



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 9, 2004

Ms. Carol Longoria  
Public Information Coordinator  
The University of Texas System  
201 West Seventh Street  
Austin, Texas 78701-2902

OR2004-7701

Dear Ms. Longoria:

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# 208595.

The University of Texas Medical Branch at Galveston ("UTMB") received a request for (1) all contents of the requestor's personnel file; (2) investigation reports done as a result of complaints filed on the requestor; (3) video/audio recordings relating to the complaints; and (4) copies of all arrests made by a named officer during 2002. You inform us that some of the requested information either has been or will be released. You seek to withhold other responsive information under sections 552.101, 552.107, 552.108, 552.119, and 552.130 of the Government Code, Texas Rule of Evidence 503, and Texas Rule of Civil Procedure 192.5.<sup>1</sup> We have considered your arguments and have reviewed the information you submitted.<sup>2</sup>

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<sup>1</sup>You also believe that this request for information implicates the interests of the Houston Police Department (the "department"). You notified the department of this request and of its right to submit arguments to this office as to why information that implicates the department's interests should not be released. *See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released). As of the date of this decision, we have received no correspondence from the department with regard to the present request for information.

<sup>2</sup>This letter ruling assumes that the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes UTMB to withhold any information that is substantially different from the submitted information. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

We first note that the submitted information includes affidavits for arrest warrants. The 78th Legislature amended article 15.26 of the Code of Criminal Procedure to add language providing:

The arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, *is public information*, and beginning immediately when the warrant is executed the magistrate's clerk *shall make a copy of the warrant and the affidavit available for public inspection* in the clerk's office during normal business hours. A person may request the clerk to provide copies of the warrant and affidavit on payment of the cost of providing the copies.

Crim. Proc. Code art. 15.26 (emphasis added). Thus, the submitted arrest warrant affidavits are made public by article 15.26 of the Code of Criminal Procedure if they were presented to a magistrate in support of the issuance of an arrest warrant. As a general rule, the exceptions to disclosure found in the Act do not apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989).

We are unable to determine whether or to what extent the arrest warrant affidavits that we have marked were presented to a magistrate in support of the issuance of an arrest warrant. Therefore, we must rule in the alternative. Thus, to the extent that these arrest warrant affidavits were so presented, they must be released under article 15.26 of the Code of Criminal Procedure. To the extent that they were not so presented, UTMB must dispose of these arrest warrant affidavits in accordance with the rest of this ruling.

Next, we address your claim under section 552.101 of the Government Code in conjunction with the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8.<sup>3</sup> You believe that HIPAA, may govern some of the submitted information. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* HIPAA, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 ("Privacy Rule"); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. *See* 45 C.F.R. § 164.502(a).

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<sup>3</sup>Section 552.101 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 information that is protected by other statutes.

This office recently addressed the interplay of the Privacy Rule and the Act. *See* Open Records Decision No. 681 (2004). In that decision, we noted that section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted that the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” *See* Open Records Decision No. 681 at 8 (2004); *see also* Gov’t Code §§ 552.002, .003, .021. We therefore held that disclosures under the Act come within section 164.512(a) of title 45 of the Code of Federal Regulations. Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See* Open Records Decision No. 681 at 9 (2004); *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make information that is subject to disclosure under the Act confidential, UTMB may withhold requested protected health information from the public only if an exception in subchapter C of the Act applies.

You also raise section 552.107(1). This exception protects information that comes 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. *See* 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. *See* 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. *See 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 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. *See* 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 to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *See 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) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein). You inform us that the information at Tab 8 consists of communications between attorneys for UTMB and their clients that were made in connection with the rendition of professional legal services. You also state that these communications were and remain confidential. Based on your representations, we conclude that UTMB may withhold the information at Tab 8 under section 552.107(1).<sup>4</sup>

Next, we address your claims under section 552.108. This exception provides in part:

(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; [or]

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(b)(1)-(2). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). As a general rule, sections 552.108(b)(1) and 552.108(b)(2) are applicable to two different categories of law enforcement information. Section 552.108(b)(1) protects internal records of a law enforcement agency, the release of which would interfere with law enforcement and crime prevention. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.) (Gov't Code § 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws). Section 552.108(b)(2) is applicable only if the internal record at issue relates to a concluded criminal matter that did not result in a conviction or a deferred adjudication.

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<sup>4</sup>As we are able to make this determination, we need not address your other arguments with regard to the Tab 8 information. We note, however, that section 552.101 does not encompass the attorney-client and attorney work product privileges. *See* Open Records Decision Nos. 676 at 1-3 (2002), 677 at 4-6 (2002).

