



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 31, 2009

Captain Thomas P. Karlok  
Custodian of Records  
Galveston Police Department  
P.O. Box 17251  
Galveston, Texas 77552-7251

OR2009-10649

Dear Captain Karlok:

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# 350727 (ORR# 09-176).

The Galveston Police Department (the "department") received a request for the cellular telephone records and all e-mails sent and received by the police chief from October 5, 2008, until April 5, 2009.<sup>1</sup> You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.111, 552.117, 552.1175, 552.136, 552.137, and 552.145 of the Government Code and Texas Rule of Evidence 508.<sup>2</sup> We have

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<sup>1</sup> You note that the department initially received the present request on April 22, 2009. In accordance with section 552.263 of the Government Code, the department required the requestor to provide a deposit for payment of anticipated costs for the preparation of the requested information. *See* Gov't Code § 552.263(a). The department received the required deposit on May 11, 2009, and, accordingly, that is the date on which we consider the department to have received the present request. *See id.* § 552.263(f).

<sup>2</sup> Although you raise section 552.024 of the Government Code, we note that this section is not an exception to public disclosure under the Act. Rather, this section permits a current or former official or employee of a governmental body to choose whether to allow public access to certain information relating to the current or former official or employee that is held by the employing governmental body. *See* Gov't Code § 552.024. Section 552.117 of the Government Code is instead the proper exception to assert. We also note you raise sections 552.108(5)(b) and 552.108(i). These sections do not exist.

considered your arguments and reviewed the submitted representative sample of information.<sup>3</sup>

Initially, we note that portions of the submitted information are not responsive to the present request because they were created outside the requested date range. In addition, you have also attached police reports to the submitted e-mails which do not relate to the request. This ruling does not address the public availability of non-responsive information and the department is not required to release this in response to the request.

Next, you assert that the police chief's cellular telephone logs are subject to a previous determination. In Open Records Decision No. 673 (2001), this office set forth the circumstances under which a governmental body may rely on a ruling from this office as a previous determination for purposes of section 552.301(a) of the Government Code. *See* Open Records Decision No. 673. In that decision, this office noted that there are two types of previous determinations. The first type exists when the requested information is precisely the same information as was addressed in a prior attorney general ruling, the ruling was addressed to the same governmental body, the ruling concluded that the information is or is not excepted from disclosure, and the facts, circumstances, and law on which the prior ruling was based have not changed. The second type is an attorney general decision that explicitly grants a governmental body or class of governmental bodies a previous determination that may be relied upon to withhold a specific type of information without seeking an attorney general's ruling if certain conditions are met.

In this instance, you inform us that the police chief's cellular telephone logs were the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2009-07316 (2009). We note, however, the records at issue in that ruling were those of the city manager of the City of Galveston (the "city"), not the police chief. In addition, the ruling was addressed to the city, not the department. Accordingly, the department may not withhold the police chief's cellular telephone records in accordance with Open Records Letter No. 2009-07316. *See* ORD 673. However, we understand you to also assert that a type 2 previous determination under Open Records Letter No. 2009-07316 should apply to the same types of information, such as the police chief's cellular telephone records. We note, however, that Open Records Letter No. 2009-07316 does not meet any of the criteria discussed in Open Records Decision No. 673 for the second type of previous determination. Moreover, Open Records Letter No. 2009-07316 clearly states that it must not be relied upon as a previous determination regarding any other records other than those addressed in that ruling. Therefore, Open Records Letter No. 2009-07316 is not a second

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<sup>3</sup> 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.

type of previous determination for the submitted cellular telephone records and the department may not rely on it as such.

Next, we must address the department's obligations under the Act. Section 552.301(e) requires the governmental body to submit to this office, not later than the fifteen-business-day deadline after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the request for information; (3) a signed statement of the date on which the governmental body received the request or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples if the information is voluminous. *See* Gov't Code § 552.301(e)(1)(A)-(D). As previously noted, the department received this request on May 11, 2009. Accordingly, the fifteen-business-day deadline was June 2, 2009. Although you submitted some of the responsive records by the fifteen-business-day deadline, a portion of the responsive information was not submitted until July 17, 2009. Consequently, with respect to the cellular telephone records submitted on July 17, 2009, we find that the department failed to comply with the procedural requirements of section 552.301.

