ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 7, 2011

Ms. Caroline Kelley
City Attorney
City of Missouri City
1522 Texas Parkway
Missouri City, Texas 77489

OR2011-16379

Dear Ms. Kelley:

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# 435495.

The City of Missouri City (the "city") received a request for a copy of a specified investigation that resulted in the demotion of a named police officer and specified e-mails. The city received a second request from the same requestor for the signed complaint upon which this officer's termination from the city's police department (the "department") was based, the investigation that determined the officer violated department policy and the city's personnel policy, the department's drug testing policy and code of conduct, the city's personnel policy, and specified e-mails from a specified time period. You state the city has provided the requestor with some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.108, 552.117, 552.1175, 552.137, and 552.152 of the Government Code.[1] We have considered your arguments and the submitted information, some of which consists of representative samples.[2]

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[1]Although you initially also raised sections 552.111, 552.130, 552.136, 552.140, and 552.147 of the Government Code as exceptions to disclosure of the information responsive to the second request for information, you did not submit to this office written comments stating the reasons why these sections would except any of this information, nor have you identified any information you seek to withhold under these exceptions; we therefore assume you no longer assert these exceptions. *See* Gov't Code §§ 552.301, .302.

[2]We 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

Initially, we note some of the submitted information is not responsive to any of the requests for information because it was created after the dates the requests were received. This decision does not address the public availability of the non-responsive information, which we have marked, and that information need not be released in response to the present requests.

Next, we must address the city's obligations under the Act. Section 552.301 of the Government Code prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. Gov't Code § 552.301(b). Pursuant to section 552.301(e), a governmental body that receives a request for information it wishes to withhold under the Act is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). You state the city received the first request for information on July 28, 2011. However, you did not submit your request for a ruling from this office concerning this request until September 13, 2011. Therefore, we find the city failed to comply with the requirements of section 552.301 as to the information responsive to the first request.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.* § 552.302 (where request for attorney general decision does not comply with requirements of section 552.301, information at issue is presumed to be public); *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). We note that a compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). You raise sections 552.101, 552.102, and 552.152 of the Government Code for the information at issue, which can provide compelling reasons to withhold information. Thus, we will address your arguments under these exceptions for the portion of the submitted information that is

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extent those records contain substantially different types of information than that submitted to this office.

responsive to the first request. We will also consider your arguments for the remaining submitted information that is responsive to the second request.

We first address your claims under section 552.103 of the Government Code, as it is potentially the most encompassing exception you raise. Section 552.103 of the Government Code 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.
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> . . .
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> (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 under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). 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. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated").

You assert the information you submitted in response to the second request for information is excepted from disclosure under section 552.103 because the city reasonably anticipates litigation. You provide two letters that the city received from an attorney who represents the named officer in connection with his termination. However, we note the city received these

letters from the officer's attorney after the city received the second request. Furthermore, you have not otherwise demonstrated that the opposing party had taken concrete steps toward litigation on the date this request was received. *See* Open Records Decision No. 331 (1982). Thus, we find you have failed to establish the city reasonably anticipated litigation on the date the second request for information was received. *See* Gov't Code § 552.103(c). Accordingly, the city may not withhold any of the information at issue under section 552.103.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. The city claims section 552.101 in conjunction with the constitutional doctrine embodied in *Garrity v. New Jersey*, 385 U.S. 493 (1967) and *Spevack v. Klein,* 385 U.S. 511 (1967) for the portions of the responsive submitted information that consist of statements provided by department employees in connection with the internal investigation to which the information at issue pertains. Both *Garrity* and *Spevack* dealt with the constitutional prohibition against self-incrimination in court or other judicial proceedings. *See Spevack,* 385 U.S. 511, *Garrity,* 385 U.S. 493. Here, the question is whether the information at issue must be released in response to a request for information under the Act. Information is not confidential under the Act simply because the party that provided the information anticipated or requested that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976); *see also* Attorney General Opinion JM-672 (1987) (governmental body cannot overrule or repeal provisions of Act by agreement or contract). We therefore conclude the city may not withhold any of the information at issue under section 552.101 on the basis of the decisions in *Garrity* nor *Spevack.*

Section 552.101 of the Government Code also encompasses constitutional privacy. 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. Open Records Decision No. 455 at 4. 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. *Id.* 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.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). You claim portions of the responsive submitted information are protected by constitutional privacy. Upon review, however, we find you have not demonstrated how the information at issue falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Accordingly, the city may not withhold any of this information under section 552.101 in conjunction with constitutional privacy.

