



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 10, 2014

Mr. Brian L. Rose  
Assistant General Counsel  
Harris County District Attorney's Office  
1201 Franklin, Suite 600  
Houston, Texas 77002-1901

OR2014-20375

Dear Mr. Rose:

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# 543530.<sup>1</sup>

The Harris County District Attorney's Office (the "district attorney's office") received four requests for information pertaining to a former district attorney's office employee, including his personnel file, a specified e-mail, and communications between the district attorney's office and the Harris County Sheriff's Office relating to a "backdated search warrant" or the former employee. You state you have released some information. You state you do not have information responsive to portions of the requests.<sup>2</sup> You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.117,

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<sup>1</sup>We note we have combined these requests, which originally were assigned identification numbers 543530, 544793, and 545192, under identification number 543530.

<sup>2</sup>The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

552.1175, 552.119, 552.130, 552.136, and 552.137 of the Government Code.<sup>3</sup> Further, you state release of the submitted information may implicate the proprietary interests of the former district attorney's office employee. Accordingly, you state you notified this third party of the request for information and of his right to submit arguments to this office as to why the information at issue should not be released. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released). We have received comments on behalf of the former employee. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the submitted information contains a peace officer's Texas Commission on Law Enforcement ("TCOLE") identification number. In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. We understand the officer's TCOLE identification number is a unique computer-generated number assigned to peace officers for identification in the commissioner's electronic database and may be used as an access device number on the TCOLE website. Accordingly, we find the TCOLE number in the submitted information does not constitute public information under section 552.002 of the Government Code. Therefore, the TCOLE number in the submitted information is not subject to the Act and need not be released to the requestor.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

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(17) information that is also contained in a public court record[.]

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<sup>3</sup>We note the district attorney's office failed to comply with section 552.301(b) in raising sections 552.119, 552.130, and 552.136 of the Government Code. *See* Gov't Code § 552.301(b). However, because these sections can provide compelling reasons to withhold information, we will address the applicability of these sections to the submitted information. *See id.* §§ 552.007, .302, .352. Although you also raise sections 552.103, 552.107, and 552.111, for the submitted information, you provide no arguments explaining how these exceptions are applicable to the information at issue. Therefore, we assume you no longer assert these exceptions. *See id.* §§ 552.301, .302.

Gov't Code § 552.022(a)(17). Exhibit C contains court-filed documents that are subject to subsection 552.022(a)(17) and must be released unless they are made confidential under the Act or other law. *See id.* You seek to withhold the information subject to subsection 552.022(a)(17) under section 552.108 of the Government Code. However, section 552.108 is a discretionary exception and does not make information confidential under the Act. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). Therefore, the marked court-filed documents may not be withheld under section 552.108 of the Government Code. As you claim no other exception to the disclosure of the marked court-filed documents, they must be released.

Section 552.108(a) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) 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(a)(1) must reasonably explain how and why the release of the information at issue 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, 710 (Tex. 1977). Section 552.108 may be invoked by the proper custodian of information relating to an investigation or prosecution of criminal conduct. Open Records Decision No. 474 at 4-5 (1987). Where a governmental body possesses information relating to a pending case of another law enforcement agency, the governmental body may withhold the information under section 552.108(a)(1) if it demonstrates the information relates to the pending case and this office is provided with a representation from the law enforcement entity that the law enforcement entity wishes to withhold the information.

You state Exhibit C pertains to a pending criminal prosecution being conducted by the Montgomery County District Attorney's Office (“Montgomery County”). You have submitted an affidavit from Montgomery County stating Exhibit C pertains to its pending criminal prosecution and objecting to the release of this information. Based on these representations, we conclude the release of Exhibit C 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) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, with the exception of the information subject to section 552.022(a)(17), the district attorney's office may withhold Exhibit C under section 552.108(a)(1) of the Government Code on behalf of Montgomery County.<sup>4</sup>

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<sup>4</sup>As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes, including federal law. The remaining information contains an Employment Eligibility Verification, Form I-9. Form I-9 is governed by title 8, section 1324a of the United States Code, which provides the form “may not be used for purposes other than for enforcement of this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5); *see* 8 C.F.R. § 274a.2(b)(4). Release of this document under the Act would be “for purposes other than for enforcement” of the referenced federal statutes. Accordingly, the district attorney’s office must withhold the submitted I-9 form, which we have marked, under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code.

Section 552.101 of the Government Code also encompasses section 6103(a) of title 26 of the United States Code, which makes tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms). Section 6103(b) defines the term “return information” as follows:

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 Treasury] 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[.]

