The ruling you have requested has been modified pursuant to a court order. The court judgment has been attached to this document.

ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 6, 2008

Ms. Molly Shortall
Assistant City Attorney
City of Arlington
P.O. Box 90231
Arlington, Texas 76004-3231

OR2008-01763

Dear Ms. Shortall:

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# 301522.

The Arlington Police Department (the "department") received a request for e-mail communications sent or received by the Arlington police chief "since" a specified incident. The requestor subsequently amended the request to encompass both e-mail communications and memoranda sent or received by the police chief relating to the specified incident during a particular time period. You state that some responsive information has been released to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.108 of the Government Code.[1] We have considered the exceptions you claim and reviewed the submitted information.

Section 552.107 of the Government Code protects information that comes within the attorney-client privilege. 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. *See* Open Records Decision No. 676

[1]We note that you claim some of the submitted information is protected under the attorney-client privilege based on Texas Rule of Evidence 503. In this instance, however, because the information at issue is not subject to section 552.022 of the Government Code, the information is properly addressed here under section 552.107, rather than rule 503. Open Records Decision No. 676 at 3 (2002); *see also* Gov't Code § 552.022 (listing categories of information that are expressly public under the Act and must be released unless confidential under "other law"). As such, we address your arguments related to the attorney-client privilege under section 552.107.

at 6-7 (2002). 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. *See* 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. *See 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 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. *See* TEX. R. EVID. 503(b)(1)(A)-(E). 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.* 503(b)(1), 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. *See Osborne v. Johnson*, 954 S.W.2d 180,184 (Tex. App.—Waco 1997, no writ). 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 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 assert that Exhibit B-1 consists of a confidential communication between attorneys for the City of Arlington and the police chief that was made in connection with the rendition of professional legal services. You indicate that the communication remains confidential. Based on your representations and our review of the submitted information, we conclude that the department may withhold Exhibit B-1 under section 552.107 of the Government Code.

We next address the department's assertions under section 552.108(b)(1) of the Government Code, which excepts from public disclosure an internal record of a law enforcement agency that is maintained for internal use in matters relating to law enforcement or prosecution if "release of the internal record or notation would interfere with law enforcement or prosecution." *Id.* § 552.108(b)(1). Generally, a governmental body claiming section 552.108(b)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

The statutory predecessor to section 552.108(b)(1) protected information that would reveal law enforcement techniques. *See, e.g.*, Open Records Decision Nos. 531 (1989) (detailed use of force guidelines), 456 (1987) (information relating to location of off-duty police officers), 413 (1984) (sketch showing security measures to be used at next execution), 409 (1984) (information regarding certain crimes protected if it exhibits pattern that reveals investigative techniques), 341 (1982) (information whose disclosure would hamper efforts to detect forgeries of drivers' licenses), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). The statutory predecessor to section 552.108(b)(1) was not applicable to generally known policies and procedures. *See, e.g.,* ORD 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected); *see also* Open Records Decision No. 252 at 3 (1980) (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

A governmental body that relies on section 552.108(b)(1) must sufficiently explain how and why the release of the information would interfere with law enforcement and crime prevention. *See* Open Records Decision Nos. 562 at 10 (1990), 531 at 2. You assert that release of the information in Exhibit B "would give tactical advantage in . . . hazardous situations to the suspect [and] endanger the lives and safety of police officers and consequently, the public in general." However, most of the information in Exhibit B is relevant solely to the incident at issue and consists of generally known policies, procedures, and techniques. Based on our review of your arguments and the information at issue, we find that the release of some of the information in Exhibit B would interfere with law enforcement or crime prevention. Accordingly, the department may withhold the information we have marked in Exhibit B pursuant to section 552.108(b)(1). However, we find that the department has failed to demonstrate how release of the remaining information in Exhibit B would interfere with law enforcement or crime prevention. Accordingly, the remaining information is not excepted from public disclosure under section 552.108(b)(1) of the Government Code.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. You raise section 552.101 in conjunction with section 418.176 of the Texas Homeland Security Act, chapter 418 of the Government Code (the "HSA"). Section 418.176 of the Government Code provides in relevant part:

> (a) Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:

> (1) relates to staffing requirements of an emergency response provider, including law enforcement agency, a fire-fighting agency, or an emergency services agency;
>
> (2) relates to a tactical plan of the provider; or
>
> (3) consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers, of the provider.