You raise section 552.102 of the Government Code for portions of the responsive submitted information. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

Gov't Code § 552.102(a). We understand you to claim the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code. Section 552.101 also encompasses the common-law right to privacy, which protects information if it (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.*, 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be met. *Id.* at 681-82. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court recently expressly disagreed with *Hubert*'s interpretation of section 552.102(a) and held its privacy standard differs from the *Industrial Foundation* test under section 552.101. *Tex. Comptroller*, 2010 WL 4910163, at *5. The supreme court then considered the applicability of section 552.102, not *Industrial Foundation*, and held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Id.* at *10. Thus, *Texas Comptroller* applies only to a public employee's birth date maintained by the employer in an employment context. In this instance, the information at issue does not contain the birth dates of state employees. Thus, no portion of this information may be withheld under section 552.102. In addition, we find the information at issue is not highly embarrassing or intimate information of no legitimate public interest. Therefore, the city may not withhold any of this information under section 552.101 on the basis of common-law privacy.

You claim portions of the responsive submitted information are excepted from disclosure under section 552.107(1) of the Government Code. This section 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. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. 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.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends

on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You inform us the information you have marked under section 552.107 consists of confidential communications between the city's legal division and city employees that were made in furtherance of the rendition of professional legal services to the city. You also inform us these communications were intended to be confidential and their confidentiality has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Therefore, the city may withhold the information you marked under section 552.107(1).[3]

You raise section 552.152 of the Government Code for portions of the remaining responsive information. Section 552.152 provides:

> Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Act of May 9, 2011, 82nd Leg., R.S., S.B. 1303, § 27.001(20) (to be codified as Gov't Code § 552.152). You inform us the information you have marked under section 552.152 relates to undercover police officers. You inform us release of this information would subject these officers to a threat of physical harm. Based on your representations and our review, we agree you have demonstrated release of most the information at issue would subject the officers to a substantial threat of physical harm. Therefore, the city must generally withhold the information you have marked under section 552.152. However, we find you have failed to demonstrate how some of the information at issue would subject the officers to a substantial threat of physical harm. Accordingly, the information we have marked for release may not be withheld under section 552.152.

You raise section 552.108 of the Government Code for portions of the remaining information. Section 552.108 provides, in pertinent part, the following:

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[3]As our ruling for this information is dispositive, we need not address your remaining arguments against its disclosure.

> (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:
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> > (1) release of the information would interfere with the detection, investigation, or prosecution of crime; [or]
> >
> > (2) it is information that the deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]
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> > . . .
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> (b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:
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> > (1) release of the internal record or notation would interfere with law enforcement or prosecution; [or]
> >
> > (2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(1)-(2), (b)(1)-(2). Subsections 552.108(a)(1) and 552.108(b)(1) are mutually exclusive of subsections 552.108(a)(2) and 552.108(b)(2). Subsection 552.108(a)(1) protects information, the release of which would interfere with a particular pending criminal investigation or prosecution, while subsection 552.108(b)(1) encompasses internal law enforcement and prosecution records, the release of which would interfere with law enforcement and prosecution efforts in general. In contrast, subsections 552.108(a)(2) and 552.108(b)(2) protect information that relates to a concluded criminal investigation or prosecution that did not result in a conviction or deferred adjudication. A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why the exception it claims is applicable to the information the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). We note section 552.108 is generally not applicable to information relating to an administrative investigation that did not result in a criminal investigation or prosecution. *See Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution); *see also* Open Records Decision No. 350 at 3-4 (1982).

You argue portions of the remaining information you submitted in response to the second request for information are subject to section 552.108. In this case, you inform us release of the remaining administrative information you have marked would interfere with law

enforcement. However, you do not explain the administrative information at issue pertains to a pending criminal case. Accordingly, we find you have failed to demonstrate section 552.108 is applicable to any of the information at issue. *See id.* Thus, the city may not withhold this information under section 552.108.