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). Upon review, we find the remaining information contains a W-4 form which constitutes tax return information that is confidential under section 6103(a). Accordingly, the district attorney’s office must withhold the submitted W-4 form, which we have marked, pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. However, we find you have failed to demonstrate any portion of the remaining information at issue is subject to section 6103(a) of title 26 of the United States Code. Therefore, the district attorney’s office may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

Section 552.101 of the Government Code also encompasses chapter 411 of the Government Code, which makes confidential criminal history record information (“CHRI”) generated by

the National Crime Information Center or by the Texas Crime Information Center. *See* Gov't Code § 411.083(a). 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 laws with respect to the CHRI it generates. *See id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that 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; however, 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-.127. Thus, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with chapter 411, subchapter F of the Government Code. We note 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). Further, CHRI does not include driving record information. *See id.* § 411.082(2)(B). Upon review, we find the information we marked consists of CHRI the district attorney's office must withhold under section 552.101 in conjunction with section 411.083 of the Government Code. However, we find you have not demonstrated how any portion of the remaining information consists of CHRI for purposes of chapter 411 of the Government Code, and the district attorney's office may not withhold it under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses section 560.003 of the Government Code, which provides, "[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act]." *Id.* § 560.003; *see id.* § 560.001(1) ("biometric identifier" means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). Upon review, we find you have failed to demonstrate any of the remaining information is subject to section 560.003 of the Government Code. Thus, the district attorney's office may not withhold any of the remaining information under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses section 1701.454 of the Occupations Code, which governs the public availability of information submitted to TCOLE under subchapter J of chapter 1701 of the Occupations Code. Section 1701.454 provides as follows:

- (a) All information submitted to the [TCOLE] under this subchapter is confidential and is not subject to disclosure under Chapter 552, Government Code, unless the person resigned or was terminated due to substantiated

incidents of excessive force or violations of the law other than traffic offenses.

(b) Except as provided by this subchapter, a [TCOLE] member or other person may not release information submitted under this subchapter.

Occ. Code § 1701.454. The remaining information contains an F-5 Report of Separation of Licensee, which you state was submitted to TCOLE. You state the officer at issue did not resign or was not terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses. Therefore, the district attorney's office must withhold the F-5 form we marked under section 552.101 in conjunction with section 1701.454 of the Occupations Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision No. 600 (1992) (personal financial information includes choice of a particular insurance carrier), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information). However, information concerning financial transactions between an employee and a public employer is generally of legitimate public interest. ORD 545. Upon review, we find the information we marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the district attorney's office must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy.<sup>5</sup> However, we find the remaining information is not highly intimate or embarrassing information or is of legitimate public interest. Therefore, none of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Next, we address your argument under section 552.102 of the Government Code. Section 552.102(a) of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of

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

personal privacy.” Gov’t Code § 552.102(a). We understand you to assert 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. As previously mentioned, common-law privacy 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. 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 of appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has expressly disagreed with *Hubert’s* interpretation of section 552.102(a) and held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. See *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The supreme court also considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. See *id.* at 348. Having carefully reviewed the information at issue, we have marked information that must be withheld under section 552.102(a) of the Government Code. However, we find none of the remaining information is subject to section 552.102(a) of the Government Code, and the district attorney’s office may not withhold any of the remaining information on that basis.

The representative of the former employee raises section 552.110(b) of the Government Code. Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, substantial competitive injury would likely result from release of the information at issue. *Id.*; see also Open Records Decision No. 661 at 5 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, release of requested information would cause that party substantial competitive harm).

Upon review, we find the representative of the former employee has failed to demonstrate that the release of any of the remaining information would result in substantial harm to the former employee’s competitive position. See ORD 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). Accordingly, none of the remaining information may be withheld under section 552.110(b).

Section 552.117(a)(2) of the Government Code excepts from public disclosure the current and former home addresses and telephone numbers, emergency contact information, social security number, and family member information of a peace officer, regardless of whether the peace officer made an election under section 552.024 or section 552.1175 of the

Government Code to keep such information confidential. Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Section 552.117 is also applicable to personal cellular telephone numbers, provided 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 telephone numbers paid for by governmental body and intended for official use). Accordingly, the district attorney's office must withhold the information we marked under section 552.117(a)(2); however, the district attorney's office may only withhold the marked cellular number if the service is not paid for by a governmental body.<sup>6</sup> However, we find none of the remaining information is confidential under section 552.117(a)(2), and the district attorney's office may not withhold any of it on that basis.

