



ATTORNEY GENERAL OF TEXAS  
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OR2010-00361

Dear Ms. Fleming and Mr. West:

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# 366772 (OIG ORR File # OR-2009-00283).

The Texas Department of Criminal Justice (the “department”) received a request for information related to the Prison Entrepreneurship Program (the “program”) and its former Chief Executive Officer. The department’s Office of the General Counsel (the “OGC”) and Office of the Inspector General (the “OIG”) have submitted separate briefs, as well as separate documents that each seeks to withhold from disclosure. The OGC states that it will release some of its responsive information and the OIG states that it will release some of its responsive information with redactions pursuant to (1) the previous determination issued by this office in Open Records Letter No. 2005-01067 (2005), and (2) section 552.147 of the Government Code.<sup>1</sup> The OIG claims that its submitted information is excepted from

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<sup>1</sup>We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act.

disclosure under sections 552.101, 552.108, 552.130, and 552.134 of the Government Code.<sup>2</sup> The OGC claims that its submitted information is excepted from disclosure under sections 552.101, 552.107, 552.108, and 552.134 of the Government Code. The OGC also explains that its submitted information may contain a third party's proprietary information subject to exception under the Act. Accordingly, the OGC has notified the program of this request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have considered the exceptions claimed by the OGC and the OIG and reviewed the submitted information.<sup>3</sup>

Initially, we note that a portion of the OIG's submitted information, which we have marked, is not responsive to the instant request because it was created after the date of this request. The department need not release non-responsive information in response to this request, and this ruling will not address the public availability of such information.

We next note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, we have not received any correspondence from the program. Thus, the program has not demonstrated that it has a protected proprietary interest in any of the submitted information. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the department may not withhold any of the OGC's submitted information on the basis of any proprietary interest the program may have in it.

We next address the OIG's argument under section 552.108(a)(1) of the Government Code. 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

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<sup>2</sup>The OIG initially also raised sections 552.117, 552.137, and 552.1175, but provided no arguments explaining how these sections apply to the OIG's submitted information. Accordingly, we understand the OIG to have withdrawn its claims under these sections.

<sup>3</sup>The OGC states that its submitted information constitutes a representative sample of its responsive information. We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). The OIG states that the entirety of its submitted information relates to a pending investigation into alleged criminal conduct. Based on this representation, we conclude that the release of this information 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. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e.*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).

Section 552.108 does not except from disclosure “basic information about an arrested person, an arrest, or a crime.” Gov’t Code § 552.108(c). Section 552.108(c) refers to the basic “front-page” information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-187; *see also* Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Thus, with the exception of basic information, which the OIG states it has already released, the department may withhold the OIG’s submitted information under section 552.108(a)(1) of the Government Code.<sup>4</sup>

We next address the OGC’s arguments against disclosure of its submitted information. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses section 508.313 of the Government Code, which provides in part:

(a) All information obtained and maintained [by the department], including a victim protest letter or other correspondence, a victim impact statement, a list of inmates eligible for release on parole, and an arrest record of an inmate, is confidential and privileged if the information relates to:

- (1) an inmate of the institutional division [of the department] subject to release on parole, release to mandatory supervision, or executive clemency;
- (2) a releasee; or
- (3) a person directly identified in any proposed plan of release for an inmate.

*Id.* § 508.313(a); *see id.* § 508.001(9) (“releasee” means a person released on parole or to mandatory supervision). The OGC states that some of the submitted information, which it

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<sup>4</sup>As this ruling is dispositive with regard to the information submitted by the OIG, we need not address the OIG’s remaining arguments against disclosure.

has marked, constitutes documents originating from and maintained in the Parole Division files of releasees. Upon review, we find that this information relates to releasees and is subject to section 508.313 of the Government Code. The requestor in this instance is not authorized to obtain the information at issue under section 508.313(c). Further, this information is not made public under section 552.029 of the Government Code. *See id.* § 508.313(f). Accordingly, the department must withhold the information the OGC has marked under section 552.101 of the Government Code in conjunction with section 508.313 of the Government Code.<sup>5</sup>

Section 552.134 of the Government Code relates to department inmates and provides in relevant part:

(a) Except as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the [department] is excepted from [required public disclosure] if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Gov't Code § 552.134(a). The OGC states that the remaining information it has marked under section 552.134 relates to "[program] participation by and custody level classifications of offenders" confined in a department facility. Upon review, we agree that the information we have marked under section 552.134 relates to department inmates. We also agree that none of this information is subject to release under section 552.029 of the Government Code. Accordingly, the department must withhold the information we have marked under section 552.134 of the Government Code. However, the OGC has failed to establish how the remaining information it has marked under section 552.134 relates to department inmates; thus, the department may not withhold any of the remaining information at issue under section 552.134.

The OGC raises no further exceptions against disclosure of the remaining information for which it raised section 552.134. However, we note that this information contains an e-mail address of a member of the public. Section 552.137 of the Government Code states that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure.<sup>6</sup> *Id.* § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). Subsection 552.137(c)(1)

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<sup>5</sup>As this ruling is dispositive, we need not address the OGC's remaining arguments against disclosure of this information.