If a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex.App.—Austin 1990, no writ). A compelling reason exists when the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). The department raises section 552.108 for this information. Section 552.108 is a discretionary exception to disclosure and may be waived. *See* Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 177 (1977) (statutory predecessor to section 552.108 subject to waiver). Thus, your claim under section 552.108 does not provide a compelling reason for non-disclosure with respect to cellular telephone records submitted on July 17, 2009; therefore, they may not be withheld on that basis. However, your claims under sections 552.101, 552.117, 552.1175, 552.136, and 552.145 can provide a compelling reason for non-disclosure. Accordingly, we will address your arguments under these exceptions for this information.

We first address your arguments for withholding the police chief's cellular telephone records. 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 exception encompasses information that other statutes make confidential. Section 1039 of title 18 of the United States Code addresses fraud and related activity in connection with obtaining confidential phone records information, and provides in pertinent part:

(b) Prohibition on sale or transfer of confidential phone records information.--

(1) Except as otherwise permitted by applicable law, whoever, in interstate or foreign commerce, knowingly and intentionally sells or transfers, or attempts to sell or transfer, confidential phone records information of a covered entity, without prior authorization from the customer to whom such confidential phone records information relates, or knowing or having reason to know such information was obtained fraudulently, shall be fined under this title, imprisoned not more than 10 years, or both.

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(c) Prohibition on purchase or receipt of confidential phone records information.--

(1) Except as otherwise permitted by applicable law, whoever, in interstate or foreign commerce, knowingly and intentionally purchases or receives, or attempts to purchase or receive, confidential phone records information of a covered entity, without prior authorization from the customer to whom such confidential phone records information relates, or knowing or having reason to know such information was obtained fraudulently, shall be fined under this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 1039(b)(1), (c)(1). For purposes of section 1039, confidential phone records information includes information that “is contained in any bill, itemization, or account statement provided to a customer by or on behalf of a covered entity solely by virtue of the relationship between that covered entity and the customer.” *Id.* § 1039(h)(1)(C). We understand you to claim that because all of the telephone numbers in the requested information are contained in a bill, itemization, or account statement, such telephone numbers constitute “confidential phone records information” as defined in section 1039(h)(1)(C) and are therefore made confidential by section 1039. However, section 1039 applies to phone record information held by a covered entity. Section 1039(h)(2) defines covered entities as telecommunications carriers or providers of IP-enabled voice service. *Id.* § 1039(h)(2). Because the department is not a covered entity for purposes of section 1039, information it holds is not subject to section 1039 of title 18 of the United States Code and none of the requested information may be withheld on that basis.

Section 552.101 of the Government Code also encompasses the doctrines of common-law and constitutional privacy. Common-law privacy protects information that is (1) highly

intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. See *Indus. Found. v. Tex. Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. See 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has since concluded that other types of information also are private under section 552.101. See Open Records Decision No. 659 at 4-5 (1999) (summarizing information that attorney general has determined to be private).

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. See *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. ORD 455 at 4. The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* at 7. The scope of information protected is narrower than that under the common-law doctrine of privacy; constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)).

You raise section 552.101 in conjunction with common-law and constitutional privacy with respect to certain unlisted telephone numbers belonging to members of the public. This office has stated on several occasions that an individual's home address and telephone number generally are not protected by constitutional or common-law privacy under section 552.101. See Open Records Decision Nos. 554 at 3 (1990) (disclosure of a person's home address and telephone number is not an invasion of privacy), 455 at 7 (1987) (home addresses and telephone numbers do not qualify as "intimate aspects of human affairs"). Furthermore, we have frequently stated that a mere expectation of privacy on the part of the individual does not permit that information to be withheld under section 552.101. See Open Records Decision Nos. 479 at 1 (1987) (information is not confidential simply because the party that submitted the information anticipated or requested confidentiality). Therefore, the department may not withhold the unlisted telephone numbers belonging to members of the public under section 552.101 of the Government Code in conjunction with common-law or constitutional privacy.

You also claim section 552.117 of the Government Code for portions of the police chief's cellular telephone records. Section 552.117(a)(1) of the Government Code excepts from disclosure the current 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 request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). We note that section 552.117 also encompasses a personal cellular telephone number, provided that the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular mobile phone numbers paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Section 552.117(a)(2) excepts from disclosure this same information regarding a peace officer, as defined by article 2.12 of the Texas Code of Criminal Procedure, regardless of whether the officer elected under section 552.024 or 552.1175 of the Government Code to keep such information confidential.

To the extent the cellular telephone numbers in the submitted information pertain to current or former department employees who are officers, and the officers at issue paid for the cellular telephone service with their own funds, the department must withhold this information under section 552.117(a)(2) of the Government Code. To the extent this information pertains to current or former civilian employees of the department, who paid for the cellular telephone service with their own funds, the department must withhold this information under section 552.117(a)(1) of the Government Code if the employees at issue elected to keep such information confidential prior to the department's receipt of this request for information. The department may not withhold any cellular telephone number that pertains to cellular telephone service paid for by the department under section 552.117 of the Government Code.

