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ATTORNEY GENERAL OF TEXAS

May 4, 2017

Ms. Julie Allen
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Office of General Counsel
Texas Alcoholic Beverage Commission
P.O. Box 13127
Austin, Texas 78711

OR2017-09653

Dear Ms. Allen:

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# 656044 (TABC Ref. ID No. 1485989077).

The Texas Alcoholic Beverage Commission (the "commission") received a request for certain information pertaining to a named individual.¹ You inform us the commission does

¹You state, and provide documentation showing, the commission sought and received clarification of the request for information. *See* Gov't Code § 552.222(b) (stating governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). We note we asked the commission to provide additional information pursuant to section 552.303 of the Government Code. *See* Gov't Code § 552.303(c)-(d) (if attorney general determines that information in addition to that required by section 552.301 is necessary to render decision, written notice of that fact shall be given to governmental body and requestor, and governmental body shall submit necessary additional information to attorney general not later than seventh calendar day after date of receipt of notice). We have received and considered the information submitted by the commission pursuant to that request.

not have some of the requested information.² You state the commission will redact certain information pursuant to sections 552.117, 552.1175(b), and 552.130(c) of the Government Code.³ You assert some of the submitted information is not responsive to the instant request. Alternatively, you claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.108, 552.111, 552.137, 552.152, and 552.156 of the Government Code. We have considered submitted arguments and reviewed the submitted representative sample of information.⁴

Initially, you assert some of the submitted information is not responsive to the request for information because the commission may have obtained the information from other governmental bodies. However, you inform us the information at issue is maintained within commission investigation files. Thus, we find this information is responsive to the instant request. Accordingly, we will consider your arguments against the disclosure of this information.

Next, we note some of the requested information may have been the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2016-25037 (2016). We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Thus, to the extent the requested information is identical to the information previously requested and ruled upon, the commission may continue to rely on Open Records Letter No. 2016-25037 as a previous determination and withhold or release the identical information at issue in accordance with that ruling. *See*

²The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

³Section 552.117 of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and daily member information of current or former officials or employees of a governmental body. *See Gov't Code* § 552.117(a)(1). Section 552.024 of the Government Code permits a governmental body to redact information subject to section 552.117 of the Government Code in certain situations without requesting a decision from this office. *See id.* § 552.024(c). Section 552.1175(f) of the Government Code authorizes a governmental body to redact under section 552.1175(b), without the necessity of requesting a decision from this office, the home addresses and telephone numbers, emergency contact information, social security number, and family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure who properly elects to keep this information confidential. *See id.* § 552.1175(b), (f). Section 552.130(c) of the Government Code allows a governmental body to redact the information described in section 552.130(a) without the necessity of seeking a decision from the attorney general. *Id.* § 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).

⁴We 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 that those records contain substantially different types of information than that submitted to this office.

Open Records Decision No. 673 (2001) (so long as law, facts, and 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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, to the extent the requested information is not subject to the previous ruling, we will consider your arguments against disclosure of the information at issue.

We also note some of the submitted information is a part of completed investigations subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for the required disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless it is excepted by section 552.108 of the Government Code or made confidential under the Act or other law. Gov't Code § 552.022(a)(1). You raise section 552.107 of the Government Code for this information. However, this section does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Accordingly, the commission may not withhold the information at issue under section 552.107. Nevertheless, section 552.107 encompasses the attorney-client privilege, which is found at rule 503 of the Texas Rules of Evidence. The Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Therefore, we will consider the applicability of rule 503 for the information at issue. Additionally, we will consider your argument under section 552.107 for the information not subject to section 552.022(a)(1).

Section 552.101 of the Government Code 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 made confidential by section 5.48 of the Alcoholic Beverage Code, which provides as follows:

(a) "Private records," as used in this section, means all records of a permittee, licensee, or other person other than the name, proposed location, and type of permit or license sought in an application for an original or renewal permit or license, or in a periodic report relating to the importation, distribution, or sale of alcoholic beverages required by the commission to be regularly filed by a permittee or licensee.

