



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 20, 2004

Mr. Leonard V. Schneider
Ross, Banks, May, Cron & Cavin, P.C.
2 Riverway, Suite 700
Houston, Texas 77056-1918

OR2004-6023

Dear Mr. Schneider:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 205549.

The Rosenberg Police Department (the "department"), which you represent, received a request for personnel, disciplinary, and administrative records pertaining to four named department employees. You advise that the department sought clarification of the request from the requestor, and you have submitted a copy of the requestor's written response. *See* Gov't Code § 552.222 (providing that a governmental body may ask the requestor to clarify the request if what information is requested is unclear to the governmental body); *see also* Open Records Decision No. 663 at 5 (1999) (discussing requests for clarification). You indicate that some of the requested information does not exist. The Public Information Act (the "Act") does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ *dism'd*); Open Records Decision No. 452 at 3 (1986). You also point out that the request includes three factual questions concerning other requests for the information sought by the requestor. As you acknowledge, the Act does not require a governmental body to answer fact questions. *See* Open Records Decision No. 555 at 1-2 (1990). You contend that the information at issue is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.117, 552.119, 552.130, 552.136, and 552.137 of the Government Code. We have considered the exceptions you

claim and reviewed the submitted representative samples of information.¹ We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that member of public may submit comments stating why information should or should not be released).

As a preliminary matter, you indicate that the requestor agreed to narrow the scope of the request to exclude Texas driver's license numbers and account number information. *See* Gov't Code § 552.222. We therefore agree that the account number information and Texas driver's license numbers you have marked in the submitted documents are not responsive to the present request and need not be released. Furthermore, you state that the department will withhold home addresses, home telephone numbers, social security numbers, and the family member information of peace officers pursuant to a previous determination issued by this office in Open Records Decision No. 670 (2001).² *See* Open Records Decision No. 670 (2001) (allowing a governmental body to withhold information within the scope of the statutory predecessor to section 552.117(a)(2) without the necessity of requesting an attorney general decision); *see also* Gov't Code § 552.301(a) (allowing a governmental body to withhold information that is subject to a previous determination). We will address your claimed exceptions to disclosure with respect to the remaining submitted information.

First, however, we note that the information submitted as Exhibit U includes an agenda of a public meeting of the city council of the City of Rosenberg (the "city"). The minutes, tape recordings, and agendas of a governmental body's public meetings are specifically made public under the Open Meetings Act, chapter 551 of the Government Code. *See* Gov't Code §§ 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying upon request), 551.043 (notice of meeting of governmental body must be posted in a place readily accessible to general public at least 72 hours before scheduled time of meeting), 551.050 (municipal governmental body required to post notice of meeting at a place convenient to the public in the city hall); *see also* Gov't Code § 552.022(a)(15) (information regarded as open to the public is not excepted from disclosure under Act unless expressly confidential by law). Information made public by statute may not be withheld from the public under any of the Act's exceptions to public disclosure. *See, e.g.*, Open Records Decision Nos. 544 (1990), 378 (1983), 161 (1977), 146 (1976). Accordingly, the agenda we have marked in Exhibit U must be released in accordance with the Open Meetings Act. *See* Gov't Code § 551.022.

¹ We assume that the "representative samples" of records submitted to this office are truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

² "Peace officer" is defined at article 2.12 of the Code of Criminal Procedure.

We now turn to your claimed exceptions to disclosure. Because you contend that the information at issue is excepted from disclosure in its entirety under section 552.103 of the Government Code, we first address your claim under that section. We first note that the information in Exhibit O and the remaining information in Exhibit U is subject to section 552.022 of the Government Code, which provides in pertinent part:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). Exhibit O consists of a completed employee performance evaluation made for or by the department and is subject to section 552.022(a)(1). The remainder of Exhibit U consists of an executed contract between the city and a consulting firm involving the expenditure of public funds and is subject to section 552.022(a)(3). This information, which we have marked, must be released unless it is confidential under other law.

Section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the department may not withhold Exhibit O or the contract we have marked in Exhibit U under section 552.103. As you raise no other exceptions for this information, we determine the department must release it to the requestor.

We next address your claim under section 552.103 with respect to the remaining submitted information. 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.

....

(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). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was 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). A governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that 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). 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.³ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983). You contend that the department reasonably anticipates litigation in this instance on the basis of statements made by the requestor in letters and other materials presented to the city council, which you have submitted for review. Upon review of your

³In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

arguments and the information at issue, we find that you have not demonstrated that the requestor has taken any objective steps toward litigation. Thus, we determine that the department has not established that litigation was reasonably anticipated at the time the department received the present request. Accordingly, we determine that the information at issue is not excepted from disclosure under section 552.103 and may not be withheld on that basis.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information made confidential by other statutes. You contend that the information in Exhibit K is protected under the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in pertinent part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

Occ. Code § 159.002(b). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). The information in Exhibit K consists of an e-mail between department employees and was not created by a physician or someone under the supervision of a physician. We therefore find that Exhibit K does not consist of medical records for purposes of the MPA and may not be withheld pursuant to the MPA.

