



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 3, 2011

Mr. George E. Hyde
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2517 North Main Avenue
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OR2011-07891

Dear Mr. Hyde:

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# 419531.

The City of Shavano Park (the "city"), which you represent, received a request for sixty-eight categories of information pertaining to the requestor's client.¹ You indicate the city does not have some of the requested information.² You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, 552.1175, 552.119, and 552.130 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5.³ We have considered your

¹The city sought and received clarification of the information requested. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified).

²The Act does not require a governmental body to disclose information that did not exist when the request for information was received. Open Records Decision No. 452 at 3 (1986).

³Although you also raise section 552.022 of the Government Code, section 552.022 is not an exception to disclosure, but is a provision in the Act that lists categories of information that are not excepted from disclosure unless they are expressly confidential under other law. *See* Gov't Code § 552.022.

arguments and reviewed the submitted representative sample of information.⁴ We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note some of the submitted information is not responsive to the request for information because it was created after the city received the request. This ruling does not address the public availability of any information that is not responsive to the request, and the city is not required to release this information, which we have marked, in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed).

We next note the submitted documents indicate the city previously released some of the requested information in response to an earlier request for this information under the Act. Section 552.007 of the Government Code provides that if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law. *See* Gov't Code 552.007; Open Records Decision Nos. 518 at 3 (1989), 400 at 2 (1983). Sections 552.103, 552.107, and 552.111 of the Government Code, Texas Rule of Evidence 503, and Texas Rule of Civil Procedure 192.5 are discretionary in nature and serve only to protect a governmental body's interests. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 676 at 6 (2002) (section 552.107 is not other law for purposes of section 552.022), 542 at 4 (1990). As such, sections 552.103, 552.107, and 552.111, and rules 503 and 192.5 do not expressly prohibit the release of the submitted information or make the information confidential. Therefore, to the extent the city previously released any of the submitted information in response to a prior open records request, the city may not now withhold any such information under any of these sections or rules. However, sections 552.101, 552.117, 552.1175, 552.119, 552.130, 552.136, and 552.137 of the Government Code prohibit release of information or make information confidential; thus, we will consider the applicability of these sections to the submitted information.⁵ We will also consider your arguments under sections 552.103,

⁴We assume 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 those records contain substantially different types of information than that submitted to this office. We also note the submitted information contains social security numbers. 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.

⁵The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987); *see, e.g.*, Open Records Decision No. 470 at 2 (1987) (because release of confidential information could impair rights of third parties and because improper release constitutes a misdemeanor, attorney general will raise predecessor statute of section 552.101 on behalf of governmental bodies).

552.107, and 552.111, rule 503, and rule 192.5 to the extent the submitted information was not previously released.

We also note the submitted information contains completed reports and evaluations that are subject to section 552.022 of the Government Code. Under section 552.022(a)(1), a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it either is excepted under section 552.108 of the Government Code or is expressly confidential under other law. As discussed above, sections 552.103, 552.107, and 552.111 are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived. *See Dallas Area Rapid Transit*, 4 S.W.3d at 475-76; ORD 677 at 10, 676 at 6, 542 at 4. As such, sections 552.103, 552.107, and 552.111 are not other law that make information confidential for the purposes of section 552.022; therefore, the city may not withhold this information under these sections. However, the Texas Supreme Court has held the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" that makes information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). You assert this information is excepted under section 552.101 of the Government Code, which also constitutes other law for purposes of section 552.022. We will therefore consider your arguments under Texas Rule of Evidence 503, Texas Rule of Civil Procedure 192.5, and section 552.101 for the information subject to section 552.022.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. The submitted information contains a CR-3 accident report that was completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). Section 550.065(b) states that except as provided by subsection (c) or (e), accident reports are privileged and confidential. *See id.* § 550.065(b). Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *Id.* § 550.065(c)(4). Under this provision, the Texas Department of Transportation or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute.⁶ *Id.* The requestor has not provided the city with two of the three pieces of information; thus, the city must withhold the accident report under section 552.101 in conjunction with section 550.065(b).

Texas Rule of Evidence 503(b)(1) provides the following:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

⁶Transp. Code § 550.0601 ("department" means Texas Department of Transportation).