Section 552.117(a)(1) excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of current or former employees or officials of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Upon review, we find none of the remaining information is confidential under section 552.117(a)(1), and the district attorney's office may not withhold any of it on that basis.

Section 552.1175 protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family member information of certain individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential. *See* Gov't Code § 552.1175(b). Section 552.1175 applies, in part, to "peace officers as defined by Article 2.12, Code of Criminal Procedure[.]" *Id.* § 552.1175(a)(1). Some of the remaining information relates to an individual who was a licensed peace officer of another law enforcement agency at the time the information at issue was created. However, we are unable to determine from the information provided if the individual at issue is currently a licensed peace officer. Thus, we must rule conditionally. Accordingly, to the extent the information at issue, which we have marked, relates to an individual who is currently licensed as a peace officer and who elects to restrict access to the information in accordance

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<sup>6</sup>As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

with section 552.1175(b), the district attorney's office must withhold the marked information under section 552.1175 of the Government Code. Conversely, if the individual whose information is at issue is not currently licensed as a peace officer or does not elect to restrict access to his information in accordance with section 552.1175(b), the marked information may not be withheld under section 552.1175. However, we find none of the remaining information is subject to section 552.1175, and the district attorney's office may not withhold any of the remaining information on that basis.

Section 552.139(b)(3) of the Government Code provides, "a photocopy or other copy of an identification badge issued to an official or employee of a governmental body" is confidential.<sup>7</sup> *Id.* § 552.139(b)(3). Therefore, the district attorney's office must withhold the photocopies of the identification cards we marked under section 552.139(b)(3) of the Government Code.<sup>8</sup>

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, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See id.* § 552.130. Accordingly, the district attorney's office must withhold the motor vehicle record information we marked under section 552.130 of the Government Code.

Section 552.136 of the Government Code provides, "[n]otwithstanding any other provision of [the Act], 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(b). An access device number is one that 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 a paper instrument, and includes an account number. *Id.* § 552.136(a) (defining "access device"). The district attorney's office informs us an employee's identification number is used in conjunction with another security number in order to access an employee's retirement or deferred compensation accounts. Upon review, we find the district attorney's office must withhold the employee identification number under section 552.136 of the Government Code.

Section 552.137 of the Government Code 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

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<sup>7</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>8</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). Upon review, we find the district attorney's office must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless their owner affirmatively consents to their public disclosure.

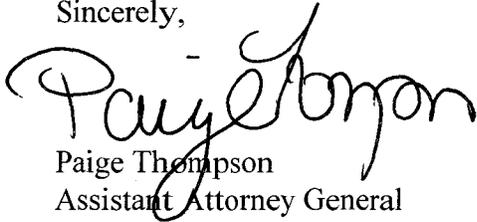
In summary, the TCOLE number in the submitted information is not subject to the Act and need not be released to the requestor. With the exception of the information subject to section 552.022(a)(17), the district attorney's office may withhold Exhibit C under section 552.108(a)(1) of the Government Code on behalf of Montgomery County. The district attorney's office must withhold (1) the submitted I-9 form we marked under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code; (2) the submitted W-4 form we marked pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code; (3) the information we marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code; (4) the F-5 form we marked under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code; (5) the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy; and (6) the information we marked under section 552.102(a) of the Government Code. The district attorney's office must withhold the information we have marked under section 552.117(a)(2); however, the district attorney's office may only withhold the marked cellular number if the service is not paid for by a governmental body. To the extent the information we marked under section 552.1175 of the Government Code relates to an individual who is currently licensed as a peace officer and who elects to restrict access to the information in accordance with section 552.1175(b), the district attorney's office must withhold the marked information under section 552.1175 of the Government Code. The district attorney's office must withhold (1) the photocopies of the identification cards we marked under section 552.139(b)(3) of the Government Code; (2) the motor vehicle record information we marked under section 552.130 of the Government Code; (3) the employee identification number under section 552.136 of the Government Code; and (4) the e-mail addresses we marked under section 552.137 of the Government Code, unless their owner affirmatively consents to their public disclosure. The district attorney's office must release the remaining information.

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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink that reads "Paige Thompson". The signature is written in a cursive, flowing style.

Paige Thompson  
Assistant Attorney General  
Open Records Division

PT/dls

Ref: ID# 543530

Enc. Submitted documents

c: 4 Requestors  
(w/o enclosures)

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