ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 4, 2008

Ms. Holly C. Lytle
Assistant County Attorney
El Paso County
500 East San Antonio, Room 503
El Paso, Texas 79901

OR2008-12198

Dear Ms. Lytle:

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# 320908.

The El Paso County Attorney's Office (the "county") received a request for 34 categories of information[1] pertaining to the employment and termination of a county employee as well as information concerning other claims of wrongful termination made against the county and Justice of the Peace Number 5.[2] You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.111, 552.114, 552.117, 552.130 and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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[1]We note that the requestor has asked the county to answer questions. The Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request. *See* Open Records Decision Nos. 563 at 8, 555 at 1-2 (1990). However, a governmental body must make a good faith effort to relate a request to information held by the governmental body. *See* Open Records Decision No. 561 at 8 (1990). We assume the county has made a good faith effort to do so.

[2]We note that the requestor made her request for information on June 2, 2007; however, you explain that the county required the requestor to make a deposit for payment of the anticipated costs in accordance with section 552.263 of the Government Code, but that the requestor, on June 25, modified her request to seek only access to the information. *See* Gov't Code 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date that governmental body receives deposit or bond).

Initially, you assert that the submitted information includes a student's school attendance record in Attachment H as well as other educational information in Attachment I. The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, does not permit state and local educational authorities to disclose to this office, without parental or an adult student's consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.[3] Consequently, education records that are responsive to a request for information under the Act should not be submitted to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. *See* 34 C.F.R. § 99.3 (defining "personally identifiable information").

We note that the county is not an educational agency or institution for purposes of FERPA. In this instance, however, you state that the county obtained the student's attendance record from the educational institution that created that document. FERPA contains provisions that govern access to education records that were transferred by an educational agency or institution to a third party. To the extent that the attendance record as well as the other educational information was obtained from the educational institution, so as to be governed by FERPA, we will not address the applicability of FERPA to the attendance record, because our office is prohibited from reviewing education records to determine whether appropriate redactions have been made under FERPA. Such determinations under FERPA must be made by the educational authorities from which education records were obtained.[4] Thus, the county should contact any educational institutions from which the attendance record and other educational information was obtained, as well as the DOE, regarding the applicability of FERPA to these records.

Next, you acknowledge, and we agree, that the county failed to comply with section 552.301 of the Government Code for the information submitted on July 18, 2008. A governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential

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[3]A copy of this letter may be found on the Office of the Attorney General's website: http://www.oag.state.tx.us/opinopen/og_resources.shtml.

[4]Accordingly, we also do not address your arguments under section 552.114 of the Government Code. *See* Gov't Code §§ 552.026 (incorporating FERPA into the Act), .114 (excepting from disclosure "student records"); Open Records Decision No. 539 (1990) (determining the same analysis applies under section 552.114 of the Government Code and FERPA).

or third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Sections 552.101, 552.102, 552.130, and 552.137 of the Government Code can provide a compelling reasons to overcome this presumption; therefore, we will address your arguments under these exceptions for the information submitted on July 18, 2008.

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. This section encompasses information protected by other statutes, such as the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides the following:

> (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
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> (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b),(c). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). The county may release the marked medical records only in accordance with the MPA. *See* Open Records Decision No. 598 (1991).

Section 552.101 also encompasses section 31306 of title 49 of the United States Code and section 382.405 of title 49 of the Code of Federal Regulations. Section 31306 of title 49 of the United States Code relates to alcohol and controlled substances testing for operators of commercial motor vehicles and provides in relevant part:

> (b) Testing program for operators of commercial motor vehicles. - (1)(A) In the interest of commercial motor vehicle safety, the Secretary of Transportation shall prescribe regulations that establish a program requiring motor carriers to conduct preemployment, reasonable suspicion, random, and post-accident testing of operators of commercial motor vehicles for the use of a controlled substance in violation of law or a United States Government regulation and to conduct reasonable suspicion, random, and post-accident testing of such operators for the use of alcohol in violation of law or a United States Government regulation. . . .

49 U.S.C. § 31306(b)(1)(A). Section 31306(c) pertains to testing and laboratory requirements and provides that

> [i]n carrying out subsection (b) of this section, the Secretary of Transportation shall develop requirements that shall -
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> . . .
>
> > (7) provide for the confidentiality of test results and medical information (except information about alcohol or a controlled substance) of employees, except that this clause does not prevent the use of test results for the orderly imposition of appropriate sanctions under this section[.]

