KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 1, 2015

Mr. Tucker Royall
Ms. Kathleen Decker
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2015-10602

Dear Mr. Tucker & Ms. Decker:

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# 565481 (PIR Nos. 15-20984 & 15-20986).

The Texas Commission on Environmental Quality (the "commission") received two requests from the same requestor for all information regarding Gulf Chemical and Metallurgical Corporation ("Gulf") from a specified time period. The commission states it has released some of the requested information. The commission claims the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.111, 552.117, 552.136, and 552.137 of the Government Code.[1] Additionally, the commission states release of the submitted information may implicate the proprietary interests of Gulf. Accordingly, the commission states, and provides documentation showing, it notified Gulf of the requests for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). The commission also inform us it has

[1]Although the commission raises section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded section 552.101 does not encompass discovery privileges. Further, although the commission claims Texas Rule of Evidence 503, we note the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107 of the Government Code. *See* Open Records Decision Nos. 676 at1-2 (2002), 575 at 2 (1990).

notified the Department of Public Safety of its right to submit comments to this office as to why its information should not be released. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information). We have received comments from Gulf. We have considered the submitted arguments and reviewed the submitted representative sample of information.[2]

Initially, 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, the following:

> (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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> . . .
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> (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body; [and]
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> . . .
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> (17) information that is also contained in a public court record[.]

Id. § 552.022(a)(3), (17). Some of the submitted information consists of information in an account, voucher, or contract relating to the receipt or expenditure of funds by a governmental body and a court-filed document that are subject to subsections 552.022(a)(3) and (a)(17), respectively. The commission must release this information pursuant to section 552.022, unless it is made confidential under the Act or other law. *See id.* Although the commission raises section 552.103 of the Government Code for all of this information and section 552.111 of the Government Code for the court-filed document, these exceptions are discretionary in nature and do not make information confidential under the Act. *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 8-10 (2002) (governmental body may waive attorney work product privilege under section 552.111), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the commission may not withhold any of the information subject to section 552.022, which we have marked, under section 552.103 or section 552.111. However, the Texas Supreme Court has held the Texas Rules of Civil Procedure are "other law" that make information expressly confidential for purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001).

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

Thus, we will consider the commission's assertion of the attorney work product privilege under Texas Rule of Civil Procedure 192.5. Additionally, the commission raises section 552.136 of the Government Code for some of this information, which makes information confidential for purposes of section 552.022. Accordingly, we will also consider the applicability of section 552.136 to the information at issue. Further, we will address the commission's arguments against disclosure of the remaining information.

Section 552.103 of the Government Code provides, in relevant 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, orig. proceeding); *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). We note contested cases conducted under the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991). We further note a contested case before the State Office of Administrative Hearings (the "SOAH") is considered litigation for the purposes of the APA. *See id.*

To establish litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect litigation is "realistically contemplated." *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (investigatory file may be withheld if governmental body attorney determines it should be withheld pursuant

to section 552.103 and litigation is "reasonably likely to result"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* ORD 452 at 4.

The commission informs us two administrative enforcement cases are currently pending against Gulf. Additionally, the commission has received a request for a contested case hearing based on an air quality permit application submitted by Gulf. The commission states it could grant this hearing request, which would lead to a contested case hearing before SOAH. Upon review, we find the commission reasonably anticipated litigation when it received the request for information. We also find the commission has established the information at issue is related to the anticipated litigation for purposes of section 552.103(a). Therefore, we agree the commission may withhold the information in Attachments G through Y that is not subject to section 552.022 of the Government Code under section 552.103(a) of the Government Code.[3]

However, once the information has been obtained by all parties to the anticipated litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note the applicability of section 552.103(a) ends when the litigation has concluded or is no longer anticipated. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

Section 552.107(1) of the Government Code 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 that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "to facilitate 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)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional

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

legal services to the client; or (B) reasonably necessary to transmit 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, orig. proceeding). 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).

