



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

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Ms. Donna L. Johnson  
Counsel for the Harris County Attorney's Office  
Olson & Olson, L.L.P.  
2727 Allen Parkway, Suite 600  
Houston, Texas 77019-2133

OR2012-12040

Dear Ms. Johnson:

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# 460504 (12PIA0244).

The Harris County Attorney's Office (the "county attorney's office"), which you represent, received a request for all e-mails to or from two named individuals during a specified time period. You state the county attorney's office has or will release some information to the requestor. You further state you will redact driver's license or personal identification numbers pursuant to section 552.130(c) of the Government Code and social security numbers pursuant to section 552.147(b) of the Government Code.<sup>1</sup> You claim some of the submitted information is not subject to the Act. In addition, you claim the submitted information is excepted from disclosure pursuant to sections 552.101, 552.103, 552.104, 552.105, 552.106, 552.107, 552.108, 552.111, 552.116, 552.117, 552.1175, 552.137, 552.139, and 552.153 of

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<sup>1</sup>Section 552.130(c) allows a governmental body to redact the information described in subsections 552.130(a)(1) and (a)(3) without the necessity of seeking a decision from the attorney general. See Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). See *id.* § 552.130(d), (e). Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. See *id.* § 552.147(b).

the Government Code. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, we must address the obligations of the county attorney's office under the Act. Section 552.301 of the Government Code prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Gov't Code § 552.301. Section 552.301(b) requires that a governmental body ask for a decision from this office and state which exceptions apply to the requested information by the tenth business day after receiving the request. *Id.* § 552.301(b). You state the county attorney's office received the request for information on May 9, 2012. Accordingly, the tenth business day after the receipt of the request was May 23, 2012. Although you timely raised sections 552.101, 552.103, 552.105, 552.106, 552.107, 552.108, 552.111, 552.116, 552.117, 552.1175, 552.137, 552.139, and 552.153 of the Government Code in your initial request for a decision to this office, you did not raise section 552.104 until May 31, 2012. Thus, with respect to section 552.104, the county attorney's office failed to comply with the procedural requirements mandated by section 552.301(b).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the waiver of its claims under the exception at issue, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason exists when third party interests are at stake or when information is confidential under other law. Open Records Decision No. 177 (1977). Although the county attorney's office seeks to withhold the submitted information under section 552.104 of the Government Code, section 552.104 is a discretionary exception to disclosure and does not demonstrate a compelling reason to withhold information from the public. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions). Because the county attorney's office failed to comply with the procedural requirements of the Act with respect to section 552.104, the county attorney's office has waived its claim under this exception, and no information may be withheld on this basis.

We next address your contention some of the submitted information is not subject to the Act. The Act is applicable to "public information." *See* Gov't Code § 552.021. Section 552.002

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<sup>2</sup>We assume the "representative sample" of information 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 that those records contain substantially different types of information than that submitted to this office.

of the Act provides that “public information” consists of “information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it.” *Id.* § 552.002(a). Thus, virtually all information that is in a governmental body’s physical possession constitutes public information that is subject to the Act. *Id.* § 552.002(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. Gov’t Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987). Moreover, section 552.001 of the Act provides that it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. *See* Gov’t Code § 552.001(a).

You state the e-mails you have marked consist of personal e-mails that do not relate to the transaction of official county attorney’s office business. *See* Open Records Decision No. 635(1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Upon review of the information at issue, we agree the e-mails we have marked do not constitute “information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business” by or for the county attorney’s office. *See* Gov’t Code § 552.021. Thus, we conclude the marked e-mails are not subject to the Act, and need not be released in response to this request. However, we find the remaining e-mails at issue were created in connection with the transaction of official business of the county attorney’s office. Therefore, the remaining e-mails you seek to withhold constitute “public information” as defined by section 552.002(a) and are subject to the Act. Accordingly, we will address your submitted arguments for these e-mails.

Next, we note some of the remaining information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part, as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

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

...

(17) information that is also contained in a public court record; and

(18) a settlement agreement to which a governmental body is a party.