Id. § 31306(c)(7). Federal regulations clarify the extent to which test results pertaining to operators of motor vehicles are confidential. Section 382.401 of title 49 of the Code of Federal Regulations, titled "Retention of records," requires employers to retain certain records pertaining to alcohol and controlled substances testing. *See* 49 C.F.R. § 382.401. Section 382.401 provides in part:

> (a) General requirement. Each employer shall maintain records of its alcohol misuse and controlled substances use prevention programs as provided in this section. The records shall be maintained in a secure location with controlled access.
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> (b) Period of retention. Each employer shall maintain the records in accordance with the following schedule:
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> > (1) Five years. The following records shall be maintained for a minimum of five years:
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> > > (I) Records of driver alcohol test results indicating an alcohol concentration of 0.02 or greater,
> > >
> > > (ii) Records of driver verified positive controlled substances test results,
> > >
> > > (vi) Records related to the administration of the alcohol and controlled substances testing programs[.]
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> > (2) Two years. Records related to the alcohol and controlled substances collection process (except calibration of evidential breath testing devices).

> (3) One year. Records of negative and canceled controlled substances test results (as defined in part 40 of this title) and alcohol test results with a concentration of less than 0.02 shall be maintained for a minimum of one year.
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> . . .
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> (c) Types of records. The following specific types of records shall be maintained. "Documents generated" are documents that may have to be prepared under a requirement of this part. If the record is required to be prepared, it must be maintained.
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> (1) Records related to the collection process:
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> . . .
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> (ii) Documents relating to the random selection process;
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> . . .
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> (v) Documents generated in connection with decisions to administer reasonable suspicion alcohol or controlled substances tests;
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> . . .
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> (vi) Documents generated in connection with decisions on post-accident tests;
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> . . .
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> (2) Records related to a driver's test results:
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> . . .
>
> (v) Documents presented by a driver to dispute the result of an alcohol or controlled substances test administrated under this part[.]

49 C.F.R. § 382.401(a)-(c). Section 382.405 of title 49 of the Code of Federal Regulations, titled "Access to facilities and records," provides in part:

> (a) Except as required by law or expressly authorized or required in this section, no employer shall release driver information that is contained in records required to be maintained under § 382.401.

. . .

> (h) An employer shall release information regarding a driver's records as directed by the specific written consent of the driver authorizing release of the information to an identified person. Release of such information by the person receiving the information is permitted only in accordance with the terms of the employee's specific written consent as outlined in § 40.321(b) of this title.

Id. § 382.405(a). Section 382.405 also specifies the circumstances under which an employer may release test results. *See id.* § 382.405(b)-(g).

You inform us that Attachment K contains information about drug tests taken by an employee as required by federal law to maintain his commercial driver's license. We understand you to claim that the information in Attachment K is maintained by the county pursuant to federal law. You do not inform us that any written consent has been given with respect to the disclosure of the drug tests. Therefore, the county must withhold the information you have highlighted and the information we have marked under section 552.101 of the Government Code in conjunction with section 31306 of title 49 of the United States Code and section 382.405 of title 49 of the Code of Federal Regulations.[5]

You also argue that Attachments I and M, and the remaining portion of Attachment K, contain private information which is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. Section 552.101 also encompasses the doctrine of common-law privacy. Section 552.102(a) of the Government Code excepts from public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy [.]" *Id.* § 552.102(a). Section 552.102 is applicable to information that relates to public officials and employees. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). The privacy analysis under section 552.102(a) is the same as the common-law privacy standard under section 552.101. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (addressing statutory predecessor). We will therefore consider the applicability of common-law privacy under section 552.101 together with your claim under section 552.102.

Common-law privacy protects information that (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual

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[5]As our ruling is dispositive for this information, we need not address your argument under section 552.102.

assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has also found that personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from disclosure under common-law privacy. *See* Open Records Decision No. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, protected under common-law privacy). Upon review, we find that some of the information at issue constitutes highly intimate or embarrassing information for the purposes of common-law privacy. Accordingly, we have marked the information in Attachments I and M that must be withheld under section 552.101 of the Government Code in conjunction with common law privacy. The county may not withhold any of the remaining information at issue in Attachments I, K, and M under either section 552.101 or section 552.102 on the basis of common-law privacy.

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 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 Texas 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), (B), (C), (D), (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(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).