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

Tex. R. Evid. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must do the following: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (privilege attaches to complete communication, including factual information). Having considered your representations and reviewed the information at issue, we find you not have established any of the remaining information subject to section 552.022 constitutes a privileged attorney-client communication. Therefore, the city may not withhold this information under rule 503.

For the purpose of section 552.022, information is confidential under rule 192.5 of the Texas Rules of Civil Procedure only to the extent the information implicates the core work product aspect of the work product privilege. ORD 677 at 9-10. Core work product is defined as the work product of an attorney or an attorney's representative developed in anticipation of litigation or for trial that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. Tex. R. Civ. P. 192.5(a), (b)(1).

Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate the material was (1) created for trial or in anticipation of litigation and (2) consists of an attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *Id.*

The first prong of the work product test, which requires a governmental body to show the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and (2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See Nat'l Tank 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. The second prong of the work product test requires the governmental body to show the documents at issue contains 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 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). Having considered your representations and reviewed the information at issue, we find you have not established any of the remaining information subject to section 552.022 constitutes privileged core attorney work product. Therefore, the city may not withhold this information under rule 192.5.

You assert the information not subject to section 552.022 is excepted from disclosure under section 552.103 of the Government Code, which 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 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 from disclosure under section 552.103(a).

For 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). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, this office has considered the following factors: 1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding where a) discovery takes place, b) evidence is heard, c) factual questions are resolved, and d) a record is made; and 2) whether the proceeding is an adjudicative forum of first jurisdiction, *i.e.*, whether judicial review of the proceeding in district court is an appellate review and not the forum for resolving a controversy on the basis of evidence. *See* ORD 588.

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* ORD 452 at 4. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.⁷ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

You argue, among other grounds, that the city anticipates litigation related to the requested information because it pertains to a peace officer discharged by the city and the officer has the ability "to contest the characterization of his separation as designated in a Report of Separation (F-5) application to Texas peace officers through the application of Texas Occupations Code § 1701.452-4525 [sic]." *See* Occ. Code § 1701.4525 (establishing

⁷In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336; hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

process for officer to contest information in employment termination report). A peace officer may contest information contained in the officer's F-5 employment termination report in accordance with section 1701.4525 of the Occupations Code. *Id.* § 1701.4525(a). Section 1702.4525 provides that such a contest may result in a proceeding conducted by the State Office of Administrative Hearings. *See id.* § 1701.4525(b), (d), (e). However, we find you have not established how the mere chance that the terminated officer may contest the information in his F-5 employment termination report pursuant to section 1701.452 of the Occupations Code demonstrates the city reasonably anticipates litigation. *See* ORD 677 at 3 (holding mere chance of litigation not sufficient to trigger section 552.103(a)). You have also submitted an affidavit from the city's Chief of Police who argues the city anticipates litigation because the requestor's client appealed his termination to the city's Grievance Committee and the requestor, as an attorney representing the discharged employee, "injected" himself into that appeals process. We note, however, the Chief of Police also states in this affidavit that the city's "grievance process is a non-judicial, informal process used to collect information for final disposition of disciplinary action." You also argue the "format, content, context and tone of the request [for information] mirrors a request for production served in litigation pursuant to the Texas Rules of Civil Procedure" and the request for information "is sufficient on its own to place the [c]ity on notice of anticipated litigation." However, upon review, we find you have not furnished concrete evidence that litigation involving the city is realistically contemplated and is more than mere conjecture. *See* ORD 452 at 4; *see also* ORD 361 at 2 (1983) (holding fact request was made by an attorney on behalf of a rejected applicant insufficient to invoke litigation exception). Thus, we conclude you have failed to demonstrate the city reasonably anticipated litigation related to the requested information, and it may not withhold the submitted information under section 552.103.

You also assert some of the submitted information is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) protects information coming 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. ORD 676 at 6-7. First, a governmental body must demonstrate 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). 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. 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, *id.*, 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 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*, 922 S.W.2d at 923 (privilege extends to entire communication, including facts contained therein).