The commission states the remaining information it has indicated consists of a communication involving commission attorneys and officials. The commission states the communications were made for the purpose of facilitating the rendition of professional legal services to the commission and these communications have remained confidential. Upon review, we find the commission has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the commission may withhold the remaining information it has indicated under section 552.107(1) of the Government Code.[4]

The commission asserts the information in Attachments BB, CC, DD, and EE is excepted from disclosure under section 552.108 of the Government Code. Initially, we consider the commission's assertion its Environmental Crimes Unit (the "ECU") qualifies as a law enforcement agency for purposes of section 552.108. Section 552.108 is applicable only to records created by an agency, or a portion of an agency, whose primary function is to investigate crimes and enforce criminal laws. *See* Open Records Decision Nos. 493 at 2 (1988), 287 (1981). Section 552.108 generally does not apply to records created by an agency whose chief function is essentially regulatory in nature. *See* Open Records Decision No. 199 (1978). An agency that does not qualify as a law enforcement agency may claim, under certain limited circumstances, that section 552.108 protects records in its possession. *See, e.g.*, Attorney General Opinion MW-575 (1982), Open Records Decision Nos. 493 , 272 (1981).

The commission informs us the ECU is a distinct part of the agency that is devoted to criminal law enforcement. The commission states the sole responsibility of the ECU is to conduct and participate in the detection, investigation, and prosecution of environmental crimes. The commission explains the staff of the ECU includes eleven criminal investigators who are assigned only to criminal cases. The commission also informs us the ECU follows a law enforcement agency's protocol regarding the gathering and storage of evidence and information for the purpose of preserving the admissibility of evidence at a criminal trial. The commission also states ECU case files are segregated from those of the rest of the agency. Having considered all of the submitted arguments and reviewed the related

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[4]As our ruling is dispositive, we need not address the commission's remaining argument against disclosure of this information.

documentation the commission has provided, we conclude the commission has demonstrated the ECU is a law enforcement agency for purposes of section 552.108 of the Government Code. *See A&T Consultants v. Sharp*, 904 S.W.2d 668, 677-78 (Tex. 1995) (comptroller may withhold from disclosure audit papers pursuant to section 552.108 to protect the comptroller's interest in enforcing the tax laws); Open Records Decision Nos. 320 at 1 (1982) (Texas National Guard is law enforcement agency for purposes of statutory predecessor), 127 at 8 (1976) (arson investigation unit of fire department is law enforcement agency), 126 at 5 (1976) (Attorney General's Organized Crime Task Force is law enforcement agency).

Section 552.108(b)(1) excepts from disclosure "[a]n 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 . . . if (1) release of the internal record or notation would interfere with law enforcement or prosecution[.]" Gov't Code § 552.108(b)(1). This section is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). This office has concluded this provision protects certain kinds of information, the disclosure of which might compromise the security or operations of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 at 3-4 (1989) (detailed guidelines regarding police department's use of force policy), 508 at 3-4 (1988) (information relating to future transfers of prisoners), 413 (1984) (sketch showing security measures for forthcoming execution). However, to claim this aspect of section 552.108 protection a governmental body must meet its burden of explaining how and why release of the information at issue would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). Further, commonly known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (former section 552.108 does not protect Penal Code provisions, common-law rules, and constitutional limitations on use of force), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques submitted were any different from those commonly known with law enforcement and crime prevention). To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a law-enforcement agency must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. Open Records Decision No. 409 at 2 (1984).

The commission states the information in Attachment CC consists of a search warrant execution and safety plan, which provides detailed guidance to members of the search warrant team. The commission explains the release of these records would disclose investigation strategies used and measures taken to ensure the safety of the search warrant team and employees of a large industrial facility during the execution of a search warrant. The commission further states the information in Attachment DD consists of detailed summaries of records relating to witnesses and potential defendants, which is used to locate

potential suspects and witnesses, verify witness' credibility, and prepare for witness interviews and suspect interrogations. The commission explains revealing these records would unduly interfere with law enforcement efforts by revealing strategies, techniques, and resources utilized by the commission's criminal investigators and could be used by a suspect to evade detection or mislead criminal investigators. Upon review, we find the commission has demonstrated release of the information in Attachments CC and DD would interfere with law enforcement. Thus, the commission may withhold the information in Attachments CC and DD under section 552.108(b)(1) of the Government Code.[5]

Section 552.108(a)(4) and (b)(3) of the Government Code states the following:

> (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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> . . .
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> (4) it is information that:
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> (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or
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> (B) reflects the mental impressions or legal reasoning of an attorney representing the state.
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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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> . . .
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> (3) the internal record or notation:
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> (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

