



June 5, 2002

Ms. Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR2002-3042

Dear Ms. Bergeron:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 163212.

The Texas Natural Resource Conservation Commission (the "TNRCC") received a request for information related to an amendment to Air Quality Permit No. 21233. You state that some responsive information has been released to the requestor. You claim that the remaining requested information is excepted from disclosure under section 552.101 of the Government Code, but you provide no arguments in support of that contention.

In addition, because you believe the privacy and/or property rights of an interested third party may be implicated, you notified the Department of Energy Pantex Facility, BWXT-Pantex L.L.C. (the "DOE"), of the request. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act [the "Act"] in certain circumstances). The DOE responded to the notice, and asserted that a portion of the requested information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code.¹ We have considered the exceptions claimed and reviewed the submitted information.

¹While the DOE claims that the requested information is also excepted under 30 Tex. Admin. Code § 1.5(d)(2), this provision does not constitute an exception to disclosure. Rather, section 1.5(d)(2) merely addresses parameters for a request for a ruling from this office.

Section 552.108 of the Government Code excepts from disclosure certain records of law enforcement agencies and prosecutors. Section 552.108 applies only to records created by an agency, or a portion of an agency, whose primary function is to investigate crimes and enforce criminal laws. *See* Open Records Decision Nos. 493 (1988), 287 (1981). Section 552.108 generally does not apply to records created by an agency whose chief function is essentially regulatory in nature. Open Records Decision No. 199 (1978). An agency that does not qualify as a law enforcement agency may, under certain limited circumstances, claim that section 552.108 protects records in its possession. *See, e.g.*, Attorney General Opinion MW-575 (1982); Open Records Decision Nos. 493 (1988), 272 (1981).

The DOE explains that the Atomic Energy Act authorizes members, officers, employees, contractors, and subcontractors of the DOE to carry firearms while engaged in the performance of official duties, and to make arrests without a warrant for violations of the Atomic Energy Act that are punishable by fine or imprisonment or both. 42 U.S.C. § 2201(k) We find that the DOE is a law enforcement agency for purposes of section 552.108. Therefore, we will address the DOE's claim regarding the applicability of section 552.108 to the information at issue.

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. Open Records Decision No. 531 at 2 (1989) (quoting *Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977)). This office has stated that under the statutory predecessor to section 552.108(b), a governmental body may withhold information that would reveal law enforcement techniques. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 456 (1987) (release of forms containing information regarding location of off-duty police officers in advance would unduly interfere with law enforcement), 413 (1984) (release of sketch showing security measures to be used at next execution would unduly interfere with law enforcement), 409 (1984) (if information regarding certain burglaries exhibits a pattern that reveals investigative techniques, information is excepted under section 552.108), 341 (1982) (release of certain information from Department of Public Safety would unduly interfere with law enforcement because release would hamper departmental efforts to detect forgeries of drivers' licenses), 252 (1980) (section 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 this exception, however, a governmental body must meet its burden of explaining, if the requested information does not supply the explanation on its face, how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). Furthermore, generally known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common law rules, and constitutional limitations on use of force are not protected

under section 552.108), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known).

The DOE explains that the information at issue consists of portions of the DOE's Application to the TNRCC to amend an existing Air Quality Permit. The DOE states that this information is classified as Official Use Only ("OUO") pursuant to DOE's Classification and Unclassified Controlled Nuclear Information (UCNI) Guide for Safeguards and Security Information dated September 2000. The DOE further states that "unclassified information that is not readily available in the open professional literature or visually from an uncontrolled area may be identified as UCNI or OUO if the information is useful to a malefactor in defeating part of a security system and results in an adverse effect, while not leading to damage to the national security." The DOE claims that the OUO information at issue here would be useful to a malefactor in defeating a security system and resulting in an adverse effect at the Pantex Plant (the "Plant"), thus interfering with the Plant's security and law enforcement missions. Moreover, the DOE states that its concern is in protecting its facility "from any malevolent act" and that it therefore "must protect any information that could . . . [identify] vulnerabilities of the [Plant], its processes, practices, procedures, physical construction and/or location." Based upon the DOE representations and our careful review of the information at issue, we find that release of the submitted OUO information would interfere with law enforcement. We conclude, therefore, that most of the submitted OUO information is excepted under section 552.108(b)(1) of the Government Code. To the extent that emissions data are contained in the submitted information, the commission must release this information to the requestor. 42 U.S.C. § 7414(c) (although trade secret information protected by statute, Clean Air Act clearly exempts emissions data from protection afforded trade secret information). However, any responsive information detailing the locations or points of emissions where a link exists between those locations or points and a security risk or danger is excepted from disclosure under section 552.108(b)(1). The remaining submitted information must be released to the requestor.²

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.

²As section 552.108 is dispositive, we do not address the section 552.101 claim.

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 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,



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Assistant Attorney General
Open Records Division

CN/sdk

Ref: ID# 163212

Enc. Submitted documents

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