(b) The private records of a permittee, licensee, or other person that are required or obtained by the commission or its agents, in connection with an investigation or otherwise, are privileged unless introduced in evidence in a hearing before the commission or before a court in this state or the United States.

Alco. Bev. Code § 5.48. The term “privileged” in this statute has been construed to mean “confidential” for purposes of the Act. Attorney General Opinion JM-1235 at 2 (1990); Open Records Decision Nos. 186 (1978), 62 (1974). Thus, section 5.48 makes confidential any records required or obtained by the commission, with the exception of “the name, proposed location, and type of permit or license sought in an application for an original or renewal permit or license” and “a periodic report relating to the importation, distribution, or sale of alcoholic beverages required by the commission to be regularly filed by a permittee or licensee.” Alco. Bev. Code § 5.48.

You state the information at issue consists e-mailed communications within the commission and between the commission and permittees and licensees related to the application records for commission licenses or permits. You state the correspondence between the commission and permittees or licensees contains private application information. You state none of the information at issue has been introduced as evidence in a hearing before the commission or before a court in Texas or the United States. Based on your representations and our review, we agree the information at issue constitutes private records under section 5.48 of the Alcoholic Beverage Code. Accordingly, the commission must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 5.48 of the Alcoholic Beverage Code.⁵

Section 552.101 of the Government Code also encompasses the Americans with Disabilities Act (“ADA”). *See* 42 U.S.C. §§ 12101 *et seq.* Title I of the ADA requires information about the medical conditions and medical histories of applicants or employees be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. 29 C.F.R. § 1630.14(c). An employer’s medical examination or inquiry into the ability of an employee to perform job-related functions is to be treated as a confidential medical record. *Id.*; *see also* Open Records Decision No. 641 (1996). The federal Equal Employment Opportunity Commission (the “EEOC”) has determined medical information for purposes of the ADA includes “specific information about an individual’s disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual.” *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). Federal regulations define “disability” for the purposes of the ADA as (1) a physical or mental impairment that substantially limits one or more of the major life activities of the individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment. 29 C.F.R. § 1630.2(g). The regulations further provide that physical or mental impairment means: (1) any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological,

⁵As our ruling is dispositive, we do not address your remaining arguments against disclosure of this information.

musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. *See id.* § 1630.2(h). Upon review, we find the ADA is not applicable to any of the remaining information. Thus, the commission may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with the ADA.

Texas Rule of Evidence 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

(A) between the client or the client's representative and the client's lawyer or the lawyer's representative;

(B) between the client's lawyer and the lawyer's representative;

(C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;

(D) between the client's representatives or between the client and the client's representative; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made to further the rendition of professional legal services to the client or reasonably necessary to transmit the communication. *Id.* 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under rule 503, provided the client has not waived the privilege or the

communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

You explain the information subject to section 552.022(a)(1) within Exhibit C-2 consists of information reviewed by attorneys for the commission for the purpose of facilitating the rendition of professional legal services to the commission. You state the information at issue was intended to be confidential and was not disclosed to non-privileged parties. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information subject to section 552.022(a)(1) within Exhibit C-2. Accordingly, the commission may withhold the information subject to section 552.022(a)(1) within Exhibit C-2 under rule 503 of the Texas Rules of Evidence.⁶

Section 552.101 of the Government Code also encompasses section 1701.260 of the Occupations Code, which provides, in relevant part, as follows:

(a) The [Texas Commission on Law Enforcement (“TCOLE”)] shall establish and maintain a training program open to any employee of a school district or open-enrollment charter school who holds a license to carry a concealed handgun issued under Subchapter H, Chapter 411, Government Code. The training may be conducted only by the [TCOLE] staff or a provider approved by the [TCOLE].

(b) The [TCOLE] shall collect from each person who participates in the training program identifying information that includes the person’s name, the person’s date of birth, the license number of the license issued to the person under Subchapter H, Chapter 411, Government Code, and the address of the person’s place of employment.

...

(l) All information about a person collected or submitted under this section is confidential, except as provided by Subsection (j), and is not subject to disclosure under Chapter 552, Government Code.