You seek to withhold the information at Tabs 5, 6, and 7 and the related audio and video information under section 552.108. You inform us that the information in question pertains to investigations conducted by the UTMB police department. You state, however, that the Tab 6 information relates to an administrative investigation. You also have marked one of the audio CD's as relating to the administrative investigation. Section 552.108 is generally not applicable to records of administrative investigations that did not result in a criminal investigation or prosecution. *See Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (addressing statutory predecessor to Gov't Code § 552.108). You do not inform us that the Tab 6 and related audio information pertains to an administrative case that resulted in a criminal investigation or prosecution. We therefore conclude that UTMB may not withhold any of the Tab 6 or related audio information that pertains to the administrative investigation under section 552.108.

You also state, however, that the remaining information that UTMB seeks to withhold under section 552.108 relates to concluded investigations that did not result in a conviction or deferred adjudication. Based on your representation and our review of the information in question, we find that section 552.108(b)(2) is applicable to the information at Tabs 5 and 7 and the related audio and video information that pertains to a criminal case.

We note that section 552.108 does not except from disclosure “basic information about an arrested person, an arrest, or a crime.” Gov't Code § 552.108(c). Section 552.108(c) refers to the basic front-page information held to be public in *Houston Chronicle Publishing 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). UTMB must release basic information under section 552.108(c), even if the information does not literally appear on the front page of an offense or arrest report. Basic information includes the identity of the complainant and any arrested person and a detailed description of the offense. *See Houston Chronicle*, 531 S.W.2d at 186-88; Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*).

You contend, however, that some of the information that is subject to section 552.108(c) is confidential under section 552.101 in conjunction with section 611.002 of the Health and Safety Code. You also claim that section 611.002 is applicable to information that relates to the administrative investigation. Section 611.002 encompasses information created or maintained by a mental health professional and provides in part:

- (a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.
  
- (b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b). Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001(2).

You have not shown that any of the information encompassed by section 552.108(c) or any of the information that relates to the administrative investigation constitutes a communication between a patient and a professional. *See id.* § 611.002(a). Likewise, you have not shown that any of this information is a record of the identity, diagnosis, evaluation, or treatment of a patient that was created or is maintained by a professional. *Id.* Therefore, UTMB may not withhold any of the information encompassed by section 552.108(c) or any of the information that relates to the administrative investigation under section 552.101 in conjunction with section 611.002 of the Health and Safety Code.<sup>5</sup>

You also seek to withhold information that is subject to section 552.108(c) under section 552.101 in conjunction with constitutional and common-law privacy. Constitutional privacy protects two types of interests. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions related to the “zones of privacy” pertaining to marriage, procreation, contraception, family relationships, and child rearing and education that have been recognized by the United States Supreme Court. *See Fadlo v. Coon*, 633 F.2d 1172 (5<sup>th</sup> Cir. 1981); Open Records Decision No. 455 at 3-7 (1987). The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5<sup>th</sup> Cir. 1985); Open Records Decision No. 455 at 6-7 (1987). This aspect of constitutional privacy balances the individual’s privacy interest against the public’s interest in the information. *See* Open Records Decision No. 455 at 7 (1987). Constitutional privacy under section 552.101 is reserved for “the most intimate aspects of human affairs.” *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492).

The common-law right to privacy protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses the types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has since concluded

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<sup>5</sup>You also raise section 552.101 in conjunction with chapter 573 of the Health and Safety Code. We note, however, that chapter 573 does not contain a confidentiality provision. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to public).

that other types of information also are private under section 552.101. *See* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress).

UTMB seeks to withhold the identities of patients who are identified as a complainant or arrested person in the police reports at Tabs 5 and 7. This office has addressed several special situations in which such front-page information may be withheld from disclosure. For example, in Open Records Decision No. 366 (1983), we agreed that information about an ongoing undercover narcotics operation could be withheld from disclosure under the statutory predecessor to section 552.108, even though some of the information at issue was front-page arrest report information. The police department explained how the release of certain details would interfere with the undercover operation, which was ongoing and expected to culminate in more arrests. *See* Open Records Decision No. 366 (1983); *see also* Open Records Decision No. 333 at 2 (1982); *cf.* Open Records Decision Nos. 393 (1983) (identifying information concerning victims of sexual assault), 339 (1982), 169 at 6-7 (1977), 123 (1976).

In this instance, you have not demonstrated the existence of any circumstances that would permit UTMB to withhold the name of a patient who is identified as a complainant or arrested person in the police reports at Tabs 5 and 7. We conclude, however, that other portions of the information at Tab 5 are protected by common-law privacy under section 552.101. We have marked that information. With the exception of the marked information, UTMB must release basic information with regard to the police reports at Tabs 5 and 7 in accordance with section 552.108(c).<sup>6</sup> UTMB may withhold the remaining information at Tabs 5 and 7, along with the audio and video information that relates to the criminal investigations, under section 552.108(b)(2).