*Id.* § 552.022(a)(3), (17)–(18). The information we have marked consists of information relating to receipt of public funds subject to subsection 552.022(a)(3) of the Government Code, court-filed documents subject to subsection 552.022(a)(17) of the Government Code, and settlement agreements, to which the county attorney’s office is a party, subject to subsection 552.022(a)(18) of the Government Code. You seek to withhold this information under sections 552.103, 552.108, and 552.111 of the Government Code. However, these sections are discretionary exceptions and do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov’t Code § 552.103); Open Records Decision Nos. 677 at 10-11 (2002) (attorney work-product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 6-7 (1987) (statutory predecessor to section 552.111 subject to waiver), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Thus, the county attorney’s office may not withhold the information subject to section 552.022 under section 552.103, section 552.108, or section 552.111. The Texas Supreme Court has held, however, the Texas Rules of Civil Procedure are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will address your attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure for a portion of the information subject to section 552.022. In addition, you raise section 552.101 of the Government Code for some of the information subject to section 552.022, and we note a portion of the information at issue is subject to section 552.136 of the Government Code.<sup>3</sup> Because each of these sections make information confidential under the Act, we will address the applicability of sections 552.101 and 552.136 to the information at issue. We will also address your arguments against disclosure of the information not subject to section 552.022 of the Government Code.

Texas Rule of Civil Procedure 192.5 encompasses the attorney work product privilege. For purposes of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. *See* ORD 677 at 9–10. Rule 192.5 defines core work product as the work product of an attorney or an attorney’s representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney’s representative. *See* TEX. R. CIV. P. 192.5(a), (b)(1).

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<sup>3</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate the material was (1) created for trial or in anticipation of litigation and (2) consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *Id.*

The first prong of the work product test, which requires a governmental body to show the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and (2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See Nat'l Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204. The second part of the work product test requires the governmental body to show that the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both parts of the work product test is confidential under rule 192.5, provided the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp.*, 861 S.W.2d at 427.

You generally state some of the information subject to section 552.022 consists of attorney work product. Upon review, we conclude you have not demonstrated any of the information at issue consists of core work product for purposes of rule 192.5. Therefore, the county attorney's office may not withhold any of the information at issue under Texas Rule of Civil Procedure 192.5.

You claim some of the submitted information is confidential pursuant section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes, such as section 261.201 of the Family Code. Section 261.201 provides as follows:

(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:

(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). You generally assert some of the submitted information is excepted from disclosure under section 261.201. Upon review, we find you have failed to demonstrate the information you seek to withhold contains a report of alleged or suspected abuse or neglect made under this chapter or the identity of the person making the report. Further, you do not explain, and the remaining information does not reflect, it relates to files, reports, records, communications, or working papers used or developed in an investigation under chapter 261 or in providing services as a result of such an investigation. *See id.* § 261.001(1), (4) (defining “abuse” and “neglect” for 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). Therefore, the information you have marked is not confidential under section 261.201 and may not be withheld on that basis under section 552.101.

You also raise section 58.003 of the Family Code, which is encompassed by section 552.101 of the Government Code, and provides that a court may seal certain records of a person who has been found to have engaged in delinquent conduct or conduct indicating a need for supervision, or of a person taken into custody to determine whether the person engaged in delinquent conduct or conduct indicating a need for supervision. *See id.* § 58.003(a); *see id.* § 51.03 (defining “delinquent conduct” and “conduct indicating a need for supervision” for purposes of Fam. Code ch. 58). You assert the documents you have marked “identify minor children.” However, we note the information at issue does not pertain to records of delinquent conduct or conduct indicating a need for supervision. Further, you explain the records at issue have not been ordered sealed by a court. Therefore, the county attorney’s office may not withhold the information at issue under section 552.101 of the Government Code in conjunction with section 58.003 of the Family Code.

Section 552.101 of the Government Code also encompasses section 58.005 of the Family Code, which provides as follows:

Records and files concerning a child, including personally identifiable information, and information obtained for the purpose of diagnosis, examination, evaluation, or treatment or for making a referral for treatment of a child by a public or private agency or institution providing supervision of a child by arrangement of the juvenile court or having custody of the child under order of the juvenile court may be disclosed only to [certain listed individuals.]

*Id.* § 58.005(a). You do not inform us, and the information at issue does not itself reflect, any of this information was “obtained for the purpose of diagnosis, examination, evaluation, or treatment or for making a referral for treatment of a child by a public or private agency or institution providing supervision of a child by arrangement of the juvenile court or having custody of the child under order of the juvenile court.” *Id.* We therefore conclude the information you have marked is not excepted from disclosure under section 552.101 of the Government Code in conjunction with section 58.005 of the Family Code.