Gov't Code § 418.176(a). The fact that information may relate to a governmental body's security concerns or emergency management activities does not make the information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You generally assert that the remaining information in Exhibit B was collected and assembled or is maintained for the purpose of preventing, detecting, responding to, and investigating possible terrorist or related criminal activity. While you assert that the information at issue relates to a tactical plan of the department, we find that the information is relevant solely to the incident at issue and consists of generally known policies, procedures, and techniques. *See id.* § 418.176. Further, we find that you have not shown that any of the information at issue relates to an emergency response provider's staffing requirements or a list or compilation of pager or telephone numbers. *See id.* Therefore, we conclude that the department may not withhold any of the remaining information in Exhibit B under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code.

In summary, the department may withhold Exhibit B-1 under section 552.107 of the Government Code. We have marked the information in Exhibit B that the department may withhold under section 552.108(b)(1) of the Government Code. The remaining information must be released.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 challenge 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 Office of the Attorney General 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,

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/mcf

Ref: ID# 301522

Enc. Submitted documents

c: Ms. Cynthia Neff
Fort Worth Star-Telegram
P.O. Box 915006
Fort Worth, Texas 76115
(w/o enclosures)

CAUSE NO. D-1-GV-08-000335

CITY OF ARLINGTON, Plaintiff,	§	IN THE DISTRICT COURT OF
v.	§	
GREG ABBOTT, ATTORNEY GENERAL OF TEXAS, Defendant	§	TRAVIS COUNTY, TEXAS
FORT WORTH STAR-TELEGRAM, Intervenor.	§	250TH JUDICIAL DISTRICT

Filed in The District Court of Travis County, Texas
on 4-2-08 at 3:13 P.M.
Amalia Rodriguez-Mendoza, Clerk

ORDER GRANTING DECLARATORY JUDGMENT

On March 31, 2008 came on to be heard the Application for Writ of Mandamus filed by Intervenor Fort Worth Star-Telegram and the Petition for Declaratory Judgment filed by Plaintiff City of Arlington. Plaintiff, Defendant and Intervenor all appeared by and through counsel of record. After hearing oral argument and after reviewing the evidence, the parties' pleadings and relevant case law, the Court is of the opinion that Intervenor's Application for Writ of Mandamus should be DENIED and Plaintiff's Petition for Declaratory Judgment should be GRANTED in part. It is, therefore,

ORDERED that Intervenor's Application for Writ of Mandamus is DENIED and Plaintiff's Petition is GRANTED in part.

The Court holds that the "after action report" on the October 12, 2007 critical Police incident on Carter Drive in Arlington, Texas is subject to exceptions from release under the Texas Public Information Act and should not be released in its entirety. The Court finds that the predominate amount of information in the report may be withheld from release based on exceptions contained in TEX. GOV'T CODE ANN. § 418.176 (Vernon 2005 & Supp. 2007) and § 552.108 (Vernon 2004 & Supp. 2007). However, the

portions of the report which contain information that was already been released to the public in the "Summary" report (Arlington's Exhibit 2) shall be released to the public. Open Record Letter Ruling OR2008-01763 issued by the Attorney General shall be nullified to the extent that it is inconsistent with this ruling.

Costs of court and attorneys fees are taxed against the parties having heretofore incurred same.

This order finally disposes of all parties and all claims and is appealable.

SIGNED the 2 day of April, 2008.

Gus J. Strauss
JUDGE PRESIDING
53rd District
Court, by assignment