ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 17, 2010

Mr. James D. Parker
Assistant City Attorney
For City of Kyle
Knight & Partners
223 West Anderson Lane, Suite A-105
Austin, Texas 78752

OR2010-17431

Dear Mr. Parker:

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# 400396.

The City of Kyle (the "city"), which you represent, received a request for all exhibits provided to the arbitrator at a named officer's appeal of his termination, all correspondence concerning the hearing involving the named officer's termination or his conduct that led to his termination from the city's police department (the "department"), and any sustained complaints made against department officers from January 1, 2007 to present. You state you have released or will release some information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.117, 552.130, and 552.147 of the Government Code.[1] We have considered the exceptions you claim and reviewed the submitted representative sample of information.[2]

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[1]Although you initially raised section 552.102, you have not submitted to this office written comments stating the reasons why this section would allow the information to be withheld. Thus, the city has not demonstrated that any of the submitted information is confidential for purposes of section 552.102. *See* Gov't Code §§ 552.301, .302. Additionally, although you raise section 552.1175 for portions of the submitted information, we note the correct exception to raise for information pertaining to officers employed by the city is section 552.117.

[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.

You inform us the information pertaining to complaints against officers in Exhibit D and one of the videos in Exhibit H were the subject of prior requests for information received by the city, as a result of which this office issued Open Records Letter Nos. 2010-08353(2010) and 2010-16515 (2010). In Open Records Letter No. 2010-08353, we concluded the city must withhold some of the information at issue under section 552.101 in conjunction with section 143.089(g), but must release the remaining information. In Open Records Letter No. 2010-16515, we concluded the city may withhold the portion of the video recording that had not been shown in open court under section 552.108 and must withhold a Texas license plate number under section 552.130 if the number appeared in the portion of the video shown in open court, but must release the remaining information. We have no indication the law, facts, or circumstances on which these prior rulings were based have changed. Accordingly, we conclude the city must continue to rely on Open Records Letter Nos. 2010-08353 and 2010-16515 as previous determinations and withhold or release the previously ruled upon information in accordance with those rulings. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, with respect to the information that was not previously ruled upon by this office, we will address your arguments against disclosure of this information.

Next, we note that one of the submitted audio recordings in Exhibit H, which we have marked, was previously released voluntarily by the city to another requestor. Section 552.007 of the Government Code provides that if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Thus, pursuant to section 552.007, the city may not now withhold the previously released audio recording unless its release is expressly prohibited by law or the information is confidential under law. Although you raise sections 552.103 and 552.108 for the previously released information, these sections are general exceptions to disclosure that do not prohibit the release of information or make information confidential. *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 No. 586 (1991) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the city may not now withhold the previously released audio recording under section 552.103 or section 552.108 of the Government Code. As you raise no further exceptions to the disclosure of this information, the previously released audio recording must be released.

Next, we note the remaining information includes several completed incident reports, all of which are subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1)

provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108." Gov't Code § 552.022(a)(1). Pursuant to section 552.022(a)(1), a completed report is expressly public unless it is either excepted under section 552.108 of the Government Code or is expressly confidential under other law. You raise section 552.103 of the Government Code for this information. As discussed previously, section 552.103 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News,* 4 S.W.3d at 475-76; ORD 665 at 2 n.5 (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the city may not withhold the completed reports under section 552.103 of the Government Code. However, information subject to section 552.022(a)(1) may be withheld under section 552.108 of the Government Code. Additionally, you raise sections 552.101, 552.117, 552.130, and 552.147, which are "other law" for the purposes of section 552.022. Therefore, we will consider the applicability of these sections to the information subject to section 552.022(a)(1).

You seek to withhold the information in your first Exhibit B and the remaining information in Exhibit H under section 552.108 of the Government Code. Section 552.108 of the Government Code provides in relevant part 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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> > (1) release of the information would interfere with the detection, investigation, or prosecution of crime;
> >
> > (2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in a conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(1), (a)(2). We note that the protections offered by subsections 552.108(a)(1) and 552.108(a)(2) of the Government Code are, generally, mutually exclusive. Section 552.108(a)(1) generally applies to information that pertains to criminal investigations or prosecutions that are currently pending, while section 552.108(a)(2) protects law enforcement records that pertain to criminal investigations and prosecutions that have concluded in final results other than criminal convictions or deferred adjudications. A governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108, .301(e)(1)(A); *see also Ex parte Pruitt,* 551 S.W.2d 706 (Tex. 1977).

By its terms, section 552.108 applies only to a law enforcement agency or a prosecutor. You state that the information at issue relates to an internal affairs investigation of the named

officer. Section 552.108 is generally not applicable to records of an administrative investigation that did not result in a criminal investigation or prosecution. *See Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (addressing statutory predecessor to section 552.108). You explain, however, that this administrative investigation is also part of an active criminal investigation by the department. You have also provided an affidavit from the Hays County District Attorney's Office stating that this information also relates to a pending prosecution with that office. Based on these representations, we conclude that release of the information in your first Exhibit B and the remaining information in Exhibit H 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). Accordingly, section 552.108(a)(1) is applicable to this information.