<sup>6</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

states that subsection 552.137(a) does not apply to an e-mail address “provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor’s agent.” *Id.* § 552.137(c)(1). You do not indicate that the owner of the e-mail address we have marked has consented to release, and you also do not indicate whether this person had or was an agent of an organization that had a contractual relationship with the department. Therefore, the department must withhold the e-mail address we have marked under section 552.137, unless the owner of this address had or was an agent of an organization that had a contractual relationship with the department.

Section 552.107(1) 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. Open Records Decision No. 676 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. 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. *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 a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1). 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, 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. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). 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(1) 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).

The OGC states that the information it has marked under section 552.107 consists of or documents communications between attorneys for and clients of the department. The OGC has identified all of these parties. The OGC states that these communications were made in furtherance of the rendition of legal services to the department, and informs this office that these communications have remained confidential. Based on the OGC’s representations and our review, we agree that the information the OGC has marked under section 552.107

constitutes privileged attorney-client communications. Accordingly, the department may withhold these communications under section 552.107 of the Government Code.<sup>7</sup>

Section 552.108(b)(1) of the Government Code excepts from required public disclosure an internal record of a law enforcement agency 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." Gov't Code § 552.108(b)(1). A governmental body that seeks to withhold information under 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 id.* § 552.301(e)(1)(A); *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.) (section 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws); Open Records Decision Nos. 562 at 10 (1990), 531 at 2 (1989). In Open Records Decision No. 506 (1988), this office determined that the statutory predecessor to section 552.108(b) excepted from disclosure "cellular mobile phone numbers assigned to county officials and employees with specific law enforcement responsibilities." *Id.* at 2. We noted that the purpose of the cellular telephones was to ensure immediate access to individuals with specific law enforcement responsibilities and that public access to these numbers could interfere with that purpose. *Id.*

The OGC informs us that the cellular telephone number it has marked is assigned to a department administrator, who is a peace officer who requires this telephone to perform his job in the field. The OGC asserts that the release of this number would interfere with law enforcement and crime prevention. Based on the OGC's representations and our review of the information at issue, we conclude that the department may withhold the information the OGC has marked under section 552.108(b)(1) of the Government Code.

We note that the OGC's remaining information contains home and cellular telephone numbers for department employees. Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that the information be kept confidential under section 552.024 of the Government Code. Section 552.117(a)(2) excepts from public disclosure the home addresses, home telephone numbers, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code.<sup>8</sup> Gov't Code § 552.117(a)(2). Section 552.117 also encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cell phone service. *See Open*

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<sup>7</sup>As this ruling is dispositive, we need not address the OGC's remaining argument against disclosure of this information.

<sup>8</sup>"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Accordingly, to the extent the information we have marked under section 552.117 relates to a peace officer, the department must withhold this information under section 552.117(a)(2) of the Government Code.<sup>9</sup> To the extent such information does not relate to a peace officer, we consider section 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Therefore, if the information we have marked under section 552.117 does not relate to a peace officer, the department must withhold this information under section 552.117(a)(1) to the extent the department did not pay for the listed cellular telephone and to the extent the involved employees timely elected under section 552.024 to keep their information confidential.

Finally, we note that some of the remaining information at issue appears to be protected by copyright. A governmental body must allow inspection of copyrighted materials unless an exception applies to the information, but a custodian of public records must comply with copyright law and is not required to furnish copies of records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). Thus, if a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, (1) with the exception of basic information, the department may withhold the OIG's submitted information under section 552.108(a)(1) of the Government Code, (2) the department must withhold the information the OGC has marked under section 552.101 of the Government Code in conjunction with section 508.313 of the Government Code, (3) the department must withhold the information we have marked under section 552.134 of the Government Code, (4) the department must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of this address had or was an agent of an organization that had a contractual relationship with the department, (5) the department may withhold the information the OGC has marked under section 552.107 of the Government Code, (6) the department may withhold the information the OGC has marked under section 552.108(b)(1) of the Government Code, (7) to the extent the information we have marked under section 552.117 of the Government Code relates to a peace officer, the

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<sup>9</sup>We note the previous determination issued in Open Records Decision No. 670 (2001) authorizes a governmental body to withhold the home addresses and telephone numbers, personal cellular telephone and pager numbers, social security numbers, and family member information of its peace officers under section 552.117(a)(2) without the necessity of requesting an attorney general decision.

department must withhold this information under section 552.117(a)(2); conversely, to the extent this information does not relate to a peace officer, the department must withhold this information under section 552.117(a)(1) to the extent the department did not pay for the listed cellular telephone and to the extent the involved employees timely elected under section 552.024 to keep their information confidential, and (8) the department must release the remainder of the submitted information, but only in accordance with copyright law.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Ryan T. Mitchell  
Assistant Attorney General  
Open Records Division

RTM/dls

Ref: ID# 366772

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

**[Third party:]**

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