The documents at Tab 6 also contain information that must be withheld under section 552.101 in conjunction with common-law privacy. We have marked that information. To the extent that the audio information that relates to the administrative investigation contains these same types of private information, they also must be redacted from the audio information under section 552.101. If UTMB has no means of redacting these types of information, then all of the audio information that relates to the administrative investigation must be withheld under section 552.101.

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<sup>6</sup>We note that basic information under section 552.108(c) does not include an arrested person's driver's license number. *See Houston Chronicle*, 531 S.W.2d at 186-88; Open Records Decision No. 127 at 3-4 (1976).

Next, we address your claim under section 552.119.<sup>7</sup> This section provides as follows:

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

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

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

Gov't Code § 552.119. You have not demonstrated, and it is not otherwise apparent to this office, that the release of any submitted image of a peace officer would endanger the life or physical safety of anyone depicted in the photograph. We therefore conclude that UTMB may not withhold any of the submitted information under section 552.119.

Section 552.130 excepts from disclosure information that relates to "a motor vehicle operator's or driver's license or permit issued by an agency of this state" or "a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document."<sup>8</sup> Gov't Code § 552.130(a)(1), (3). We have marked information at Tab 9 that UTMB must withhold if the information relates to an operator's or driver's license or a personal identification document issued by an agency of the State of Texas or a local agency in this state that is authorized to issue an identification document.

The Tab 9 information also contains a social security number that UTMB may be required to withhold under section 552.101 in conjunction with federal law. A social security number is confidential under section 552.101 in conjunction with the 1990 amendments to the federal

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<sup>7</sup>We note that UTMB failed to claim an exception to disclosure under section 552.119 within the time prescribed by section 552.301 of the Government Code. *See* Gov't Code §§ 552.301(b), .302. However, a claim under this exception can provide a compelling reason to withhold information from the public, and therefore we will address section 552.119. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982).

<sup>8</sup>Although your claim under this exception was untimely, we will address section 552.130, as it is a mandatory exception to disclosure and may not be waived. *See* Gov't Code §§ 552.007, .301, .302, .352; Open Records Decision No. 674 at 3 n.4 (2001).

Social Security Act if it was obtained or is maintained by a governmental body under any provision of law enacted on or after October 1, 1990. *See* 42 U.S.C. § 405(c)(2)(C)(viii)(I); Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that the social security number that we have marked in the Tab 9 information is confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no law, and we are aware of no law, enacted on or after October 1, 1990 that requires or authorizes UTMB to obtain or maintain a social security number. Thus, we have no basis for concluding that the marked social security number was obtained or is maintained under such a law and is therefore confidential under the federal law. We caution you, however, that chapter 552 of the Government Code imposes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352. Therefore, before releasing a social security number, you should ensure that it was not obtained and is not maintained by UTMB under any provision of law enacted on or after October 1, 1990.

In summary: (1) to the extent that they were presented to a magistrate in support of the issuance of an arrest warrant, the marked arrest warrant affidavits must be released under article 15.26 of the Code of Criminal Procedure; (2) UTMB may withhold the information at Tab 8 under section 552.107(1); (3) UTMB may withhold the information at Tabs 5 and 7 and the related audio and video information under section 552.108(b)(2), except for the basic information that must be released under section 552.108(c); (4) in releasing basic information with regard to the Tab 5 information, UTMB must withhold the information that is private under section 552.101; (5) UTMB also must withhold the marked portions of the information at Tab 6 that are private under section 552.101; (6) to the extent that such private information also is contained in the audio information that relates to the administrative investigation, the private information must be redacted under section 552.101; if UTMB has no means of redacting such information, then UTMB must withhold all of the audio information that relates to the administrative investigation under section 552.101; (7) the information marked under section 552.130 at Tab 9 must be withheld if it relates to a driver's or operator's license or personal identification document issued by an agency of this state or a local agency authorized to issue a personal identification document; and (8) UTMB may be required to withhold the social security number at Tab 9 under section 552.101 in conjunction with section 405(c)(2)(C)(viii)(I) of title 42 of the United State Code. The rest of the submitted information must be released. As we are able to make these determinations, we need not address your other arguments against disclosure.

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 30 calendar days. *Id.* § 552.324(b). In order to get the full

benefit of such an appeal, the governmental body must file suit within 10 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).

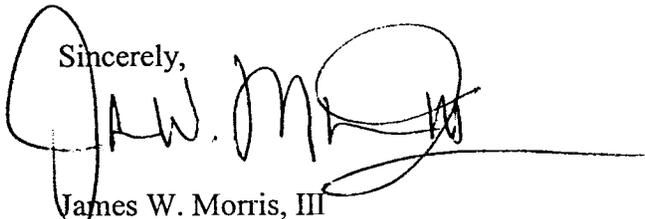
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 10 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); *Texas 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 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'J.W. Morris, III', with a horizontal line extending to the right.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 208595

Enc: Submitted documents

c: Mr. Robert Marquez  
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