



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 25, 2009

Ms. Molly Shortall  
Assistant City Attorney  
City of Arlington  
P.O. Box 90231  
Arlington, Texas 76004-3231

OR2009-11987

Dear Ms. Shortall:

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# 353455.

The City of Arlington (the "city") received a request for correspondence between the city and the Cowboys Organization or the city's police department occurring over a specified period of days. You state some information has been released. You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.106, 552.107, 552.108, and 552.117 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. You raise section 552.101 in conjunction with sections 418.176, 418.177, 418.181, and 418.182 of the Government Code for information you have marked in the submitted information. These sections were added to chapter 418 of the Government Code as part of the Texas Homeland Security Act (the "THSA"). Section 418.176 provides in relevant part:

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<sup>1</sup>Although you also raise section 552.101 of the Government Code in conjunction with the attorney-client privilege under Texas Rule of Evidence 503, this office has concluded that section 552.101 does not encompass discovery privileges. See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Thus, we will not address your claim that the submitted information is confidential under section 552.101 in conjunction with rule 503.

(a) Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:

(1) relates to staffing requirements of an emergency response provider, including law enforcement agency, a fire-fighting agency, or an emergency services agency; [or]

(2) relates to a tactical plan of the provider[.]

Section 418.177 provides as follows:

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.

Section 418.181 provides:

Those documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

Section 418.182 provides in part:

(a) [I]nformation, including access codes and passwords, in the possession of a governmental entity that relates to the specifications, operating procedures, or location of a security system used to protect public or private property from an act of terrorism or related criminal activity is confidential.

*Id.* §§ 418.176, .177, .181, .182. The fact that information may generally be related to emergency preparedness does not make the information *per se* confidential under the provisions of the THSA. See Open Records Decision No. 649 at 3 (1996) (language of confidentiality provisions controls scope of its protection). As with any confidentiality statute, a governmental body asserting one of these sections must adequately explain how the responsive information falls within the scope of the provision. See Gov't Code

§ 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You assert portions of the submitted information consist of staffing requirements, tactical plans, and access codes and passwords related to the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity. Upon review, we find you have demonstrated that some of the information at issue, which we have marked, relates to staffing requirements maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism. The city must withhold this information under section 552.101 in conjunction with section 418.176 of the Government Code. You have further demonstrated that some of the information at issue, which we have marked, was collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism and relates to an assessment of the risk or vulnerability of critical infrastructure to an act of terrorism. The city must withhold this information under section 552.101 in conjunction with section 418.177 of the Government Code. Finally, we find you have demonstrated that some of the information at issue, which we have marked, identifies the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism or consists of access codes and passwords that relate to the specifications, operating procedures, or location of a security system used to protect public or private property from an act of terrorism or related criminal activity. The city must withhold this information under section 552.101 in conjunction with section 418.181 and section 418.182 of the Government Code.

However, we find that you have not demonstrated that the remaining information at issue is maintained for the purpose of responding to an act of terrorism as it relates to an emergency response provider's staffing requirements or tactical plan. *See id.* § 418.176. Moreover, we find that the remaining information does not constitute nor reveal the contents of a vulnerability assessment, reveal the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism, or consist of codes or passwords relating to a security system used to protect public or private property from an act of terrorism. *See id.* §§ 418.177, .181, .182. Thus, none of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with section 418.176, section 418.177, section 418.181, or section 418.182.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. 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 a 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. See 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 assert portions of the remaining information consist of communications between and amongst city staff, city attorneys, and outside attorneys representing the city and the Cowboys Organization, that were made for the purpose of providing legal advice to the city. Further, you indicate that these communications were made for the purpose of facilitating the rendition of professional legal services pertaining to issues in which the city and the Cowboys Organization share a common legal interest. See generally TEX. R. EVID. 503(b)(1)(c) (discussing privilege among parties “concerning a matter of common interest”); see also *In re Auclair*, 961 F.2d 65, 69 (5th Cir. 1992) (citing *Hodges, Grant & Kaufmann v. United States Government*, 768 F.2d 719, 721 (5th Cir. 1985)) (attorney-client privilege not waived if privileged communication is shared with third person who has common legal interest with respect to subject matter of communication). You state that these communications were made in confidence and have maintained their confidentiality. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the communications you have marked, which the city may withhold under section 552.107 of the Government Code.<sup>2</sup>

