



**ATTORNEY GENERAL OF TEXAS**  
**GREG ABBOTT**

April 28, 2004

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

OR2004-3498

Dear Ms. Smith:

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# 200366.

The Texas Department of Public Safety ("DPS") received a request for a named officer's personnel file. You claim that the requested information is excepted from disclosure under sections 552.107 and 552.108 of the Government Code and Texas Rule of Evidence 503. We have considered your arguments and reviewed the submitted information.

We first note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides that

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,

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (17). In this instance, you state that the memorandum at issue "is part of the requested investigation." Therefore, we conclude that the submitted memorandum is contained in a completed investigation made of, for, or by DPS. Therefore, DPS must release the information at issue under section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. Additionally, we have marked a document that also is contained in public court records. DPS must release this information under section 552.022(a)(17) unless it is expressly confidential under other law. You do not claim, and our review does not indicate, that the document we have marked under section 552.022(a)(17) is confidential under other law. Therefore it must be released.

You do not assert that the memorandum is excepted by section 552.108. However, you raise section 552.107 of the Government Code with regard to the memorandum. We note, however, that this section is a discretionary exception to public disclosure that protects the governmental body's interests and may be waived.<sup>1</sup> As such, section 552.107 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, DPS may not withhold the memorandum under section 552.107.

You contend that the memorandum at issue is confidential under Texas Rule of Evidence 503. The Texas Supreme Court has held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider whether rule 503 is applicable to the memorandum. Rule 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

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 lawyer 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;

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<sup>1</sup> See Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege may be waived), 676 at 10-11 (2002) (attorney-client privilege may be waived), 665 at 2 n.5 (discretionary exceptions generally), 630 at 4 (1994) (attorney-client privilege under Gov't Code § 552.107(1) may be waived).

(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.

TEX. R. EVID. 503. 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. *Id.* 503(a)(5).

Thus, 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 information is privileged and 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).

You inform us that the memorandum at issue reflects the communication of legal advice and opinion by attorneys for DPS to their clients concerning legal issues raised during investigations. Based on your representations and our review of the information at issue, we agree that DPS may withhold the memorandum under Texas Rule of Evidence 503. *See also Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (concluding that attorney’s entire investigative report was protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney for purpose of providing legal services and advice).

You assert that the remainder of the requested information is excepted from required public disclosure by section 552.108. Section 552.108(a)(1) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” A governmental body that raises section 552.108 must reasonably explain how and why section 552.108 is applicable to the information. *See Gov’t Code § 552.301(e)(1)(A); Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). When an incident is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information relating to the incident. *See Open Records Decision Nos. 474 at 4-5 (1987), 372 (1983); see also Open Records Decision No. 586 (1991).*

You argue that section 552.108 is applicable to the remaining information because “the personnel, complaint, and disciplinary records pertaining to an arresting officer . . . is information that could be utilized to attack the credibility of the officer’s testimony.” You have also provided this office with an affidavit from an assistant district attorney for Harris County who objects to the release of the requested information as it would interfere with the pending criminal prosecution of the alleged offense. Based on our review of the submitted documents and the representation of this individual, we conclude that the release of the information at issue 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), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).

In summary, you may withhold the memorandum at issue under Texas Rule of Evidence 503. You may withhold the remaining information under section 552.108 of the Government Code, with the exception of the information we have marked for release under section 552.022(a)(17) of the Government Code.

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).

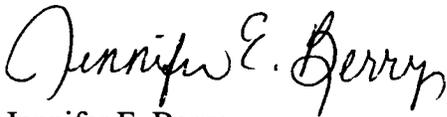
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Dep't of Pub. 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,



Jennifer E. Berry  
Assistant Attorney General  
Open Records Division

JEB/sdk

Ref: ID# 200366

Enc: Submitted documents

c: Mr. George Jacobs  
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(w/o enclosures)