Section 552.101 of the Government Code also encompasses section 58.007 of the Family Code. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997, are confidential under section 58.007(c), which provides as follows:

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:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (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 data 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). For purposes of section 58.007(c), a “child” is defined as a person ten years of age or older and under seventeen years of age. *Id.* § 51.02(2)(A). We have reviewed the information at issue and find it does not identify a juvenile suspect or offender for purposes of section 58.007. *See id.* § 51.03(a), (b) (defining “delinquent conduct” and “conduct indicating a need for supervision”). Accordingly, we find you have not demonstrated the applicability of section 58.007(c) of the Family Code to the information at issue. Thus, the county attorney’s office may not withhold the information at issue under section 552.101 of the Government Code in conjunction with section 58.007(c) of the Family Code.

You raise section 418.182 of the Government Code for portions of the submitted information, which is also encompassed by section 552.101 of the Government Code. Section 418.182 was added to chapter 418 of the Government Code as part of the Texas Homeland Security Act (the “HSA”) and provides in part:

(a) Except as provided by Subsections (b) and (c), information, including access codes and passwords, in the possession of a governmental entity that relates to the specifications, operating procedures, or location of a security system used to protect public or private property from an act of terrorism or related criminal activity is confidential.

(b) Financial information in the possession of a governmental entity that relates to the expenditure of funds by a governmental entity for a security system is public information that is not excepted from required disclosure under [the Act].

Gov't Code § 418.182(a), (b). The fact that information may generally be related to a security system does not make the information *per se* confidential under the HSA. *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 HSA must adequately explain how the responsive information falls within the scope of the provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You assert the information you have marked reveals the identity of a "person of interest" to federal law enforcement agents. However, this information does not relate to the specifications, operating procedures, or location of security systems used to protect public property from an act of terrorism or related criminal activity. Accordingly, we conclude this information is not confidential under section 418.182(a) of the Government Code and may not be withheld under section 552.101 of the Government Code on that basis.

You next assert portions of the remaining information are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common-law informer's privilege. Section 552.101 encompasses the common-law informer's privilege, which Texas courts have long recognized. *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 common-law 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." *See* Open Records Decision No. 279 at 2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5. The

privilege excepts the informer's statement only to the extent necessary to protect the informer's identity. *See* ORD 549 at 5.

You generally assert the submitted information contains an "informer's information" excepted by the common-law informer's privilege. The information you have marked does not contain the identity of an individual who reported a violation of criminal or civil statute to the proper authority. Therefore, we find the county attorney's office has failed to demonstrate the applicability of the informer's privilege to the information at issue. Accordingly, the county attorney's office may not withhold any of the information at issue under section 552.101 of the Government Code in conjunction with the common-law informer's privilege.

Section 552.101 of the Government Code also encompasses common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). In addition, this office has found common-law privacy generally protects the identifying information of juvenile victims of abuse or neglect. *See* Open Records Decision No. 394 (1983); *cf.* Fam. Code § 261.201. This office has also found personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Upon review, we find the information we have marked is highly intimate or embarrassing and of no legitimate public interest. Accordingly, the county attorney's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have not demonstrated how any portion of the remaining information at issue is highly intimate or embarrassing and not of legitimate public concern. Thus, none of the remaining information in at issue may be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two inter-related types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5, 478 at 4 (1987), 455 at 3-7. The first type protects an individual's autonomy within "zones of privacy," which include matters related to marriage,

procreation, contraception, family relationships, and child rearing and education. ORD 455 at 4. The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* at 7. The scope of information protected by constitutional privacy is narrower than that under the common-law doctrine of privacy; constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)). Upon review, we find no portion of the remaining information at issue falls within the zones of privacy or otherwise implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the county attorney's office may not withhold any of the information you have marked under section 552.101 in conjunction with constitutional privacy.

We next address your claim under section 552.107(1) of the Government Code, as it is potentially the most encompassing of the remaining information. Section 552.107(1) of the Government Code 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. 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 Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* 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, 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, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the information you have marked consists of communications between attorneys, attorney representatives, and clients of the county attorney's office made in furtherance of the rendition of professional legal services. You also state the communications were made in confidence, and that confidentiality has been maintained. Based on your representations and our review, we find the county attorney's office may generally withhold the information we have marked under section 552.107(1) of the Government Code. However, we note some individual e-mails contained in the otherwise privileged e-mail strings consist of communications with non-privileged parties. In addition, we note some of the submitted e-mails consist of communications with individuals you have not identified as privileged parties. Accordingly, the county attorney's office may withhold the information we have marked under section 552.107(1) of the Government Code.<sup>4</sup> To the extent the non-privileged e-mails we have marked in the otherwise privileged e-mail strings exist separate and apart from the privileged e-mail strings, they may not be withheld under section 552.107.