You assert that the information contained in Attachment F consists of communications between attorneys for the county and county employees made in the furtherance of professional legal services. You state that "no client, either by action or words, has ever agreed to waive the privilege concerning these documents." However, you have not identified several of the parties to the communications within Attachment F. *See* Open Records Decision No. 542 (1990) (stating that governmental body has burden to establishing that exception applies to requested information). From our review of the information at issue, we have been able to identify these unidentified individuals as county employees.[6] Accordingly, we find that you have established that the information contained in Attachment F falls under the attorney-client privilege and is thus excepted from disclosure under section 552.107.[7]

Section 552.111 encompasses the attorney work product privilege found at rule 192.5 of the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 192.5; *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines attorney work product as consisting of

> (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
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> (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX.R.CIV.P. 192.5. A governmental body that seeks to withhold information on the basis of the attorney work product privilege under section 552.111 bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *See id.*; Open Records Decision No. 677 at 6-8. In order for this office to conclude that information was created or developed in anticipation of litigation, we must be satisfied that

> (a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a

[6]In the future, the county should take care to identify all of the individuals who sent or received privileged communications. Failure to do so could result in a waiver of the attorney-client privilege.

[7]As our ruling is dispositive, we need not address your remaining arguments for this information

> substantial chance that litigation would ensue; and (b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; Open Records Decision No. 677 at 7.

You state that Attachment G consists of materials prepared in preparation of a grievance, claim, or litigation. Upon review, we find that you have demonstrated that Attachment G contains information that was prepared by, or consists of communications between, a party's representatives made in anticipation of litigation. Therefore, the county may withhold Attachment G under section 552.111 as attorney work product.

Section 552.117(a)(1) of the Government Code excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that such information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). We note, however, that an individual's personal post office box number is not a "home address" for the purposes of section 552.117 and therefore may not be withheld under section 552.117 *See* Open Records Decision No. 622 at 4 (1994). (purpose of section 552.117 is to protect public employees from being harassed at home.

Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The county may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. You have named twelve employees who elected to have their personal information withheld from public disclosure. Accordingly, the personal information of these employees, which you have marked, and the additional information we have marked, must be withheld under section 552.117. If the additional employee whose personal information we have marked timely elected to withhold her personal information under section 552.024, this marked information must also be withheld under section 552.117(a)(1). If that employee did not timely elect confidentiality, the marked information may not be withheld under section 552.117(a)(1).

Section 552.130 of the Government Code provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. *Id.* § 552.130(a)(1), (2). This section also excepts from disclosure information that relates to a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document. *See id.* § 552.130(a)(3). Upon review, the county must withhold the information you have marked under section 552.130 of the Government Code.

The submitted information contains account numbers that are subject to section 552.136 of the Government Code, which states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b). We have marked the bank account number and routing number that must be withheld under section 552.136.[8]

Section 552.137 of the Government Code requires a governmental body to withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See id.* § 552.137(b). You do not inform us that the owners of the e-mail addresses at issue affirmatively consented to their release. Therefore, the county must withhold the e-mail addresses you have marked under section 552.137.

In summary, the county may release the marked medical records only in accordance with the MPA and the county must withhold the information you have highlighted and the information we have marked in Exhibit K under section 552.101 of the Government Code in conjunction with section 31306 of title 49 of the United States Code and section 382.405 of title 49 of the Code of Federal Regulations. The county must withhold the information we have marked under section 552.101 or 552.102 in conjunction with common-law privacy. The county may withhold the information contained in Attachment F under section 552.107 of the Government Code and the information contained in Attachment G under section 552.111 of the Government Code. The county must withhold the personal information of the employees who timely requested that their information be withheld that you have marked, and the additional information we have marked, under 552.117(a)(1) of the Government Code. To the extent that the additional employee at issue made a timely determination under section 552.024, the county must also withhold the information we have marked pertaining to the employee under section 552.117. The county must withhold the information you have marked under section 552.130 of the Government Code, the bank account and routing information we have marked under section 552.136, and the e-mail address information you have marked under section 552.137. 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

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[8]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).

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). If the governmental body does not file suit over 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).

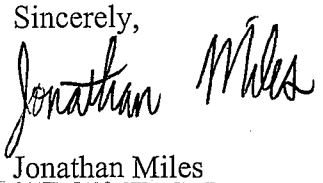
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/jh

Ref: ID# 320908

Enc. Submitted documents

c: Ms. Lisa A. Elizondo
Elizondo & Hayes, P.C.
2524 Montana
El Paso, Texas 79903
(w/o enclosures)