073 of the Government Code establishes procedures for a department employee to resolve an employment-related grievance through mediation if the employee chooses. *See* Gov't Code § 411.0073(a). These procedures must include mediation procedures and establish the circumstances under which mediation is appropriate for an employee-related grievance. *See id.* Exhibit A consists of records generated by a mediator during a formal alternative dispute resolution process. Thus, the department must withhold Exhibit A under section 552.101 of the Government Code in conjunction with section 154.073 of the Civil Practice and Remedies Code.

Section 552.101 also encompasses the Texas Homeland Security Act. Specifically, you claim that Exhibit C is subject to section 418.177 of the Government Code, which provides the following:

Information is confidential if the information:

- (1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and
- (2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

Gov't Code § 418.177. The fact that information may relate to a governmental body's security concerns does not make the information *per se* confidential under the Texas Homeland Security Act. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation

³Subsections 154.073(c), (d), (e), and (f) are inapplicable in this instance.

by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the Texas Homeland Security Act must adequately explain 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 explain that Exhibit C contains information collected and assembled by the department to "[identify] facilities in a specific geographic area that might be targets for terrorist attacks as well as characteristics of those facilities that might make them more or less vulnerable to such an attack." After reviewing your arguments and the information at issue, we agree that Exhibit C is confidential under section 418.177 of the Government Code, and the department must withhold it under section 552.101 of the Government Code.

You claim that Exhibit B is excepted under section 552.107 of the Government Code, which protects information coming within the attorney-client privilege. *Id.* § 552.107. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A)-(E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was "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." *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a

communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state that Exhibit B consists of a confidential communication between the department's general counsel and a department administrator that was made for the purpose of rendering legal services. Based on your representations and our review of the information at issue, we find that the department may withhold Exhibit B under section 552.107 of the Government Code.

Section 552.108(b)(1) of the Government Code excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would interfere with law enforcement and crime prevention. Gov't Code § 552.108(b)(1); *see also* Open Records Decision No. 531 at 2 (1989) (quoting *Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977)). Section 552.108(b)(1) is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." *See City of Ft. Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no writ). This office has concluded that section 552.108(b) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (Gov't Code § 552.108 is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted).

To claim section 552.108(b)(1), a governmental body must explain how and why release of the requested information would interfere with law enforcement and crime prevention. Gov't Code §§ 552.108(b)(1), .301; Open Records Decision No. 562 at 10 (1990). Generally known policies and techniques may not be withheld under section 552.108. *See, e.g.*, ORD 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force are not protected under predecessor to section 552.108), 252 at 3 (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known).

You claim that Exhibits D through G are subject to section 552.108(b)(1). You state that Exhibit D concerns shipments of radioactive waste materials. You explain that these shipments are made under strict security precautions to prevent unauthorized diversion of the materials for illicit purposes. Based on your representations and our review of the information at issue, we find that the department may withhold Exhibit D pursuant to section 552.108(b)(1) of the Government Code.

You state that the information in Exhibits E and F consists of registration information for undercover vehicles, the identities of undercover officers, and driver's license aliases for undercover officers. Having considered your arguments and having reviewed the information at issue, we find that release of Exhibits E and F would interfere with law enforcement and these exhibits may be withheld under section 552.108(b)(1) of the Government Code.

You also state that the information in Exhibit G pertains to documentation concerning the designation of a named person as a "cooperating individual" or "confidential informant" ("CI"). You state that "[r]evealing who has agreed to act as a CI could alert others associated with that individual that they are under suspicion, giving them opportunity to flee prior to arrest or otherwise mask their involvement in criminal activity." Having considered your arguments and having reviewed the information at issue, we find that release of Exhibit G would interfere with law enforcement and it may be withheld under section 552.108(b)(1) of the Government Code.

In summary, in conjunction with section 552.101 of the Government Code, the department must withhold (1) Exhibit A under section 154.073 of the Civil Practice and Remedies Code and (2) Exhibit C under section 418.177 of the Government Code. The department may withhold Exhibit B under section 552.107 of the Government Code. The department may withhold Exhibits D, E, F, and G under section 552.108 of the Government Code.⁴

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the

⁴As our ruling is dispositive, we do not address your remaining arguments.

Government Code. If the governmental body fails to do one of these things, 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 challenge 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 Office of the Attorney General 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. 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,



Benjamin A. Diener
Assistant Attorney General
Open Records Division

BAD/eb

Ref: ID# 306381

Enc. Submitted documents

c: Mr. Shane Allen
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