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Section 552.106 of the Government Code excepts from disclosure “[a] draft or working paper involved in the preparation of proposed legislation[.]” Gov’t Code § 552.106(a). The purpose of section 552.106 is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body. *See* Open Records Decision No. 460 at 3 (1987). Therefore, section 552.106 is applicable only to the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation and who have an official responsibility to provide such information to members of the legislative body. *See id.* at 1. Section 552.106 does not protect purely factual information from public disclosure. *See* ORD 460 at 2; *see also* Open Records Decision No. 344 at 3-4 (1982) (for purposes of statutory predecessor, factual information prepared by State Property Tax Board did not reflect policy judgments, recommendations, or proposals concerning drafting of legislation). However, a comparison or analysis of factual information prepared to support proposed legislation is within the scope of section 552.106. *See* ORD 460 at 2.

You state portions of the remaining information contain an e-mail communication discussing changes and amendments to a proposed ordinance. Upon review, however, we find you have failed to demonstrate how the information at issue, which consists of purely factual information, reveals advice, opinion, analysis, or recommendation regarding proposed legislation. Therefore, the city may not withhold any portion of the remaining information under section 552.106 of the Government Code.

Section 552.108(b)(1) of the Government Code excepts from disclosure “[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 . . . if: (1) release of the internal record or notation would interfere with law enforcement or prosecution.” Gov’t Code § 552.108(b)(1). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (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.” *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). This office has concluded that this provision protects certain kinds of information, the disclosure of which might compromise the security or operations of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (detailed guidelines regarding police department’s use of force policy), 508 (1988) (information relating to future transfers of prisoners), 413 (1984) (sketch showing security measures for forthcoming execution), 211 (1978) (information relating to undercover narcotics investigations), 143 (1977) (log revealing use of electronic eavesdropping equipment).

You state portions of the remaining information consist of e-mail communications and attachments regarding law enforcement details for an event that has already occurred. You further state that, although the event in question has already occurred, “[the city’s police

department] will use similar procedures and tactics for similar events . . . in the future” and that release of the information at issue would place the city “at a great disadvantage” in its law enforcement efforts. Based on your representations, we conclude that release of a portion of the information at issue, which we have marked, would interfere with law enforcement and crime prevention. Therefore, the city may withhold this information under section 552.108(b)(1) of the Government Code. However, we find you have failed to demonstrate how release of the remaining information at issue would interfere with law enforcement or crime prevention. Therefore, the city may not withhold any of the remaining information under section 552.108(b)(1).

You have marked cellular telephone numbers under section 552.117 of the Government Code. Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with section 552.024 or 552.1175 of the Government Code. Gov’t Code § 552.117(a)(2). Section 552.117 also encompasses personal cellular telephone numbers, provided that the cellular telephone service is paid for by the employee with his or her own funds. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular mobile numbers paid for by governmental body and intended for official use). Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. However, we are unable to determine from the information provided whether any of the individuals whose information is at issue are currently licensed peace officers. To the extent the individuals at issue are currently licensed peace officers as defined by article 2.12, the city must withhold the cellular telephone numbers you have marked and the additional numbers we have marked under section 552.117(a)(2), but only if the cellular telephone service was paid for with the employees’ own funds.

If the individuals are not currently licensed peace officers, section 552.117(a)(1) may apply to the information at issue. Section 552.117(a)(1) of the Government Code excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. *See id.* § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body’s receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential. Accordingly, to the extent that the employees to whom this information pertains timely elected confidentiality under section 552.024, the city must withhold the cellular telephone numbers you have marked and the additional numbers we have marked under section 552.117(a)(1), but only if the cellular telephone service was paid for with the employees’ own funds.

In summary, the city must withhold the information we marked under section 552.101 in conjunction with sections 418.176, 418.177, 418.181, and 418.182 of the Government Code. The city may withhold the information you marked under section 552.107 of the Government Code. The city may withhold the information we marked under section 552.108(b)(1) of the Government Code. The city must withhold the marked cellular telephone numbers under section 552.117(a)(2) of the Government Code, to the extent the individuals at issue are currently licensed peace officers as defined by article 2.12 and paid for the cellular telephone service with their own funds. If the individuals are not currently licensed peace officers, to the extent the employees timely elected confidentiality under section 552.024, the city must withhold the marked cellular telephone numbers under section 552.117(a)(1) of the Government Code, but only if the cellular telephone service was paid for with the employees' own funds. The remaining information must be released.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Matt Entsminger  
Assistant Attorney General  
Open Records Division

MRE/dls

Ref: ID# 353455

Enc. Submitted documents

c: Requestor  
(w/o enclosures)