Section 552.103 of the Government Code provides in part:

(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 that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

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

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *See id.* 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. *See* Open Records Decision Nos. 555 (1990), 518 at 5 (1989) (litigation must be "realistically contemplated"). However, this office has determined 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 litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You state some of the information you have marked pertains to ongoing cases being handled by the county attorney's office's litigation groups or relates to a case currently on appeal. You also state the information is related to this pending litigation. Based on your argument and our review, we find litigation was pending when the county attorney's office received the instant request. Additionally, we find most of the information at issue is related to the pending litigation. However, we find a portion of the information you seek to withhold relates to administrative issues of the county attorney's office. You have not demonstrated how this information is related to the ongoing litigation and it may not be withheld under section 552.103.

You also state some of information you have marked pertains to ongoing settlement negotiations. However, you have not informed us, nor do the submitted documents indicate, any party has taken any concrete steps toward the initiation of litigation with respect to this information. *See* Gov't Code § 552.301(e)(1)(A); ORD 331. Further, you have failed to provide any arguments demonstrating that actual litigation is realistically contemplated by the county attorney's office with respect to this information. *See* Gov't Code § 552.301(e)(1)(A). Thus, we find you have not established the county attorney's office reasonably anticipated litigation with respect to this information when it received the present request. As such, the county attorney's office may not withhold the information related to the settlement negotiations under section 552.103. Accordingly, the county attorney's office may generally withhold only the information we have marked under section 552.103 of the Government Code.

However, we note the opposing parties in the pending litigation have seen or had access to some of the information at issue. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to litigation, through discovery

or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349, 320 (1982). Therefore, the information the opposing parties have seen or accessed is not protected by section 552.103 and may not be withheld on that basis. We also note the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). Accordingly, with the exception of the information the opposing parties have seen or accessed, the county attorney's office may withhold the information we have marked under section 552.103 of the Government Code.<sup>5</sup>

Section 552.105 excepts from disclosure information relating to "the location of real or personal property for a public purpose prior to public announcement of the project[.]" Gov't Code § 552.105(1). Section 552.105 is designed to protect a governmental body's planning and negotiating position with respect to particular transactions. Open Records Decision Nos. 564 at 2 (1990), 357 (1982), 310 (1982). Information that is excepted from disclosure under section 552.105 that pertains to such negotiations may be excepted from disclosure so long as the transaction relating to that information is not complete. *See* ORD 310. The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiating position with regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body's good-faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* ORD 564.

You state the information you have marked relates to property transactions that have not yet been completed. You indicate release of the information at issue will harm the county attorney's office negotiating position. Based on your representations and our review, we conclude the county attorney's office may withhold the information at issue under section 552.105 of the Government Code.

Section 552.106 excepts from disclosure "[a] draft or working paper involved in the preparation of proposed legislation" and "[a]n internal bill analysis or working paper prepared by the governor's office for the purpose of evaluating proposed legislation." Gov't Code § 552.106(a)-(b). We note section 552.106(b) applies to information created or used by employees of the governor's office for the purpose of evaluating proposed legislation. The purpose of section 552.106 is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body. *See* Open Records Decision No. 615 at 2 (1993). Therefore, section 552.106 is applicable only to the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation and who have an official responsibility to provide such information to members of the legislative body. *See id.* at 1; *see also* Open Records Decision No. 429 at 5 (1985) (statutory predecessor to section 552.106 not applicable to

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

information relating to governmental entity's efforts to persuade other governmental entities to enact particular ordinances).

In this instance, you generally assert some of the remaining information is excepted from disclosure under section 552.106. However, you have not demonstrated how the remaining information constitutes a draft or working paper involved in the preparation of proposed legislation. Further, you have failed to demonstrate this information constitutes an internal bill analysis or working paper prepared by the governor's office for the purpose of evaluating proposed legislation. Therefore, we conclude the county attorney's office may not withhold any of the remaining information under section 552.106.