Occ. Code § 1701.260(a)-(b), (l). You assert some of the remaining information is identifying information for the purposes of section 1701.260. However, upon review, we find you have failed to demonstrate this information consists of the identifying information

⁶As our ruling is dispositive, we do not address your remaining arguments against disclosure of this information.

about a person collected under section 1701.260. Accordingly, we conclude the commission may not withhold this information under section 552.101 in conjunction with section 1701.260 of the Occupations Code.

Next, we address your argument under section 552.107 for the information in Exhibit C-2 not subject to section 552.022 of the Government Code. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. The elements of the privilege under section 552.107(1) are the same as those discussed above for rule 503 of the Texas Rules of Evidence. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. ORD 676 at 6-7. 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*, 922 S.W.2d at 923.

You state the remaining information in Exhibit C-2 consists of information reviewed by attorneys for the commission for the purpose of facilitating the rendition of professional legal services to the commission. You state the information at issue was intended to be confidential and was not disclosed to non-privileged parties. Upon review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Therefore, the commission may withhold the remaining information in Exhibit C-2 under section 552.107(1) of the Government Code.⁷

You assert some of the remaining information is subject to section 552.108 of the Government Code. Section 552.108 provides 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 the requirements of Section 552.021 if:

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

...

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

⁷As our ruling is dispositive, we do not address your remaining arguments against disclosure of this information.

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

(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 the requirements of Section 552.021 if:

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

...

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

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

Gov't Code § 552.108(a)(1), (4), (b)(1), (3). A governmental body raising section 552.108 must explain the applicability of section 552.108. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). However, section 552.108 is generally not applicable to records of an internal documents that are purely administrative in nature and do not involve the criminal investigation or prosecution of alleged misconduct. *See, e.g., Morales v. Ellen*, 840 S.W.2d 519, 526 (Tex. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution); *see also City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 329 (Tex. App.—Austin 2002, no pet.) (section 552.108 generally not applicable to law enforcement agency's personnel records); Open Records Decision No. 350 at 3-4 (1982). Section 552.108(b)(1) is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." *Cornyn*, 86 S.W.3d at 327. To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a governmental body must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. Instead, the governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. *See* Open Records Decision No. 562 at 10 (1990) (construing statutory predecessor). This office has concluded section 552.108(b) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.,* Open Records Decision

Nos. 531 (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (section 552.108 of the Government Code is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, ORDs 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

In Open Records Decision No. 506 (1988), this office determined that the statutory predecessor to section 552.108(b) excepted from disclosure “cellular mobile phone numbers assigned to county officials and employees with specific law enforcement responsibilities.” ORD 506 at 2. We noted that the purpose of the cellular telephones was to ensure immediate access to individuals with specific law enforcement responsibilities and that public access to these numbers could interfere with that purpose. *Id.* You argue release of the information at issue, including firearm serial numbers, would reveal “to the public internal strategies, techniques, and perspectives of investigators” and “obstruct detection or investigation of criminal activities.” You explain some of the information at issue pertains to undercover operations conducted by the commission’s Law Enforcement Division to detect and investigate criminal conduct under the commission’s enforcement authority. You further explain these records are not shared publicly, or even to non-enforcement departments of the agency. Upon review, we find you have demonstrated release of the information we have indicated would interfere with law enforcement or crime prevention. Thus, the commission may withhold the information we have indicated under section 552.108(b)(1) of the Government Code.⁸

However, you do not explain the remaining information at issue pertains to an ongoing criminal investigation or prosecution, nor have you explained how its release would interfere with the detection, investigation, or prosecution of crime. Thus, the commission has not met its burden under section 552.108(a)(1) or section 552.108(b)(1) for the remaining information at issue. Finally, you have failed to demonstrate the remaining information at issue was prepared by an attorney representing the state or that it reflects the mental impressions or legal reasoning of an attorney representing the state. *See* Gov’t Code § 552.108(a)(4), (b)(3). Thus, the commission has not met its burden under section 552.108(a)(4) or section 552.108(b)(3) for this information. Accordingly, the commission may not withhold any portion of the remaining information at issue under section 552.108 of the Government Code.

