



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 5, 2013

Ms. Molly Cost
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
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OR2013-21169

Dear Ms. Cost:

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# 507599 (PIR# 13-3642).

The Texas Department of Public Safety (the "department") received a request for (1) all communications relating to the activities, members, plans, events, and arrests associated with "Open Carry Texas;" (2) any orders, training bulletins, policy documents or other such collaborative efforts relating to "open carry" and "Open Carry Texas;" (3) affidavits of probable cause, police reports, supplemental reports, and other responsive documents filed by any department trooper relating to the detention and/or arrest of three named individuals; and (4) oaths of office and anti-bribery statements of troopers involved in the detention and/or arrest of the three named individuals. You indicate you will provide some of the requested information to the requestor with redactions made pursuant to sections 552.130 and 552.147 of the Government Code.¹ *See Gov't Code* § 552.108(c) (basic information about an arrest, arrested person, or crime cannot be withheld under section 552.108). You claim the submitted information is excepted from disclosure under sections 552.101,

¹Section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsection 552.130(a) without the necessity of seeking a decision from the attorney general. *See Gov't Code* § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. *See id.* § 552.147(b).

552.106, 552.107, 552.108, 552.111, and 552.152 of the Government Code.² You also state release of some of the submitted information may implicate the interests of Austin Regional Intelligence Center ("ARIC") and the San Antonio Police Department ("SAPD"). Accordingly, you notified ARIC and SAPD of the request and of their right to submit comments to this office as to why the information at issue should not be released to the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from SAPD.³ We have considered the submitted arguments and reviewed the submitted information.

Initially, SAPD claims some of the submitted information is not responsive to the present request. A governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). In this instance, the department has reviewed its records and determined the documents it has submitted are responsive to the request. Thus, we find the department has made a good-faith effort to relate the request to information within its possession or control. Accordingly, we will determine whether the department must release the submitted information to the requestor under the Act.

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). Section 552.106(a) ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. *See* Open Records Decision No. 460 at 1 (1987). The purpose of this exception is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body. *Id.* at 2. 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. *Id.* Section 552.106 does not protect purely factual information from public disclosure. *See id.* 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 assert the information in Tab C consists of communications between department employees regarding proposed changes to state statutes. You state the communications consist of recommendations and proposals of department employees who are responsible for

²Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). We note the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107 of the Government Code. *See* Open Records Decision Nos. 676 at 1, 677 (2002).

³As of the date of this letter, we have not received comments from ARIC.

relaying information to the Texas Legislature. Upon review, we find the information we have marked constitutes advice, opinion, analysis, and recommendations for the purposes of section 552.106. Accordingly, the department may withhold the information we have marked under section 552.106 of the Government Code. However, we find you have not demonstrated how the remaining information in Tab C constitutes advice, opinion, analysis, or recommendations regarding proposed legislation. Accordingly, the department may not withhold any of the remaining information in Tab C under section 552.106.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov't Code § 552.107(1). 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. ORD 676 at 6-7. 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 Tex. 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, and lawyer representatives. TEX. R. EVID. 503(b)(1). 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.*, 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, orig. proceeding). 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 Tab D consists of communications between attorneys or attorney representatives for the department and employees of the department. You state these communications were made in the furtherance of professional legal services to the department and were intended to be, and have remained, confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the

information at issue. Accordingly, the department may withhold Tab D under section 552.107(1) of the Government Code.⁴

Section 552.108(b) of the Government Code provides in pertinent part:

(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 [required public disclosure] if:

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

Gov't Code § 552.108(b)(1). 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.). To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a governmental body must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. Instead, the governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. *See* Open Records Decision No. 562 at 10 (1990) (construing statutory predecessor). 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), 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).

You seek to withhold Tabs A and B pursuant to section 552.108(b)(1). Further, SAPD seeks to withhold a portion of its information at issue in Tab F pursuant to section 552.108(b)(1). First, we will address your arguments. You state the information in Tab A contains the names of commissioned department officers working in an undercover capacity and information about their assignments. Further, you state the remaining information would reveal techniques the department utilizes in the detection and investigation of criminal activity, allowing criminals and other wrong-doers to ascertain patterns and weaknesses in those techniques. Based on your representations and our review, we find you have demonstrated the applicability of section 552.108(b)(1) to the information in Tab A. Accordingly, the department may withhold Tab A under section 552.108(b)(1).⁵

⁴As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

⁵As our ruling is dispositive, we need not address your remaining arguments against disclosure for this information.

You state Tab B consists of an internal department operations plan and specific duty rosters for a specified event at the Texas Capitol Grounds. You explain release of this information “would provide wrong-doers, terrorists, and other criminals with invaluable information concerning the number of officers staffing the Texas Capitol during these types of events, how the officers are deployed during these events, as well as the names of the officers themselves.” Although you acknowledge the records at issue are for past dates, you state the same staffing patterns and some of the same personnel are currently utilized by the department during these types of events. You also state “[r]eleasing this information would jeopardize the safety and security of the Capitol and those working in and visiting the Capitol building and interfere with the [d]epartment’s law enforcement functions.” Based on your representations and our review, we agree the release of the information we have marked would interfere with law enforcement or crime prevention. Accordingly, the department may withhold the marked information in Tab B under section 552.108(b)(1) of the Government Code. However, we find you have failed to demonstrate the remaining information in Tab B would interfere with law enforcement and crime prevention. Accordingly, the department may not withhold the remaining information in Tab B under section 552.108(b)(1).

