



November 21, 2001

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

OR2001-5409

Dear Ms. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 155179.

The Department of Public Safety (the "department") received a request for all investigations of complaints against a named trooper. You inform us that six such complaints have been lodged against the trooper, but that you have purged the file regarding one of the complaints pursuant to the department's records retention schedule. You further inform us that you are releasing two of the reports to the requestor with the social security numbers of troopers redacted. You claim that the remaining three reports are excepted from disclosure, in whole or in part, under sections 552.101, 552.107, 552.108, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the information submitted as Attachments A through C.

Initially we note that this office has previously addressed the documents contained in Attachment C. In Open Records Letter No. 2001-3490 (2001), we concluded that the documents were protected from disclosure under section 552.108 and section 552.101 in conjunction with common-law privacy. The department must continue to withhold the documents in Attachment C in accordance with Open Records Letter No. 2001-3490. See Open Records Decision No. 673 (2001) (regarding previous determinations).

We begin with your claims under section 552.117. 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. We have marked the information that the department must withhold under section 552.117(2).

We next address your claims under section 552.107. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. In instances where

an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and the client's confidences made to the attorney. *See* Open Records Decision No. 574 (1990). In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). After review of the submitted information in Attachment A, we agree that the documents you marked are privileged attorney-client communications that may be withheld under section 552.107.

However, the document you marked in Attachment B as being excepted from disclosure under section 552.107 is actually a completed investigation. Section 552.022 of the Government Code makes certain information expressly public, and therefore not subject to discretionary exceptions to disclosure. One such category of expressly public information under section 552.022 is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108[.]" Gov't Code § 552.022(a)(1). Our office has previously concluded that section 552.107 is a discretionary exception. *See* Open Records Decision No. 630 (1994) (section 552.107 is a discretionary exception). We do not believe that this exception "expressly [makes] information confidential under other law." Gov't Code § 552.022. Therefore, you may not withhold the document under section 552.107.

The attorney-client privilege is also found in Rule 503 of the Texas Rules of Evidence, though. Recently, 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*, No. 00-0453, 2001 WL 123933, at *8 (Tex. Feb. 15, 2001). Thus, we will determine whether the document is confidential under Rule 503.

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 layer 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 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, 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 document containing privileged information is 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). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.–Houston [14th Dist.] 1993, no writ). Based on your arguments and our review of the document, we conclude that the document is privileged under Rule of Evidence 503 and may be withheld from disclosure. We have marked the document accordingly.

We now address your claims under section 552.108. Section 552.108(b) 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" This section 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. Open Records Decision No. 531 at 2 (1989) (quoting *Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977)). When section 552.108(b) is claimed, the agency claiming it must reasonably explain, if the information does not supply the explanation on its face, how releasing the information would unduly interfere with law enforcement. Open Records Decision No. 434 at 3 (1986). Here, you indicate that the requested information concerns the number and deployment of security staff at the governor's mansion. You claim that disclosure of this information would compromise the department's ability to provide security to the governor and his family. We therefore find that you have shown the applicability of section 552.108(b). Accordingly, you may withhold the information in Attachment B that you marked as excepted from disclosure under section 552.108(b), unless we have marked otherwise.

Within Attachment B you also highlighted information you believe is excepted under section 552.101. Section 552.101 excepts from disclosure "information considered to be

confidential by law, either constitutional, statutory, or by judicial decision.” Section 552.101 also incorporates the common-law right of privacy. For information to be protected by common-law privacy it must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* court held that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685.

The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* include information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. We have marked the information in Attachment B that must be withheld under section 552.101.

In sum, the department must continue to withhold the documents in Attachment C in accordance with Open Records Letter No. 2001-3490 (2001). We have marked the information that the department must withhold under section 552.117(2). The department may withhold the documents in Attachment A that is marked under section 552.107 and may withhold the document in Attachment B that is marked under Rule of Evidence 503. The department may withhold the information marked under section 552.108 and must withhold the information marked under section 552.101.

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

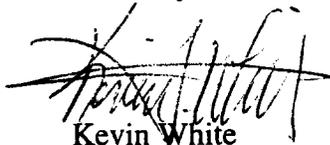
body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may 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 Department of Public 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 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,



Kevin White
Assistant Attorney General
Open Records Division

KJW/seg

Ref: ID# 155179

Enc. Submitted documents

c: Mr. Jim McNabb
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(w/o enclosures)