[5]As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

> (B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(4), (b)(3). A governmental body claiming an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information the governmental body seeks to withhold. *See id.* §§ 552.108, .301(e)(1)(A); *see also* Open Records Decision No. 434 at 2-3 (1986). The commission contends the information in Attachment BB was prepared by the ECU at the direction of and for ECU attorneys in anticipation of a criminal litigation. Thus, the commission asserts the information at issue reflects the mental impressions and legal reasoning of the ECU attorneys. Based upon these representations, the commission may withhold the information in Attachment BB under section 552.108(a)(4) and section 552.108(b)(3) of the Government Code.

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e) (governmental body must provide comments explaining why exceptions raised should apply to information requested). The commission states the information in Attachment EE relates to a concluded case that did not result in a conviction or deferred adjudication. Based on the commission's representation, we conclude section 552.108(a)(2) is applicable to the information at issue.

Section 552.108, however, does not except from disclosure basic information about an arrested person, an arrest, or a crime. *Id.* § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). *See* Open Records Decision No. 127 (1976) (summarizing types of information made public by *Houston Chronicle*). Thus, with the exception of basic information, the commission may withhold the information in Attachment EE under section 552.108(a)(2) of the Government Code.[6]

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses the informer's privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement

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[6]As our ruling is dispositive, we need not address the commission's remaining argument against disclosure of this information.

authority, provided the subject of the information does not already know the informer's identity. *See* Open Records Decision No. 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 1-2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4 (1988).

The commission states the information in Attachment AA reveals the identities of complainants who reported possible violations of section 37.10 of the Penal Code and sections 7.145 and 7.177 of the Water Code, which carry criminal penalties. There is no indication the subject of the complaint knows the identities of the complainants. Based on the commission's representations and our review, we conclude the information we have marked identifies the complainants; thus, the commission may withhold the information we have marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. However, we find the remaining information at issue does not identify an informer for the purposes of the informer's privilege. Accordingly, the commission may not withhold any of the remaining information at issue under section 552.101 of the Government Code in conjunction with the common-law informer's privilege.

Texas Rule of Civil Procedure 192.5 encompasses the attorney work product privilege. For purposes of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. *See* ORD 677 at 9-10. Rule 192.5 defines core work product as the work product of an attorney or an attorney's representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney's representative. *See* 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 the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *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 (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation there was a substantial chance litigation would ensue, and (2) the party resisting discovery believed in good faith there was a substantial chance 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 part of the work product test requires the governmental body to show

the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both parts of the work product test is confidential under rule 192.5, provided the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 426 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding). The commission argues the court-filed document consists of privileged attorney work product. However, we note the court-filed document has been disclosed to non-privileged parties. Therefore, we conclude the commission may not withhold the court-filed document under Texas Rule of Civil Procedure 192.5.

We note the remaining information contains information subject to section 552.130 of the Government Code, which provides information relating to a motor vehicle operator's or 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.[7] Gov't Code § 552.130(a). Upon review, we find the commission must withhold the motor vehicle record information we have 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); *see id.* § 552.136(a) (defining "access device"). Upon review, we find the commission must withhold the information we have marked under section 552.136 of the Government Code. However, the remaining information at issue is not subject to section 552.136, and the commission may not withhold it on that basis.

In summary, the commission may withhold (1) the information in Attachments G through Y that is not subject to section 552.022 of the Government Code under section 552.103 of the Government Code; (2) the remaining information it has indicated under section 552.107(1) of the Government Code; (3) the information in Attachments CC and DD under section 552.108(b)(1) of the Government Code; (4) the information in Attachment BB under section 552.108(a)(4) and section 552.108(b)(3) of the Government Code; and (5) with the exception of basic information, which must be released, the information in Attachment EE under section 552.108(a)(2) of the Government Code. The commission must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code and the information we have marked under section 552.136 of the Government Code. The commission 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.

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[7]The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. Open Records Decision No. 481 (1987), 480 (1987), 470 (1987).

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, 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,

David L. Wheelus
Assistant Attorney General
Open Records Division

DLW/bhf

Ref: ID# 565481

Enc. Submitted documents

c: Requestor
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