You also raise section 1703.306 of the Occupations Code, which provides that "[a] governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information." However, you do not state that the submitted documents contain any polygraph examination information. Upon review, we determine that the submitted documents do not contain any polygraph examination information, and we therefore find that the department may not withhold any portion of the submitted information under section 552.101 in conjunction with section 1703.306 of the Occupations Code.

The information submitted as Exhibit P contains fingerprint information that is subject to sections 560.001, 560.002, and 560.003 of the Government Code, which provide as follows:

Sec. 560.001. DEFINITIONS. In this chapter:

(1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.

(2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 560.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

(1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:

(A) the individual consents to the disclosure;

(B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or

(C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and

(2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 560.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

Gov't Code §§ 560.001-.003. We find that section 560.002 does not permit the disclosure of the fingerprints in Exhibit P in this instance. Therefore, the department must withhold the fingerprints, which we have marked, under section 552.101 in conjunction with section 560.003 of the Government Code.

Next, criminal history record information ("CHRI") may be confidential under state and federal law. Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 provides that any CHRI maintained by the Department of Public Safety ("DPS") is confidential. Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential

and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). However, the definition of CHRI does not include driving record information maintained by DPS under chapter 521 of the Transportation Code. *See* Gov't Code § 411.082(2)(B). The department must withhold any CHRI falling within the ambit of these state and federal regulations pursuant to section 552.101 of the Government Code.

You also contend that the information submitted as Exhibit F is excepted under section 552.101 of the Government Code in conjunction with sections 418.176 through 418.182 of the Government Code. As part of the Texas Homeland Security Act, the Seventy-eighth Legislature added sections 418.176 through 418.182 to chapter 418 of the Government Code. These newly enacted provisions make certain information related to terrorism confidential. *See* Gov't Code §§ 418.176-.182. However, the fact that information may relate to a governmental body's security concerns does not make the information *per se* confidential under the Texas Homeland Security Act. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the Texas Homeland Security Act must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies). In this case, we find you have failed to address how any of the information falls within the scope of sections 417.176 through 418.182 of the Government Code. We therefore determine that the department may not withhold any of the information in Exhibit F under section 552.101 in conjunction with any of the provisions of the Texas Homeland Security Act.

We note that Exhibit Q consists of information that is within the scope of Section 261.201(a) of the Family Code, which provides as follows:

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

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

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

Fam. Code § 261.201(a). The information in Exhibit Q was used or developed by the department in investigations of alleged sexual assaults of individuals who were children for purposes of section 261.201. *See* Fam. Code § 101.003(a) (“child” is generally defined as “a person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes”). You have not indicated that the department has adopted a rule that governs the release of this type of information. Therefore, we assume that no such regulation exists. Given that assumption, Exhibit Q is confidential pursuant to section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute). Thus, we find that the department must withhold Exhibit Q in its entirety under section 552.101 in conjunction with section 261.201(a) of the Family Code.⁴

You contend that portions of the information in Exhibit G, as well as “any phone numbers that may be numbers of informers,” are excepted under section 552.101 in conjunction with the informer’s privilege. The common-law informer’s privilege, incorporated into the Act by section 552.101, 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 authority, provided that the subject of the information does not already know the informer’s identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The 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 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)).

We note that only a report of a violation of a criminal or civil statute is protected by the informer’s privilege. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). You indicate that one of the individuals identified in Exhibit G reported violations of criminal law to the department. Accordingly, we find that a portion of the information in Exhibit G, which we have marked, is protected by the informer’s privilege and must be withheld under section 552.101. We further find, however, that you have not adequately demonstrated that the remaining information in Exhibit G consists of a report of a violation of law, and we therefore determine that the informer’s privilege is not applicable to the remaining information in Exhibit G. *See* Open Records Decision Nos. 542 (1990) (governmental body has burden of establishing that exception applies to requested information), 532 (1989), 515 (1988), 252 (1980). With respect to “phone numbers that may be numbers of informers” contained elsewhere in the submitted documents, you have not

⁴ Based on this finding, we need not reach your arguments with respect to Exhibit Q.

labeled any such numbers nor do you indicate whether the remaining documents in fact contain any such numbers. Accordingly, we find you have failed to establish that the informer's privilege is applicable to any of the remaining submitted information, and we determine that the department may not withhold any of the remaining information under section 552.101 on that basis. See Gov't Code § 552.301(e)(2) (governmental body must label information to indicate which exceptions apply to which parts of information).