Next you state the requested cellular telephone records may contain personal telephone numbers belonging to peace officers who are not employed by the department. These numbers are subject to section 552.1175 of the Government Code, which provides in part:

(b) Information that relates to the home address, home telephone number, or social security number of [a peace officer as defined by article 2.12 of the Code of Criminal Procedure], or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(b). *See, e.g.,* Open Records Decision No. 678 (2003) (ruling that confidentiality of information subject to section 552.1175 is dependent on a governmental

body's receipt of an election of confidentiality from the individual whose information is at issue). Thus, to the extent any of the telephone numbers in the requested information belong to a licensed peace officer not employed by the department who elects to restrict access to this information in accordance with section 552.1175(b), the department must withhold the telephone numbers under section 552.1175.

Next, you raise section 552.145 of the Government Code for portions of the cellular telephone records. Section 552.145 provides that "[t]he Texas no-call list created under Subchapter B, Chapter 304, Business & Commerce Code, and any information provided to or received from the administrator of the national do-not-call registry maintained by the United States government, as provided by Sections 304.051 and 304.056, Business & Commerce Code, are excepted from the requirements of Section 552.021." Gov't Code § 552.145. Although you argue that at least one of the telephone numbers in the requested information has been registered on the national or state "no-call list," we note that the confidentiality of section 552.145 applies specifically to the no-call list and information provided to or received from the administrator of the do-not call registry. Accordingly, because the submitted cellular telephone bill does not consist of the Texas no-call list or of information provided to or obtained from the administrator of the national no-call registry, section 552.145 does not apply to any portion of the cellular telephone bills maintained by the department, and none of the requested information may be withheld on that basis.

Section 552.136 of the Government Code provides in relevant part:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding 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.

*Id.* § 552.136(a)-(b). The department must withhold the account numbers we have marked in the requested cellular telephone records pursuant to section 552.136 of the Government Code.

We now address your arguments for the remaining requested information. As previously stated, section 552.101 encompasses information that other statutes make confidential. You raise section 552.101 in conjunction with section 143.089 of the Local Government Code for Exhibits N, O, and P. We understand that the city is a civil service city under chapter 143 of the Local Government Code. Section 143.089 provides for two different types of personnel files relating to a police officer: one that must be maintained as part of the officer's civil service file and another the police department may maintain for its own internal use. *See* Local Gov't Code § 143.089(a), (g). The officer's civil service file must contain certain specified items, including commendations, periodic evaluations by the police officer's supervisor, and documents relating to any misconduct in which the department took disciplinary action against the officer under chapter 143 of the Local Government Code. *Id.* § 143.089(a)(1)-(2). Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *Id.* §§ 143.051-.055; *see* Attorney General Opinion JC-0257 (written reprimand is not disciplinary action for purposes of Local Gov't Code chapter 143).

In cases in which a police department investigates a police officer's misconduct and takes disciplinary action against an officer, it is required by section 143.089(a)(2) to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the police officer's civil service file maintained under section 143.089(a). *See Abbott v. Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, no pet.). All investigatory materials in a case resulting in disciplinary action are "from the employing department" when they are held by or are in the possession of the department because of its investigation into a police officer's misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* Such records may not be withheld under section 552.101 of the Government Code in conjunction with section 143.089 of the Local Government Code. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). However, information maintained in a police department's internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. Tex. Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You indicate Exhibits N, O, and P are maintained in the department's internal files as authorized under section 143.089(g) of the Local Government Code. You state that these exhibits relate to complaints that have not yet concluded in disciplinary action. Accordingly, we conclude the department must withhold Exhibits N, O, and P under section 552.101 of the Government Code in conjunction with section 143.089 of the Local Government Code.<sup>4</sup>

Section 552.101 also encompasses section 261.201(a) of the Family Code, which provides:

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<sup>4</sup> As our ruling is dispositive, we do not address your remaining argument against disclosure.

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). We note Exhibits 7 and 11 were used or developed in alleged child abuse investigations. *See id.* § 261.001 (defining “abuse” and “neglect” for purposes of Fam. Code ch. 261); *see also id.* § 101.003(a) (defining “child” for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes). Accordingly, we find the information at issue is within the scope of section 261.201 of the Family Code. You have not indicated the department has adopted a rule that governs the release of this type of information; therefore, we assume no such regulation exists. Given that assumption, the department must withhold Exhibits 7 and 11 under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.<sup>5</sup>

We next address your claim under section 552.107(1) of the Government Code for Exhibits 13, D, F-1, H, I, J, K, L, M, Q, and R. 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

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<sup>5</sup> As our ruling is dispositive, we do not address your remaining argument against disclosure.

