



June 18, 2002

Ms. Janice Mullenix
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2002-3296

Dear Ms. Mullenix:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 164435.

The Texas Department of Transportation (the “department”) received a request for all information concerning the termination of a named former department employee. You claim that some of the requested information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.116 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

We first note that an internal audit that relates to the requested information has been completed. Section 552.022 provides in part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

....

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). You state that a copy of the audit report will be provided to the requestor. However, you claim that the requestor does not seek the completed audit itself, but rather, the department's audit working papers, which include a copy of the audit report with handwritten annotations.

The documents submitted as Exhibit B contain information that is subject to section 552.022. Some of the documents constitute completed reports made public under section 552.022(a)(1). Another category of expressly public information under section 552.022 is "the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body[.]" Gov't Code § 552.022(a)(2). One of the submitted documents contains information subject to this provision. Finally, "all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate" is information made expressly public under section 552.022(a)(5). One of the submitted documents contains such information. As provided by section 552.022(a), all of this information is public unless it is made confidential under other law. You claim that this information is excepted from disclosure under section 552.116. Section 552.116 is a discretionary exception that does not constitute other law for purposes of section 552.022.¹ Therefore, the department may not withhold any of the information that is subject to section 552.022 under section 552.116. This information, which we have marked, must be released.

We now address your claim under section 552.116 for the remaining information in Exhibit B. You argue that this information is excepted under section 552.116 of the Government Code. Section 552.116 provides as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency or institution of higher education as defined by Section 61.003, Education Code, is excepted from [public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) 'Audit' means an audit authorized or required by a statute of this state or the United States and includes an investigation.

¹Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 549 at 6 (1990). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

(2) 'Audit working paper' includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You inform this office that the information submitted as Exhibit B relates to an audit authorized by state law and performed by an internal auditor of the department. *See* Gov't Code §§ 321.0134, 2102.007. You state that the auditor compiled this information during the course of a formal audit. Based on your representations, we conclude that the information in Exhibit B constitutes audit working papers under section 552.116(b)(2) of the Government Code and is therefore excepted from disclosure in its entirety under section 552.116.

Further, you claim that the information submitted as Exhibit C is excepted under section 552.107. Section 552.107(1) protects information encompassed by the attorney-client privilege. We note that 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). Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from 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. *See id.* at 5. You state that Exhibit C consists of internal communications between department employees and a department attorney for the purpose of obtaining and giving legal advice. Upon review of your arguments and the submitted information, we conclude that Exhibit C is covered by the attorney-client privilege, and is therefore excepted from disclosure under section 552.107(1). As section 552.107 is dispositive for this information, we do not address your arguments under sections 552.101 and 552.111.

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).

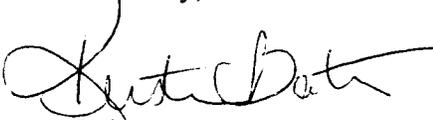
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 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,



Kristen Bates
Assistant Attorney General
Open Records Division

KAB/seg

Ref: ID# 164435

Enc. Submitted documents

c: Mr. Chad A. Cox
Cox & Hatcher LTD, LLP
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(w/o enclosures)