You contend that the documents in Exhibits J, M, N, and T contain information that is excepted from disclosure under section 552.101 in conjunction with common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. We note that when a law enforcement agency is asked to compile a particular individual's criminal history information, the compiled information takes on a character that implicates the individual's right to privacy. See *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). In addition, prior decisions of this office have determined that some kinds of medical information and personal financial information not related to a transaction between an individual and a governmental body are protected by common-law privacy. See Open Records Decision Nos. 600 (1992) (personal financial information not related to transaction with governmental body generally not subject to legitimate public interest), 470 (1987) (information pertaining to illness from severe emotional and job-related stress protected by privacy), 455 (1987) (information pertaining to prescription drugs, specific illnesses, procedures, and physical disabilities protected by privacy). However, this office has also determined that the essential facts about a financial transaction between an individual and a governmental body generally are subject to a legitimate public interest. See Open Decision Nos. 545 (1990) (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy), 523 (1989). Thus, whether financial information is subject to a legitimate public interest and therefore not protected by common-law privacy must be determined on a case-by-case basis. See Open Records Decision No. 373 (1983).

You seek to withhold all of the information in Exhibit N under common-law privacy. We note, however, that most of the information in Exhibit N is subject to a legitimate public interest and is not highly intimate and embarrassing. We have marked some personal financial information in Exhibits M and N that must be withheld under section 552.101 in conjunction with common-law privacy. We also note that Exhibit K contains a small amount of medical information, which we have marked, that is protected by common-law privacy and must be withheld under section 552.101. To the extent the documents in Exhibits N and

T consist of criminal history information compiled by the department, such information is excepted under section 552.101 in conjunction with common-law privacy pursuant to *Reporters Committee*. We find that the information in Exhibit J, and the remaining information in Exhibits M, N, and T, is not highly intimate and embarrassing and concerns matters of legitimate public interest. We therefore find that this information is not protected by common-law privacy and may not be withheld under section 552.101 on that basis.

Next, you contend that the information submitted as Exhibit E is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) excepts from disclosure information protected by 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.⁵ TEX. R. EVID. 503(b)(1). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives.⁶ TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body seeking to establish that a communication is protected by the attorney-client privilege must inform this office of the identity and capacity of each individual involved in the communication. Finally, the attorney-client privilege applies only to a communication that is confidential. *Id.* 503(b)(1). A confidential communication is a communication that 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).

⁵ The privilege does not apply when an attorney or representative is acting in a capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas 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). Because government attorneys often act in capacities other than that of professional legal counsel, including as administrators, investigators, or managers, the mere fact that a communication involves an attorney for the government does not demonstrate this element.

⁶ Specifically, the privilege applies only to confidential communications between the client or a representative of the client and the client’s lawyer or a representative of the lawyer; between the lawyer and the lawyer’s representative; by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein; between representatives of the client or between the client and a representative of the client; or among lawyers and their representatives representing the same client. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E); *see also id.* 503(a)(2), (a)(4) (defining “representative of the client,” “representative of the lawyer.”)

Whether a communication meets the definition of a confidential communication depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) of the Government Code generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein). You state, and the documents reflect, that the information in Exhibit E consists of communications between an attorney for the city and city officials or employees made in furtherance of the rendition of legal services. You also indicate that the communications were intended to be confidential and that the confidentiality has been maintained. Based on your representations and our review, we find that the information in Exhibit E is protected by the attorney-client privilege and may be withheld under section 552.107.

You also contend that the information in Exhibits F, R, and S are excepted from disclosure under section 552.108 of the Government Code, which provides pertinent part:

(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:

(1) release of the information would interfere with the detection, investigation or prosecution of crime[.]

...

(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:

(1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

Gov't Code § 552.108(a), (b). Generally, a governmental body claiming section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). We find you have failed to explain how section 552.108 is applicable to the information in Exhibit F, and we therefore determine that the department may not withhold Exhibit F under section 552.108.

Regarding Exhibits R and S, you state that documents marked 000016 and 000022 through 24 in Exhibit R, as well as document 000021 in Exhibit S, are internal department communications that are related to pending criminal investigations. Based on your representations and our review, we determine that release of these documents, which we have marked, would interfere with the detection, investigation, or prosecution of crime. See *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), writ *ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). We therefore determine that the department may withhold the documents we have marked in Exhibits R and S pursuant to section 552.108(a)(1) of the Government Code. You state, however, that the remaining documents in Exhibit S, marked 000019 and 20, are part of an ongoing internal investigation. Section 552.108 is ordinarily not applicable to internal administrative investigations involving law enforcement officers. See *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, (Tex. App. 2002, no pet. h.); Open Records Decision No. 562 at 10 (1990); *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor not applicable to internal investigation that did not result in criminal investigation or prosecution); Open Records Decision No. 350 at 3-4 (1982). You have not explained how documents 000019 and 20 in Exhibit S relate to a criminal investigation or prosecution. We therefore determine the department may not withhold these documents under section 552.108 of the Government Code.