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 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 state that the submitted information includes correspondence between the department, district attorney’s office, city, and outside legal counsel for the city. You have identified most of the parties to the communications. You further state that the communications were made in confidence and have not been shared or distributed to other individuals. Based on your arguments and our review, we find section 552.107(1) is generally applicable to Exhibits 13, D, F-1, H, I, J, K, M, Q, and R.<sup>6</sup> We also note that some of the individual e-mails in the submitted e-mail strings consist of communications with non-privileged parties. To the extent that those e-mails, which we have marked in Exhibit F-1, exist separate and apart from the e-mail strings, we conclude that they may not be withheld under section 552.107(1). In addition, we find that you have failed to demonstrate that one of the e-mails in Exhibit R, which we have marked for release, constitutes a communication made in furtherance of the rendition of legal services to the department. We also find you have failed to inform this office of the identity or capacity of all of the parties to the communications in Exhibit L, and we are unable to discern this information from the submitted records. Because you have failed to demonstrate that these remaining communications constitute attorney-client communications, we conclude that section 552.107 is not applicable to this information, and it may not be withheld on this basis.

We now address your argument under section 552.108 of the Government Code for the information in Exhibits 17 and 18. Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals

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<sup>6</sup> As our ruling is dispositive, we do not address your remaining argument against disclosure.

with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution 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). You claim section 552.108 for Exhibits 17 and 18 and state these e-mails relate to pending criminal investigations. Based on your representations and our review, we determine the release of Exhibits 17 and 18 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). Accordingly, the department may withhold Exhibits 17 and 18 under section 552.108(a)(1).

Next, you claim section 552.103 of the Government Code for Exhibits 6, 8, 9, 10, 12, 14, 15, 16, as well as Exhibits F-2, L, and the remaining portions of Exhibits F-1 and R. Section 552.103 provides in part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov’t Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, *writ ref’d n.r.e.*); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

For the purposes of section 552.103(a), litigation includes civil lawsuits and criminal prosecutions, as well as proceedings that are governed by the Administrative Procedure Act, chapter 2001 of the Government Code, or are otherwise conducted in a quasi-judicial forum. *See* Open Records Decision Nos. 588 (1991), 474 (1987), 368 (1983), 336 (1982).

We first address your argument under section 552.103 for Exhibits 6, 8, 9, 10, 12, 14, 15, and 16. You state, and provide documentation demonstrating, that these exhibits relate to pending criminal prosecutions. We note, however, that the department is not a party to these prosecutions. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990) (stating that predecessor to section 552.103 only applies when governmental body is party to litigation). In such a situation, we require an affirmative representation from the governmental body with the litigation interest that the governmental body wants the information at issue withheld from disclosure under section 552.103. You have not provided such a representation. Therefore, the department may not withhold Exhibits 6, 8, 9, 10, 12, and 14 through 16 under section 552.103.

We now address your arguments under section 552.103 for Exhibit F-2 and the remaining portions of Exhibit F-1. You state, and provide documentation showing, three department police officers are defendants in a lawsuit styled *Milburn v. Gomez*, Civil Action No. G-09-023, pending in the United States District Court for the Southern District of Texas. We note the e-mails at issue relate to the pending litigation. Accordingly, we find section 552.103 is applicable to Exhibit F-2 and the remaining portions of Exhibit F-1.<sup>7</sup>

We next address your argument under section 552.103 for Exhibit L. You state, and provide documentation showing, the city is the defendant in a lawsuit styled *Nugent v. City of Galveston*, Cause No. 09CV0458, was filed in the 56<sup>th</sup> Judicial District in Galveston County. We note the submitted information is related to this pending litigation. Accordingly, we find section 552.103 is generally applicable to Exhibit L.

We now address your argument under section 552.103 for the remaining information in Exhibit R. You generally assert this information relates to a pending litigation. We note, however, the e-mail at issue concerns an attorney asking the police chief to review the attorney's handgun permit. Accordingly, we find you have failed to demonstrate how this information relates to pending litigation for purposes of section 552.103.