However, 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). Basic information refers to the information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 185; *see also* ORD 127 at 3-5 (summarizing types of information made public by *Houston Chronicle*). Thus, with the exception of the basic information, the city may withhold the information in your first Exhibit B and the remaining information in Exhibit H under section 552.108(a)(1).[3]

We understand you to argue that some of the basic information in your first Exhibit B is subject to an agreed protective order. Section 552.107(2) of the Government Code provides that information is excepted from disclosure if "a court by order has prohibited disclosure of the information." Gov't Code § 552.107(2). This office has found that an administrative forum operating pursuant to the Administrative Procedures Act functions as a court. *See* Open Records Decision No. 588 (1990) at 3 (citing *State v. Thomas*, 766 S.W.2d 217(Tex.1989). You have submitted a copy of an agreed protective order from the hearing examiner who presided over the officer's termination appeal. The agreed order provides in part that the personal identification information of the minor/child contained in the internal affairs and investigative file will be deemed confidential and shall not be disclosed or distributed to anyone in any manner except to the officer's counsel. The basic information in your first Exhibit B contains the personal identification information of the child involved in the incident. Therefore, we find the city must withhold the identifying information of the child at issue under section 552.107(2) of the Government Code.[4]

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 encompasses information that other statutes make confidential,

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

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

such as section 58.007 of the Family Code. Section 58.007 makes confidential law enforcement records relating to conduct that occurred on or after September 1, 1997. Fam. Code § 58.007(c). For purposes of section 58.007(c), "child" means a person who is ten years of age or older and under seventeen years of age. *See id.* § 51.02(2). The relevant part of section 58.007 provides:

> (c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:
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> > (1) if maintained on paper or microfilm, kept separate from adult files and records;
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> > (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic date concerning adults; and
> >
> > (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

Id. § 58.007(c). Section 58.007(c) is applicable to information that relates to a juvenile as a suspect or offender, but not as a complainant, victim, witness, or other involved party. You argue the remaining information is confidential under section 58.007 of the Family Code. However, upon review, we conclude none of the remaining information constitutes juvenile law enforcement records. Thus, the remaining information is not confidential under section 58.007 and may not be withheld pursuant to section 552.101 of the Government Code on this basis.

Section 552.101 also encompasses section 261.201(a) of the Family Code, which provides:

> (a) [T]he following information is confidential, is not subject to public release under [the Act] 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:
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> > (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
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> > (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.

Id. § 261.201(a). You argue the remaining information consists of a report of alleged or suspected child abuse or neglect made under chapter 261. *See id.* § 261.001(1) (defining "abuse" or "neglect" for the purposes of chapter 261 of the Family Code); *see also id.* § 101.003(a) (defining "child" for purposes of this section as 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). However, we note the remaining information relates to an administrative investigation of a city police officer. Upon review, we conclude you have failed to demonstrate that any of the remaining information was used or developed in an investigation under chapter 261 of the Family Code. Accordingly, section 261.201(a) is not applicable to any of the remaining information, and no portion of the remaining information may be withheld under section 552.101 on that basis.

Next, we will address your argument under section 552.103 for the remaining information not subject to section 552.022. 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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> . . .
>
> (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 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 that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The city must meet both prongs of this test for information to be excepted under section 552.103.

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). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an

attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). 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. 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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. ORD 452 at 4.

You contend the city reasonably anticipates litigation from the requestor's clients alleging liability on the part of the city and the officer named in the request relating to the incident that led to the officer's termination. In support of your assertion, you state the requestor's firm specializes in personal injury and civil rights litigation. However, you have not demonstrated that the requestor or his clients have taken any objective steps toward filing suit. As noted above, the mere fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Accordingly, we conclude the city has failed to demonstrate it reasonably anticipated litigation on the date of the request. Thus, the city may not withhold any of the remaining information under section 552.103 of the Government Code.

You assert Exhibit E is excepted under section 552.107 of the Government Code, which protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re 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). 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). 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.*, meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5).

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

You state the information in Exhibit E consists of e-mails between department personnel and city attorneys. You state these communications were prepared to provide professional legal services and advice to the city. You states these communications were confidential and that confidentiality has been maintained. Upon review, we agree the e-mails we have marked in Exhibit E constitute privileged attorney-client communications. Accordingly, the city may withhold marked information under section 552.107 of the Government Code. However, the remaining e-mails in Exhibit E do not pertain to the provision of legal services or advice to the city. Accordingly, we find you have failed to demonstrate how these remaining e-mails constitute privileged attorney-client communications. Thus, the city may not withhold any of the remaining e-mails in Exhibit E under section 552.107 of the Government Code.

Finally, we note the information in your second Exhibit B contains an e-mail address subject to section 552.137 of the Government Code. Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). We note section 552.137(a) does not apply to the e-mail address provided by a person who has a contractual relationship with the governmental body or by the contractor's agent. *Id.* § 552.137(c)(1). We further note section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. Therefore, the city must withhold the e-mail address we have marked under section 552.137 unless the owner of the address has affirmatively consented to its release.[5] *See id.* § 552.137(b).

In summary, the city must continue to rely on Open Records Letter Nos. 2010-08353 and 2010-16515 as previous determinations and withhold or release the previously ruled upon information in accordance with those rulings. With the exception of basic information, the city may withhold the information in your first Exhibit B and the remaining information in Exhibit H under section 552.108(a)(1) of the Government Code. In releasing basic information in your first Exhibit B, the city must withhold the child's identifying information

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

under section 552.107(2) of the Government Code. The city may withhold the information we have marked in Exhibit E under section 552.107 of the Government Code. Unless it receives consent for its release, the city must withhold the e-mail address we have marked in your second Exhibit B under section 552.137 of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,

Kate Hartfield

Kate Hartfield
Assistant Attorney General
Open Records Division

KH/em

Ref: ID# 400396

Enc. Submitted documents

c: Requestor
(w/o enclosures)