As noted, you state that the department will withhold information subject to section 552.117(a)(2) of the Government Code pursuant to the previous determination of this office in Open Records Decision No. 670. See Open Records Decision No. 670; see also Gov't Code § 552.301(a). You have marked the information that will be withheld pursuant to that decision. However, we note that the documents contain additional information within the scope of section 552.117(a)(2), which excepts the home address, home telephone number, social security number, and the family member information of a peace officer. See Gov't Code § 552.117(a)(2); Open Records Decision No. 622 (1994). We have marked additional information in Exhibits L, M, N, and T that the department must withhold under section 552.117(a)(2).

We note that you raise section 552.119 of the Government Code, which excepts from disclosure a photograph of a peace officer the release of which would endanger the life or physical safety of the officer, unless certain conditions apply. Gov't Code § 552.119. Upon review, however, we find that the submitted documents do not contain any photographs of peace officers. Thus, the department may not withhold any of the information at issue under section 552.119.

Furthermore, as noted above, you indicate that the requestor agreed to exclude Texas driver's license numbers from the scope of the request. We note, however, that the documents contain additional Texas motor vehicle driver's license and registration information. Section 552.130 of the Government Code excepts information relating to a Texas motor

vehicle driver's license and information relating to a Texas motor vehicle title or registration. Gov't Code § 552.130. We have marked the motor vehicle driver's license and registration information in the submitted documents that the department must withhold under section 552.130.

We note that Exhibit F contains an e-mail address that appears to be the personal e-mail address of a peace officer, which we have marked. Section 552.137 of the Government Code provides in part:

(a) Except as otherwise provided by this section, 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 this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137(a), (b). Section 552.137 excepts certain e-mail addresses of members of the public who have not affirmatively consented to the release of the e-mail addresses. Section 552.137(c) provides certain conditions under which an e-mails of members of the public are not excepted from disclosure, which are not applicable here. *See* Gov't Code § 552.137(c) (e-mail address provided by contractor or vendor, contained in bid proposal, or on letterhead or document available to public generally not excepted under section 552.137).

Further, section 552.137 does not apply to the work e-mail addresses of officers or employees of a governmental body, a website address, or the general e-mail address of a business. Unless the relevant individual has consented to its release, we determine that the department must withhold the e-mail address we have marked in Exhibit F pursuant to section 552.137(a).

Finally, we note that the submitted information contains the social security number of a member of the public, which may be excepted under section 552.101 in conjunction with with the 1990 amendments to the federal Social Security Act, section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security number at issue is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained

or is maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.

In summary, we make the following determination: (1) the agenda in Exhibit U must be released in accordance with the Open Meetings Act; (2) the contract in Exhibit U and the information in Exhibit O must be released in accordance with section 552.022 of the Government Code; (3) the department must withhold the marked fingerprint information in Exhibit P pursuant to section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code; (4) the department must withhold Exhibit Q pursuant to section 552.101 in conjunction with section 261.201 of the Family Code; (5) we have marked the information in Exhibit G that the department must withhold pursuant to section 552.101 in conjunction with the informer's privilege; (6) we have marked personal financial information and medical information in Exhibits K, M, and N that the department must withhold pursuant to section 552.101 in conjunction with common-law privacy; (7) the department may withhold Exhibit E pursuant to section 552.107(1) of the Government Code as information protected by the attorney-client privilege; (8) the department may withhold the information we have marked in Exhibits R and S pursuant to section 552.108(a)(1) of the Government Code; (9) we have marked information in the submitted documents that the department must withhold under section 552.117(a)(2) of the Government Code, in addition to the information the department has redacted pursuant to Open Records Decision No. 670 (2001); (10) we have marked Texas motor vehicle driver's license and registration information that must be withheld under section 552.130 of the Government Code; (11) we have marked an e-mail address in Exhibit F that must be withheld under section 552.137 of the Government Code unless the relevant individual consented to its release; (12) a social security number may be excepted under section 552.101 in conjunction with federal law; (13) to the extent the information at issue includes criminal history record information, such information must be withheld under section 552.101 in conjunction with chapter 411 of the Government Code and federal regulations; and (14) to the extent the information at issue includes criminal history information compiled by the department, the department must withhold such information under section 552.101 in conjunction with common-law privacy in accordance with *Reporters Committee*. The remainder of the information at issue is not excepted from disclosure and must be released to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within thirty calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within ten calendar days.

Id. § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within ten calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within ten calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within ten calendar days of the date of this ruling.

Sincerely,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 205549

Enc: Submitted documents

c: Mr. Kevin Taylor
3419 Fountains Drive, #1402
Rosenberg, Texas 77471
(w/o enclosures)