On the submitted document titled “Exceptions Log,” you note section 552.107 is applicable to documents responsive to request numbers 1-5, 8-9, 21, 36-38, and 61-62. You assert the information “marked as Exhibit G-1 within Exhibit G . . . is represented by the [c]ity for purposes of this matter to be obtained by an attorney acting in a legal capacity for the purpose of rendering legal advice[.]” You also state “[w]hile the collection of evidence involved the videotaped interview of the officer and [sic] is not asserted as a confidential communication, all remaining information by and between legal counsel and the [c]ity are appropriately marked” pursuant to section 552.107. Accordingly, after reviewing your arguments and the submitted information, we find you have established the following information constitutes privileged attorney-client communications that the city may withhold under section 552.107: pages 6-12 of the file labeled Docs for Req No 1-4.pdf; pages 9-37 of the file labeled Docs for Req No 5-6.pdf; pages 2-6, 67, 69, 74-78, 80-81 of the file labeled Docs for Req No 5 continue.pdf; pages 161-189 of the file labeled Docs for Req No 36.pdf; the responsive information in the file labeled Docs for Req No 37-38.pdf; and page 5 of the responsive information in the file labeled Docs for Req No 61.pdf. However, we find you have not established any of the remaining information at issue consists of privileged attorney-client communications; therefore, the city may not withhold any of the remaining information under section 552.107.

You also assert some of the submitted information is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 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.” This section encompasses the attorney work product privilege found in Rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); ORD 677 at 4-8. 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.

A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. Tex. R. Civ. P. 192.5; 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 that

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

Brotherton, 851 S.W.2d at 207. 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.

You assert "Exhibit G-3 should be excepted from public disclosure as it constitutes attorney work product." However, you have not submitted information that is marked as "Exhibit G-3." See Gov't Code § 552.301(e)(2). Nevertheless, on the submitted document titled "Exceptions Log," you note section 552.111 is applicable to documents responsive to request numbers 1-6, 9, 21, 26a-26b, 33, 36-39, and 61-62. However, upon review, we find you failed to establish any of the documents at issue consist of privileged work product. Thus, we conclude you have not established any of the submitted information is excepted from disclosure pursuant to section 552.111 of the Government Code and the attorney work product privilege.

You assert portions of the remaining information are excepted from disclosure under section 552.111 and the deliberative process privilege. In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. See *City of Garland*, 22 S.W.3d at 364; *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). However, an agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating

to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6.

You assert "the information marked as" Exhibits G-1, G-2, and G-3 is excepted from disclosure under section 552.111 and the deliberative process privilege. However, as noted in part above, you have not submitted information that is marked as "Exhibit G-1," "Exhibit G-2," or "Exhibit G-3." See Gov't Code § 552.301(e)(2). Nevertheless, also as noted above, you note section 552.111 is applicable to documents responsive to request numbers 1-6, 9, 21, 26a-26b, 33, 36-39, and 61-62 on the submitted document titled "Exceptions Log." After review of your arguments and the submitted information, we conclude the information at issue consists of personnel matters, and not internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. Therefore, you have not established any of the information at issue is excepted from release under section 552.111 and the deliberative process privilege.

Section 552.101 of the Government Code also encompasses federal law. Prior decisions of this office have held section 6103(a) of title 26 of the United States Code renders tax return information confidential for purposes of section 552.101. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]" See 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. See *Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993).

Subsections (c) and (e) of section 6103 are exceptions to the confidentiality provisions of section 6103(a) and provide for disclosure of tax information to the taxpayer or the taxpayer's designee. See 26 U.S.C. § 6103(c), (e)(1)(A)(i) (tax return information may be disclosed to taxpayer), (e)(7) (information may be disclosed to any person authorized by subsection(e) to obtain such information if Secretary of Treasury determines such disclosure would not seriously impair tax administration); see also *Lake v. Rubin*, 162 F.3d 113 (D.C. Cir. 1998) (26 U.S.C. § 6103 represents exclusive statutory route for taxpayer to gain access to own return information and overrides individual's right of access under the federal Freedom of Information Act). The submitted information contains W-4 forms of the requestor's client. Accordingly, the city must release the submitted W-4 forms to the requestor pursuant to section 6103 of title 26 of the United States Code.

Section 552.101 of the Government Code also encompasses laws that make criminal history record information ("CHRI") confidential. CHRI generated by the National Crime

Information Center or by the Texas Crime Information Center is confidential under federal and state law. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083.

Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI, but a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-411.127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* ORD 565. However, driving record information is not made confidential by the confidentiality provisions that govern CHRI. *See* Gov't Code § 411.082(2)(B) (definition of CHRI does not include driving record information). In addition, section 411.083 does not apply to active warrant information or other information relating to one's current involvement with the criminal justice system. *See id.* § 411.081(b) (police department allowed to disclose information pertaining to person's current involvement in the criminal justice system).

The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code. You have not established, however, the remaining information contains CHRI for purposes of chapter 411; therefore, none of the remaining information is confidential under chapter 411 and the city may not withhold any of it under section 552.101 of the Government Code on that ground.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. 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). Prior decisions of this office have found financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy but there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600, 545 (1990), 373 (1983). For example, information related to an individual's mortgage payments, assets, bills, and credit history is generally protected by the common-law right to privacy. *See* Open Records Decision Nos. 545, 523 (1989); *see also* ORD 600 (personal financial information includes choice of particular insurance carrier). This office has also found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under

common-law privacy. *See, e.g.*, Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). In addition, a compilation of an individual's criminal history record information is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted individual has significant privacy interest in compilation of one's criminal history).

We have marked information pertaining to the cellular telephone plan of an individual that the city must withhold as private financial information under section 552.101 in conjunction with common-law privacy if the cellular telephone services were paid with personal funds. *See* Open Records Decision Nos. 620 (1993), 600, 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular mobile telephone numbers provided and paid for by governmental body and intended for official use). We have also marked additional information that the city must withhold under section 552.101 in conjunction with common-law privacy. Upon review, however, we find the remaining information is not highly intimate or embarrassing; therefore, the remaining information is not confidential under common-law privacy, and the city may not withhold it under section 552.101 on that ground.

You assert some of the submitted information is excepted under section 552.117 of the Government Code. 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 this information be kept confidential under section 552.024 of the Government Code. 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.

We have marked information, including cellular telephone numbers, of city police officers that the city must withhold under section 552.117(a)(2) and of other city employees the city must withhold under section 552.117(a)(1) if the employees elected to keep such information confidential prior to the city's receipt of the request for information.⁸ However, the city may not withhold the cellular telephone numbers we have marked under section 552.117(a)(1) or 552.117(a)(2) if the officers or employees concerned did not pay for the cellular telephone service. The city may also not withhold the information we have marked under section 552.117(a)(1) if the employees at issue did not timely elect to keep such information confidential prior to the city's receipt of the request for information.

⁸As our ruling is dispositive, we do not address your other argument to withhold this information.

You assert some of the information at issue may be excepted under section 552.1175 of the Government Code, which provides in part the following:

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). We note a pager, fax, or cellular telephone number provided to an employee at public expense may not be withheld under section 552.1175. *See generally* ORD 506. We have marked information, including cellular telephone numbers, of peace officers that the city must withhold under section 552.1175 if the officers elect to restrict access to this information in accordance with section 552.1175(b). However, the city may not withhold the cellular telephone numbers we have marked under section 552.1175 if the officers concerned did not pay for the cellular telephone service. In addition, the city may not withhold any of the information marked under section 552.1175 if the officers at issue do not elect to restrict access to this information in accordance with section 552.1175(b).

Section 552.119 of the Government Code provides the following:

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

- (1) the officer is under indictment or charged with an offense by information;
- (2) the officer is a party in a civil service hearing or a case in arbitration; or
- (3) the photograph is introduced as evidence in a judicial proceeding.

(b) A photograph excepted from disclosure under Subsection (a) may be made public only if the peace officer gives written consent to the disclosure.

Gov't Code § 552.119. Under section 552.119, a governmental body must demonstrate, if the documents do not demonstrate on their face, that release of the photograph would

endanger the life or physical safety of a peace officer.⁹ After review of your arguments, we find you have not demonstrated, and it is not apparent from our review of the submitted information, that release of the photographs at issue would endanger the life or physical safety of the peace officers depicted. Therefore the city may not withhold any of the submitted information pursuant to section 552.119 of the Government Code.