Section 552.111 of the Government Code excepts from disclosure "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]" Gov't Code § 552.111. This exception encompasses the deliberative process privilege. *See* ORD 615 at 2. The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *see* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

This office has also concluded a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

You state the e-mails and draft documents you have marked contain advice, opinions, and recommendations on policymaking matters. As noted above, section 552.111 only excepts a preliminary draft of a document from disclosure to the extent it is intended for public release in its final form. Based on your representations and our review of the information at issue, we find the county attorney's office has demonstrated portions of the information at issue, which we have marked, consist of advice, opinions, or recommendations on the policymaking matters of the county attorney's office. Additionally, we understand the draft document at issue will be released to the public in its final form. Accordingly, the county attorney's office may withhold the information we have marked under section 552.111 of the Government Code. However, we find the remaining information you seek to withhold consists of general administrative and purely factual information or has been sent to third parties whom you have failed to demonstrate share a privity of interest or common deliberative process with the county attorney's office. Therefore, we conclude you have failed to demonstrate how the deliberative process privilege applies to the remaining information you seek to withhold, and the county attorney's office may not withhold this information pursuant to the deliberative process privilege under section 552.111 of the Government Code.

Section 552.111 of the Government Code also encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); ORD 677 at 4-8. Rule 192.5 defines work product as

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5. A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. TEX. R. CIV. P. 192.5; ORD 677 at 6-8. In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied

(a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

*Nat'l Tank*, 851 S.W.2d at 207. A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

You generally state the remaining information at issue consists of attorney work product. However, as previously noted, some of the remaining information at issue consists of communications with third parties whom you have failed to demonstrate share a privity of interest with the county attorney's office. In addition, we find you have not demonstrated the information at issue consists of mental impressions, opinions, conclusions, or legal theories of a party or party's representative prepared in anticipation of litigation or for trial. Therefore, we find the county attorney's office has failed to demonstrate the applicability of the work product privilege to the information at issue, and the county attorney's office may not withhold any of the remaining information at issue under the work product privilege of section 552.111 of the Government Code.

Section 552.108(a)(1) of the Government Code exempts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). A governmental body must reasonably explain how and why section 552.108(a)(1) is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the information you have marked "indicates investigations leading to nuisance actions and temporary injunctions." We note the information at issue pertains to litigation related to child custody and the termination of the parent-child relationship. Having considered your representations, we find you have not shown the information at issue is related to pending criminal cases. Thus, you have not demonstrated release of the information at issue would interfere with the detection, investigation, or prosecution of crime. We therefore conclude the county attorney's office may not withhold the information you have marked under section 552.108(a)(1) of the Government Code.

Section 552.108(b)(1) of the Government Code excepts from disclosure “[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]” Gov’t Code § 552.108(b)(1); *see City of Fort Worth v. Cornyn*, 86 S.W.3d at 327 (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). The statutory predecessor to section 552.108(b)(1) protected information that would reveal law enforcement techniques. *See, e.g.*, Open Records Decision Nos. 531 (1989) (detailed use of force guidelines), 456 (1987) (information regarding location of off-duty police officers), 413 (1984) (sketch showing security measures to be used at next execution). The statutory predecessor to section 552.108(b)(1) was not applicable to generally known policies and procedures. *See, e.g.* Open Records Decision Nos. 531 at 2-3 (Penal Code provisions, common-law rules, and constitutional limitations on use of force not protected), 252 at 3 (1980) (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

You state release of the information you have marked “may ultimately hinder the appeal of the cases due to the potential for obstruction by outside influences.” Upon review, we find you have not demonstrated release of any of the remaining information at issue would interfere with law enforcement or crime prevention. Therefore, the county attorney’s office may not withhold any of the information at issue under section 552.108(b)(1) of the Government Code.

Section 552.116 of the Government Code provides as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) “Audit” means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital

district, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

- (A) Intra-agency and interagency communications; and
- (B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You state the information you have marked consists of audit working papers that were prepared by the county attorney's office's auditor. You state the auditor is authorized by the Harris County Commissioner's Court to conduct such audits. Based on your representations and our review, we agree the information we have marked constitutes audit working papers under section 552.116 of the Government Code. Therefore, the county attorney's office may withhold the information we have marked under section 552.116 of the Government Code. Upon review, however, we find you have not demonstrated how the remaining information constitutes audit working papers rather than information maintained in another record of the county attorney's office. *See* Gov't Code § 552.116(a). Accordingly, the county attorney's office may not withhold any of the remaining information at issue under section 552.116 of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from public disclosure a peace officer's home address and telephone number, social security number, family member information, and emergency contact information, regardless of whether the peace officer made an election under section 552.024 of the Government Code. *Id.* § 552.117(a). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. We note section 552.117(a)(2) also encompasses a peace officer's cellular telephone number, unless the cellular telephone service is paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Therefore, to the extent the individuals whose information is at issue are currently licensed peace officers, the county attorney's office must withhold the personal information we have marked under section 552.117(a)(2) of the Government Code; however, the marked cellular telephone numbers may be withheld only if the cellular service is not paid for by governmental body. If the individuals whose information is at issue are not currently licensed peace officers or the marked cellular telephone numbers are paid for by a governmental body, the county attorney's office may not withhold the information we have marked under section 552.117(a)(2).