Next, we address SAPD’s arguments for its information at issue in Tab F. SAPD states the information at issue was developed for training and use by SAPD officers and release of this information could be used against the SAPD officers to the detriment of the citizens they are sworn to protect. Upon review, we find the information we have marked would interfere with law enforcement or crime prevention. Accordingly, the department may withhold the marked information in Tab F under section 552.108(b)(1) of the Government Code. However, we find SAPD has failed to demonstrate the remaining information at issue in Tab F would interfere with law enforcement and crime prevention. Accordingly, the department may not withhold the remaining information at issue in Tab F under section 552.108(b)(1).

You and SAPD seek to withhold some of the remaining information pursuant to section 552.108(a)(1) of the Government Code. Section 552.108(a) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code 552.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by the proper custodian of information relating to a pending investigation or prosecution of criminal conduct. *See Open Records Decision No. 474 at 4-5 (1987)*. Where a governmental body has custody of information relating to a pending case of a law enforcement agency, the custodian of the records may withhold the information if it provides this office with a demonstration that the information relates to the pending case and a representation from the law enforcement agency that it wishes to have the information withheld. You inform us the information you have marked pertains to pending criminal cases. We note the information at issue includes a citation. Because a copy of this citation, which we have marked, has been provided to the individual who was cited, we find its release will not interfere with the detection, investigation, or prosecution of crime.

See Gov't Code § 552.108(a)(1). Therefore, the department may not withhold the marked citation under section 552.108(a)(1). However, based upon your representations, we conclude section 552.108(a)(1) is applicable to the remaining information you have marked and release of this information would interfere with the detection, investigation, or prosecution of crime. See *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, with the exception of the marked citation, the department may withhold the information you have marked under section 552.108(a)(1) of the Government Code. However, we find SAPD has failed to demonstrate any of the remaining information at issue in Tab F would interfere with the detection, investigation, or prosecution of crime. Accordingly, the department may not withhold the remaining information at issue in Tab F on behalf of SAPD under section 552.108(a)(1).

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home address, home telephone number, emergency contact information, 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 sections 552.024 and 552.1175 of the Government Code.⁶ See Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. See Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). In this instance, it is unclear whether the individuals whose information we have marked are licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, to the extent the individuals at issue are licensed peace officers as defined by article 2.12, the department must withhold the cellular telephone numbers we have marked under section 552.117(a)(2) of the Government Code, but only if the cellular service is not paid for by a governmental body. Conversely, to the extent the individuals at issue are not licensed peace officers as defined by article 2.12, then the department may not withhold the marked information under section 552.117(a)(2).

If the cellular telephone numbers we have marked under section 552.117 pertain to individuals who are not licensed peace officers, then the marked information may be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. See Gov't Code § 552.117(a)(1). Whether a particular item of

⁶The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former 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 employee who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the individuals at issue are not licensed peace officers as defined by article 2.12 and to the extent these individuals timely requested confidentiality under section 552.024 of the Government Code, the department must withhold the marked cellular telephone numbers under section 552.117(a)(1) of the Government Code, but only if the cellular service is not paid for by a governmental body. Conversely, to the extent the individuals at issue are not licensed peace officers as defined by article 2.12 and did not timely request confidentiality under section 552.024, the department may not withhold the marked information under section 552.117(a)(1).

Section 552.130 provides information relating to a motor vehicle operator's or driver's license issued by an agency of Texas or another state or country is excepted from public release. Gov't Code § 552.130(a)(1). Accordingly, the department must withhold the driver's license information we have marked under section 552.130 of the Government Code.⁷

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). Upon review, the department must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless its owner affirmatively consents to its public disclosure.

In summary, the department may withhold (1) the information we have marked under section 552.106 of the Government Code, (2) Tab D under section 552.107(1) of the Government code, (3) Tab A and the information we have marked in Tabs B and F under section 552.108(b)(1) of the Government Code, (4) the information you have marked under section 552.108(a)(1) of the Government Code, with the exception of the marked citation. To the extent the individuals at issue are licensed peace officers as defined by article 2.12, the department must withhold the cellular telephone numbers we have marked under section 552.117(a)(2) of the Government Code, but only if the cellular service is not paid for by a governmental body. To the extent the individuals at issue are not licensed peace officers as defined by article 2.12 and to the extent these individuals timely requested confidentiality

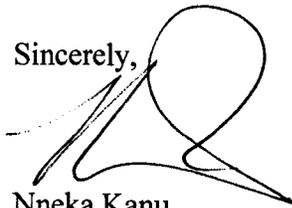
⁷Section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsection 552.130(a) without the necessity of seeking a decision from the attorney general. Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e).

under section 552.024 of the Government Code, the department must withhold the marked cellular telephone numbers under section 552.117(a)(1) of the Government Code, but only if the cellular service is not paid for by a governmental body. The department must withhold the driver's license information we have marked under section 552.130 of the Government Code. The department must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless its owner affirmatively consents to its public disclosure. The department must release the remaining information.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Nneka Kanu
Assistant Attorney General
Open Records Division

NK/bhf

Ref: ID# 507599

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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