⁸As our ruling is dispositive, we do not address your remaining arguments against disclosure of this information.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) 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 satisfied. *Id.* at 681-82. Types of information considered intimate or embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. See Open Records Decision No. 455 (1987). Further, the Third Court of Appeals has concluded public citizens' dates of birth are protected by common-law privacy pursuant to section 552.101. See *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). This office has also found common-law privacy generally protects the identifying information of juvenile victims of abuse or neglect. Cf. Fam. Code § 261.201.

Upon review, we find portions of the remaining information satisfy the standard articulated by the Texas Supreme Court in *Industrial Foundation*. However, we note some of the information at issue may pertain to deceased individuals. Because “the right of privacy is purely personal,” that right “terminates upon the death of the person whose privacy is invaded[.]” *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); see also *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 147 (N.D. Tex. 1979) (“action for invasion of privacy can be maintained only by a living individual whose privacy is invaded” (quoting RESTATEMENT (SECOND) OF TORTS § 652I (1977))); Attorney General Opinions JM-229 (1984) (“the right of privacy lapses upon death”), H-917 (1976) (“We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death.”); Open Records Decision No. 272 (1981) (“the right of privacy is personal and lapses upon death”). Accordingly, the commission must withhold all dates of birth pertaining to living individuals, as well as the information we have indicated if it pertains to a living individual, under section 552.101 of the Government Code in conjunction with common-law privacy.

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 Open Records Decision No. 615 at 2 (1993). 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, writ ref'd n.r.e.); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, 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, 364 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions 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 severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152, 157 (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, section 552.111 protects the factual information. *See* Open Records Decision No. 313 at 3 (1982).

This office has also concluded section 552.111 exempts from disclosure a preliminary draft of a document intended for public release in its final form because the draft necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document. *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 of a preliminary draft of a policymaking document, including comments, underlining, deletions, and proofreading marks, that will be released to the public in its final form. *See id.* at 2.

You state the information at issue consists of communications between commission employees. You also state this information contains the advice, opinions, and recommendations relating to the commission's policymaking. Based on your representations and our review, we find you have demonstrated the information we have marked and indicated consists of advice, opinions, or recommendations on the policymaking matters of the commission. Accordingly, the commission may withhold the information we have marked and indicated under section 552.111 of the Government Code. However, we find the remaining information consists of either general administrative information that does not relate to policymaking, or information that is purely factual in nature. Thus, you have failed to demonstrate this information is excepted under section 552.111 of the Government Code. Accordingly, the commission may not withhold the remaining information on this basis.

Section 552.111 of the Government Code also 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[.]” *See* Gov't Code § 552.111. This section 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); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as:

(1) [M]aterial 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). 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. *Id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

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 Co. 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; ORD 677 at 7. Upon review, we find you have failed to demonstrate the remaining information at issue consists of material prepared, mental impressions developed, or a communication made in anticipation of litigation or for trial for the purposes of section 552.111. Thus, the commission may not withhold the remaining information at issue as attorney work product under section 552.111 of the Government Code.

We note portions of the remaining information are subject to section 552.136 of the Government Code.⁹ Section 552.136 states, "Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected,

⁹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b); *see also id.* § 552.136(a) (defining “access device”). This office has determined an insurance policy number is an access device number for the purposes of section 552.136. *See* Open Records Decision No. 684 (2009). Accordingly, the commission must withhold the billing account number we have indicated, as well as all insurance policy numbers within the remaining information under section 552.136 of the Government Code.

You state you will redact some e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684.¹⁰ Section 552.137 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). Section 552.137 does not apply to an institutional e-mail address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). We are unable to determine whether the personal e-mail addresses at issue belong to commission officials or employees. Thus, we rule conditionally. To the extent the e-mail addresses at issue in the remaining information belong to commission officials or employees, or to the extent subsection (c) applies, this information is not subject to section 552.137 and the commission may not withhold it on that basis. *See Austin Bulldog v. Leffingwell*, 490 S.W.3d 240 (Tex. App.—Austin 2016, no pet.) (holding personal e-mail addresses of government officials used to conduct official government business are not e-mail addresses of “members of the public” for purposes of Gov’t Code § 552.137(a)). However, to the extent the e-mail addresses at issue are not the personal e-mail addresses of commission officials or employees and subsection (c) does not apply, this information is subject to section 552.137 and the commission must withhold it under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release.