If the individuals whose information is at issue are not licensed peace officers, their personal information may be excepted from disclosure under section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the current and former home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a). We further note section 552.117 also applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid for by a governmental body. *See* ORD 506 at 5-6 (1988). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The county attorney's office may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Therefore, if the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the county attorney's office must withhold the information we have marked under section 552.117(a)(1); however, the marked cellular telephone numbers may be withheld only if a governmental body does not pay for the cellular telephone service. If the individuals at issue did not timely request confidentiality under section 552.024 or the marked cellular telephone numbers are paid for by a governmental body, the county attorney's office may not withhold the marked information under section 552.117(a)(1) of the Government Code. You have not demonstrated how the remaining information you marked consists of the home address and telephone number, emergency contact information, social security number, or family member information of a current or former employee of the county attorney's office, and it may not be withheld under section 552.117(a)(1).

Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, social security number, and family member information of certain enumerated individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential. *See* Gov't Code § 552.1175. Upon review, we find you have not demonstrated how the information at issue consists of the home address and telephone number, emergency contact information, social security number, or family member information of an enumerated individual. Accordingly, the county attorney's office may not withhold any of the information at issue under section 552.1175 of the Government Code.

Section 552.136 of the Government Code "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *Id.* § 552.136. Accordingly, we find the county attorney's office must withhold the bank account and routing numbers we have marked under section 552.136 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). The e-mail addresses we have marked are not a type specifically excluded by section 552.137(c). Accordingly, the county attorney’s office must withhold these e-mail addresses under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release under section 552.137(b).

Section 552.139 of the Government Code provides:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; [and]

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body’s or contractor’s electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

*Id.* § 552.139. Section 2059.055 of the Government Code provides in pertinent part:

(b) Network security information is confidential under this section if the information is:

(1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency;

(2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or

(3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

*Id.* § 2059.055(b). You state the information you have marked contains information about the county attorney's office's computer systems. However, you have not demonstrated how the information at issue relates to computer network security, or to the design, operation, or defense of the county attorney's office's computer network as contemplated in section 552.139(a). Further, we find you have failed to explain how the information at issue consists of a computer network vulnerability report or assessment as contemplated by section 552.139(b). Accordingly, the county attorney's office may not withhold the information you have marked under section 552.139 of the Government Code.

In summary, the county attorney's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The county attorney's office may generally withhold the information we have marked under section 552.107(1) of the Government Code. However, to the extent the non-privileged e-mails we have marked in the otherwise privileged e-mail strings exist separate and apart from the privileged e-mail strings, they may not be withheld under section 552.107. The county attorney's office may also withhold: (1) the information we have marked under section 552.103 of the Government Code, except for the information seen by the opposing parties; (2) the information we have marked under section 552.105; (3) the information we have marked under section 552.111 of the Government Code; and (4) the information we have marked under section 552.116 of the Government Code. The county attorney's office must withhold the information we have marked under section 552.117(a)(2) of the Government Code, to the extent the individuals whose information is at issue are currently licensed peace officers; however, the marked cellular telephone numbers may be withheld only if a governmental body does not pay for the cellular telephone service. The county attorney's office must withhold the information we have marked under section 552.117(a)(1) of the Government Code, if the individuals whose information is at issue are not currently licensed peace officers and timely requested confidentiality under section 552.024 of the Government Code; however, the marked cellular telephone numbers may be withheld only if a governmental body does not pay for the cellular telephone service. The county attorney's office must also withhold the information we have marked under section 552.136 of the Government Code and the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release under section 552.137(b). The county attorney's office must release the remaining information.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](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,

A handwritten signature in cursive script that reads "Jennifer Burnett".

Jennifer Burnett  
Assistant Attorney General  
Open Records Division

JB/tch

Ref: ID# 460504

Enc. Submitted documents

c: Requestor  
(w/o enclosures)