You have marked portions of the remaining responsive information under section 552.117 of the Government Code. Section 552.117(a)(2) of the Government Code excepts from disclosure the current and former home addresses and telephone numbers, emergency contact information, social security number, and family member information regarding a peace officer regardless of whether the officer requested confidentiality under section 552.024 or 552.1175 of the Government Code.[4] Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)(2)). Upon review, we find the information you have marked constitutes the personal information of peace officers. We note, however, some of the information you marked is the named officer's personal information. In this instance, the requestor is an attorney who represents this officer. Section 552.023 of the Government Code states a person or a person's authorized representative has a special right of access to information that relates to the person and that is protected from disclosure by laws intended to protect the person's privacy interest. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (governmental body may not deny access to whom information relates or person's authorized representative on grounds that information is considered confidential by privacy principles). Because section 552.117 protects personal privacy, the requestor has a special right of access to his client's own information, which we have marked for release. However, the city must withhold the remaining information you marked under section 552.117(a)(2).[5]

We note a portion of the remaining responsive information may be subject to section 552.117(a)(1) of the Government Code. This section excepts from disclosure the home addresses and telephone numbers, emergency contact information, 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. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)(1)). We note section 552.117 encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cellular telephone service. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of

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[4]We note "peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

[5]As our ruling for this information is dispositive, we need not address your remaining argument against its disclosure.

the request for the information. The information at issue contains the cellular telephone numbers of a city official and a city employee. Accordingly, to the extent these individuals timely elected confidentiality under section 552.024 and pay for the cellular telephone service with personal funds, the city must withhold the cellular telephone numbers we have marked under section 552.117(a)(1). If the individuals did not timely elect to keep their personal information confidential or do not pay for the cellular telephone service with personal funds, their cellular telephone numbers may not be withheld under section 552.117(a)(1).

You claim certain e-mail addresses contained in the remaining responsive information are excepted from disclosure under section 552.137 of the Government Code. This section states "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure or the e-mail address falls within the scope of section 552.137(c). Gov't Code § 552.137(a)-(c). You state the owners of the e-mail addresses you have marked have not affirmatively consented to the release of this information. We note the e-mail addresses at issue do not fall within the scope of section 552.137(c). Thus, we agree that most of the information you marked under section 552.137 is protected under that section. However, you have also marked the names of individuals under section 552.137. Accordingly, with the exception of the names we have marked for release, the city must withhold the e-mail addresses you have marked, and the additional e-mail addresses we have marked, under section 552.137.[6]

Finally, we note that some of the submitted information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the city may withhold the information you marked under section 552.107(1) of the Government Code. With the exception of the information we marked for release, the city must withhold the information you marked under section 552.152 of the Government Code. With the exception of the information we marked for release, the city must withhold the information you marked under section 552.117(a)(2) of the Government Code. To the extent the individuals whose cellular telephone numbers we marked timely elected confidentiality under section 552.024 of the Government Code and pay for the cellular telephone service

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[6]We note Open Records Decision No. 684 (2009) is a previous determination issued by this office authorizing all governmental bodies to withhold ten categories of information without the necessity of requesting an attorney general decision, including an e-mail address of a member of the public under section 552.137 of the Government Code.

with personal funds, the city must withhold these cellular telephone numbers under section 552.117(a)(1) of the Government Code. If these individuals did not timely elect to keep their personal information confidential or do not pay for the cellular telephone service with personal funds, their cellular telephone numbers may not be withheld under that exception. With the exception of the names we marked for release, the city must withhold the e-mail addresses you marked, and the additional e-mail addresses we marked, under section 552.137 of the Government Code. The city must release the remaining responsive information, but any information protected by copyright may only be released in accordance with copyright law.[7]

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,

Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/agn

Ref: ID# 435495

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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[7]We note the information being released contains confidential information to which the requestor has a right of access. *See* Gov't Code § 552.023(a); ORD 481at 4. If the city receives another request for this information from a different requestor, then the city should again seek a decision from this office.