Section 552.152 of the Government Code provides:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 [of the Government Code] if, under the specific circumstances pertaining to the employee or officer, disclosure of the

¹⁰Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684.

information would subject the employee or officer to a substantial threat of physical harm.

Gov't Code § 552.152. You inform us the information at issue relates to undercover commission officers. You state release of this information would subject these officers to a substantial threat of physical harm. Based on your representations and our review, we find you have demonstrated the release of the information at issue would subject the officers at issue to a substantial threat of physical harm. Thus, the commission must withhold the information you have marked under section 552.152 of the Government Code.

You seek to withhold Exhibit C-6 under section 552.156 of the Government Code, which provides, in relevant part:

(a) Except as otherwise provided by this section, the following information is excepted from disclosure under this chapter:

(1) a continuity of operations plan developed under Section 412.054, Labor Code; and

(2) all records written, produced, collected, assembled, or maintained as part of the development or review of a continuity of operations plan developed under Section 412.054, Labor Code.

(b) Forms, standards, and other instructional, information, or planning materials adopted by the office to provide guidance or assistance to a state agency in developing a continuity of operations plan under [s]ection 412.054, Labor Code, are public information subject to disclosure under this chapter.

Id. § 552.156(a)-(b). Section 412.054 of the Labor Code provides, in relevant part,

(a) Each state agency shall work with the [State Office of Risk Management] to develop an agency-level continuity of operations plan that outlines procedures to keep the agency operational in case of disruptions to production, finance, administration, or other essential operations. The plan must include detailed information regarding resumption of essential services after a catastrophe, including:

(1) coordination with public authorities;

(2) management of media;

(3) customer service delivery;

- (4) assessing immediate financial and operational needs; and
- (5) other services as determined by the office.

...

(c) Except as otherwise provided by this section, the following information is confidential and is exempt from disclosure under [the Act]:

- (1) a continuity of operations plan developed under this section[.]

Labor Code § 412.054(a), (c)(1). You state Exhibit C-6 consists of the commission's Continuity of Operations Plan. You inform us this information was created in accordance with section 412.054 of the Labor Code. You also inform us the information at issue is not subject to section 552.156(b). Thus, upon review, we find you have demonstrated the applicability of section 552.156 of the Government Code to Exhibit C-6, and the commission must withhold it on this basis.

In summary, to the extent the requested information is identical to the information previously requested and ruled upon, the commission may continue to rely on Open Records Letter No. 2016-25037 as a previous determination and withhold or release the identical information at issue in accordance with that ruling. The commission must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 5.48 of the Alcoholic Beverage Code. The commission may withhold the information subject to section 552.022(a)(1) within Exhibit C-2 under rule 503 of the Texas Rules of Evidence. The commission may withhold the remaining information in Exhibit C-2 under section 552.107(1) of the Government Code. The commission may withhold the information we have indicated under section 552.108(b)(1) of the Government Code. The commission must withhold all dates of birth pertaining to living individuals, as well as the information we have marked if it pertains to a living individual, under section 552.101 of the Government Code in conjunction with common-law privacy. The commission may withhold the information we have marked and indicated under section 552.111 of the Government Code. The commission must withhold the billing account number we have indicated, as well as all insurance policy numbers within the remaining information under section 552.136 of the Government Code. To the extent the e-mail addresses at issue are not the personal e-mail addresses of commission officials or employees and subsection (c) does not apply, the commission must withhold the e-mail addresses at issue under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release. The commission must withhold the information you have marked under section 552.152 of the Government Code. The commission must withhold Exhibit C-6 under section 552.156 of the Government Code. The commission must release the remaining information.

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

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

Sincerely,

A handwritten signature in black ink that reads "Cole Hutchison". The signature is written in a cursive style with a large initial "C".

Cole Hutchison
Assistant Attorney General
Open Records Division

CH/sb

Ref: ID# 656044

Enc. Submitted documents

c: Requestor
(w/o enclosures)