Thus, you may generally withhold the remaining portions of Exhibit F-1, and Exhibits F-2 and L under section 552.103. However, once information has been obtained by all parties to the anticipated or pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing

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<sup>7</sup> As our ruling is dispositive, we do not address your remaining argument against disclosure.

party in any of the anticipated or pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You also claim section 552.111 of the Government Code for the remaining information in Exhibit R. Section 552.111 of the Government Code excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency," and encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. Gov't Code § 552.111; *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 work product as:

(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

(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 seeking to withhold information under this exception 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. *Id.*; ORD 677 at 6-8. In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied: (a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation there was a substantial chance litigation would ensue; and (b) the party resisting discovery believed in good faith there was a substantial chance litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation. *See 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; ORD 677 at 7. The second prong of the work product test requires the governmental body to show the documents at issue contain the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. Tex. R. Civ. P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test is confidential under rule 192.5, provided the information does not fall within the purview of the exceptions to the privilege enumerated in rule 192.5(c). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d at 427.

As previously stated, a governmental body bears the burden of establishing the applicability of the work product privilege to information it seeks to withhold under section 552.111 of the Government Code. In this instance, the e-mail at issue pertains to an attorney asking the police chief for help in renewing a handgun license. Although you claim this information is subject to the attorney work product privilege, you have failed to demonstrate how this e-mail was created or developed for trial or in anticipation of litigation. Furthermore, you have failed to demonstrate any of the information constitutes an attorney's or an attorney's representative's mental impressions, opinions, conclusions, or legal theories. Consequently, you have failed to demonstrate the applicability of section 552.111 of the Government Code to the e-mail at issue, and the information may not be withheld on this basis.

You also claim section 552.137 of the Government Code for portions of the remaining information. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). The e-mail addresses we have marked in the remaining information are not specifically excluded by section 552.137(c). As such, the e-mail addresses we have marked must be withheld under section 552.137, unless the owners of the addresses affirmatively consent to their release. *See id.* § 552.137(b).

In summary, in regard to the cellular telephone records, the department must withhold the cellular telephone numbers under section 552.117 if these numbers pertain either to current or former department officers, or to current or former department employees who timely elected to withhold that information, and the employees at issue paid for the cellular telephone service with their own funds. To the extent any of the telephone numbers in the requested information belong to a licensed peace officer not employed by the department who elects to restrict access to this information in accordance with section 552.1175(b), the department must withhold the telephone numbers under section 552.1175. The department must withhold the account numbers in the requested cellular telephone records pursuant to section 552.136 of the Government Code. The remaining information in the cellular telephone records must be released.

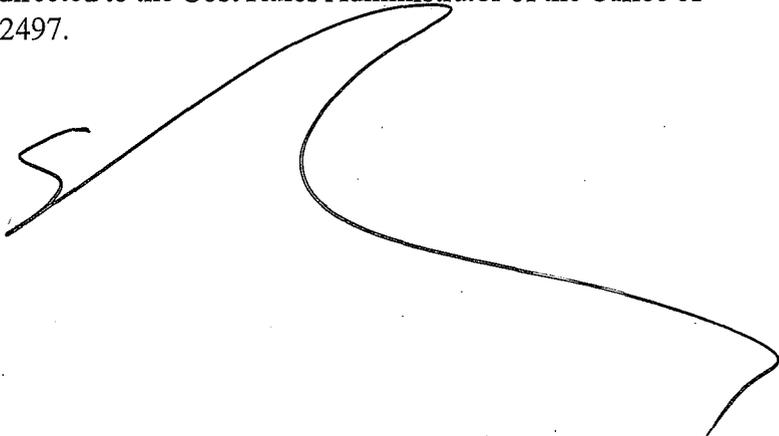
In regard to the remaining information, the department must withhold Exhibits N, O, and P under section 552.101 of the Government Code in conjunction with section 143.089 of the Local Government Code. The department must withhold Exhibits 7 and 11 under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. The department may generally withhold Exhibits 13, D, F-1, H, I, J, K, M, Q, and R under section 552.107(1) of the Government Code. However, to the extent the information we have marked in those exhibits exist separate and apart from the e-mail strings, we conclude that they may not be withheld under section 552.107(1). However, the e-mail we have marked in Exhibit R may not be withheld under section 552.107. The department may withhold Exhibits 17 and 18 under section 552.108(a)(1). The department may withhold the

remaining information in Exhibit F-1, and Exhibits F-2 and L under section 552.103 of the Government Code. The department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code. The remaining information must be released.

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 at (512) 475-2497.

Sincerely,



Chris Schulz  
Assistant Attorney General  
Open Records Division

CS/cc

Ref: ID# 350727

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)