Section 552.130 of the Government Code provides 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. Gov't Code § 552.130(a)(1), (2). But section 552.130 does not encompass motor vehicle record information of other states. We have marked Texas motor vehicle record information that the city must withhold under section 552.130. The following recordings in the submitted DVDs also contain discernable Texas license plate numbers that the city must withhold under section 552.130: lab709E-8001----01-09h15m54s-13.01.2011.avi; and 709E-8001----01-09h45m54s-13.01.2011.avi.

We note some of the remaining information is excepted under section 552.136 of the Government Code. Section 552.136(b) provides 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." The city must withhold the account and insurance policy numbers we have marked under section 552.136.

Some of the remaining information is also excepted from disclosure under section 552.137 of the Government Code. 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). See Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, the city must withhold the e-mail addresses you have marked, as well as those we have marked, under section 552.137.

We conclude the following: (1) the city must withhold the submitted CR-3 accident report under section 552.101 of the Government Code in conjunction with section 550.065(b) of the Transportation Code; (2) the city may withhold the following information under section 552.107 of the Government Code: pages 6-12, 17-18, and 21 of the file labeled Docs for Req No 1-4.pdf; pages 9-37 of the file labeled Docs for Req No 5-6.pdf; pages 2-6, 67, 69, 74-77, 80-81 of the file labeled Docs for Req No 5 continue.pdf; pages 161-189 of the file labeled Docs for Req No 36.pdf; the responsive information in the file labeled Docs for Req No 37-38.pdf; and page 5 of the responsive information in the file labeled Docs for Req

⁹"Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

No 61.pdf; (3) the city must release the W-4 forms to the requestor pursuant to section 6103 of title 26 of the United States Code; (4) the city must withhold the information we have marked under section 552.101 in conjunction with section 411.083 of the Government Code; (5) the city must withhold the cellular telephone plan information we have marked under section 552.101 in conjunction with common-law privacy if the cellular telephone services were paid with personal funds; (6) the city must withhold the remaining information we have marked under section 552.101 in conjunction with common-law privacy; (7) the city must withhold the information pertaining to peace officers we have marked under section 552.117(a)(2) of the Government Code, as well as the information pertaining to city employees, other than peace officers, we have marked under section 552.117(a)(1) of the Government Code if the employees elected to keep such information confidential prior to the city's receipt of the request for information; however, the city may not withhold the cellular telephone numbers we have marked under section 552.117(a)(1) or 552.117(a)(2) if the officers or employees concerned did not pay for the cellular telephone service; (8) the city must withhold the information we have marked under section 552.1175 of the Government Code if the officers concerned timely elect to keep such information confidential prior to the city's receipt of the request for information; however, the city may not withhold the cellular telephone numbers we have marked under section 552.1175 if the officers did not pay for the cellular telephone service; (9) the city must withhold under section 552.130 of the Government Code the Texas motor vehicle record information we have marked under that section and the Texas license plate numbers in the recordings labeled lab709E-8001----01-09h15m54s-13.01.2011.avi and 709E-8001----01-09h45m54s-13.01.2011.avi; (10) the city must withhold the information we have marked under section 552.136 of the Government Code; and (11) the city must withhold the information marked under section 552.137 of the Government Code.¹⁰ The city must release the remaining information.¹¹

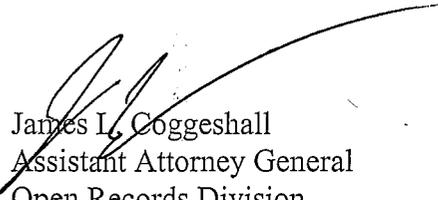
¹⁰We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver's license and license plate numbers under section 552.130 of the Government Code, insurance policy numbers under section 552.136 of the Government Code, and an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general opinion. However, Open Records Decision No. 684 does not pertain to information to which a requestor has a right of access under section 552.023 of the Government Code. *See* ORD 684 at 12.

¹¹We note the submitted information contains social security numbers. 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. We also note the requestor, as the representative of the individual at issue, has a right of access to information in the submitted documents that otherwise would be excepted from release under the Act. *See* Gov't Code § 552.023(a) ("a person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests"); ORD 481 at 4 (privacy theories not implicated when individuals request information concerning themselves). Thus, the city must again seek a decision from this office if it receives a request for this information from a different requestor.

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, 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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/eb

Ref: ID# 419531

Enc. Submitted documents

c: Requestor
(w/o enclosures)