



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

February 8, 2022

Mr. John C. West  
General Counsel  
Office of the Inspector General  
4616 Howard Lane, Suite 250  
Austin, Texas 78728

OR2022-03575

Dear Mr. West:

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# 926296 (OIG Open Records 2021.00153).

The Office of the Inspector General of the Texas Department of Criminal Justice (the "department") received a request for information regarding two former department investigators. You state the department will release some information. You state the department will redact certain information subject to section 552.117 of the Government Code pursuant to Open Records Letter No. 2005-01067 (2005).<sup>1</sup> You also state the department will redact certain information pursuant to section 552.1175(f) of the Government Code and social security numbers pursuant to section 552.147(b) of the Government Code.<sup>2</sup> You claim the submitted information is excepted from disclosure

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<sup>1</sup> Open Records Letter No. 2005-01067 serves as a previous determination permitting the department to withhold the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former employees of the department, regardless of whether they comply with section 552.1175 of the Government Code, under section 552.117(a)(3) of the Government Code without requesting a decision from this office.

<sup>2</sup> 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, date of birth, and family member information of certain individuals who properly elect to keep this information confidential. *See* Gov't Code § 552.1175(b), (f). 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).

under sections 552.101, 552.102, 552.107, 552.108, 552.130, and 552.134 of the Government Code.<sup>3</sup> We have considered the exceptions you claim and reviewed the submitted information.

Section 552.108(b) 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: . . . (2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]” Gov’t Code § 552.108(b)(2). A governmental body claiming section 552.108(b)(2) must demonstrate the information at issue relates to a concluded criminal case that did not result in a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). However, we found you have failed to demonstrate the applicability of section 552.108(b)(2) to the information at issue and the department may not withhold it on that basis.

Section 552.108(b)(1) of the Government Code excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would interfere with law enforcement and crime prevention. *Id.* § 552.108(b)(1); *see also* Open Records Decision No. 531 at 2 (1989) (quoting *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977)). A governmental body claiming section 552.108(b)(1) must explain how and why the release of the requested information would interfere with law enforcement. *See* Gov’t Code §§ 552.108(b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706. 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.” *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). This office has concluded section 552.108(b)(1) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (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). Upon review, we find you have failed to demonstrate release of the information at issue would interfere with law enforcement or crime prevention. Accordingly, the department may not withhold any of the submitted information under section 552.108(b)(1) of the Government Code.

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<sup>3</sup> Although you raise section 552.101 of the Government Code in conjunction with section 411.084 of the Government Code, we understand you to raise section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code.

Section 552.107(1) of the Government Code protects information coming 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 “to facilitate 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). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. Tex. R. Evid. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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).

The department states the information at issue documents a communication between department employees and an attorney for the department. Additionally, the department states this communication was made for the purpose of facilitating the rendition of professional legal services, the confidentiality of the communication has been maintained, and the communication was not intended to be shared with any third parties. Based on these representations and our review, we find the department has demonstrated the applicability of the attorney-client privilege to the information we have marked. Thus, the department may withhold the information we marked under section 552.107(1) of the Government Code.<sup>4</sup>

Section 552.134 of the Government Code relates to inmates of the department and provides:

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

Except as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the [department] is excepted from [required public disclosure] if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Gov't Code § 552.134(a). The information at issue consists of records involving an investigation into employees' conduct. Therefore, these records are not "about an inmate" for purposes of section 552.134 and, thus, the department may not withhold the entirety of these records under section 552.134. Portions of the records at issue, however, include identifying information of inmates. This information is subject to section 552.134. Accordingly, the department must withhold the inmate identifying information we have marked and indicated under section 552.134 of the Government Code.<sup>5</sup>

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. Section 552.101 of the Government Code encompasses the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code, which governs release of medical records. Section 159.002 of the MPA provides, in relevant part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

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

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* § 159.002, .004. This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982).* Upon review, we find some of the remaining information constitutes a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that was created or is maintained by someone under the supervision of a physician. Accordingly, the department must withhold the information we marked under section 552.101 of the Government Code in conjunction with the MPA.

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

However, we find none of the remaining information constitutes medical records subject to section 159.002. Accordingly, the department may not withhold any of the remaining information under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses chapter 411 of the Government Code, which pertains to criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code makes CHRI the Texas Department of Public Safety (“DPS”) maintains confidential, except DPS may disseminate this information as provided in subchapters E-1 and F of chapter 411 of the Government Code. *See* Gov’t Code § 411.083(a). Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for criminal justice purposes. *See id.* §§ 411.083(b)(1), .089. The remaining information contains Federal Bureau of Investigation (“FBI”) numbers that constitute CHRI generated by the FBI. Therefore, the department must generally withhold the submitted FBI numbers under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code.

We note the requestor is a representative of the Office of Capital and Forensic Writs (the “OCFW”). Section 411.1272 of the Government Code provides:

The [OCFW] and a public defender’s office are entitled to obtain from the [DPS] [CHRI] maintained by the [DPS] that relates to a criminal case in which an attorney compensated by the [OCFW] or by the public defender’s office has been appointed.

*Id.* § 411.1272. In addition, section 411.087(a) of the Government Code provides, in pertinent part:

(a) [A] person, agency, department, political subdivision, or other entity that is authorized by this subchapter or Subchapter E-1 to obtain from the [DPS] [CHRI] maintained by the [DPS] that relates to another person is authorized to:

...

(2) obtain from any other criminal justice agency in this state [CHRI] maintained by that criminal justice agency that relates to that person.

*Id.* § 411.087(a)(2). If the department determines the information at issue relates to a criminal case in which an attorney compensated by the OCFW is appointed, then the requestor is authorized to obtain the FBI numbers pursuant to sections 411.087(a)(2) and 411.1272 of the Government Code. *See id.* §§ 411.087(a)(2), .1272. In that instance, the department may not withhold the CHRI at issue under section 552.101 in conjunction with

section 411.083, and said information must be released. However, if the department determines the information at issue does not relate to a criminal case in which an attorney compensated by the OCFW is appointed, then the city must withhold the FBI numbers under section 552.101 in conjunction with section 411.083.

Section 552.101 also encompasses section 58.008 of the Family Code, which provides, in part:

(b) Except as provided by Subsection (c), law enforcement records concerning a child and information concerning a child that are stored by electronic means or otherwise and from which a record could be generated may not be disclosed to the public and shall be:

(1) if maintained on paper or microfilm, kept separate from adult records;

(2) if maintained electronically in the same computer system as adult records, accessible only under controls that are separate and distinct from the 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 Subsection (c) or Subchapter B, D, or E.

Fam. Code § 58.008(b); *see also id.* § 51.03(a) (defining “delinquent conduct” for purposes of title 3 of Family Code). Section 58.008(b) is applicable to records of juvenile conduct that occurred before, on, or after September 1, 2017. *See* Act of May 28, 2017, 85th Leg., R.S., ch. 746, § 22. The juvenile must have been at least 10 years old and less than 17 years of age when the conduct occurred. *See* Fam. Code § 51.02(2) (defining “child” for purposes of title 3 of Family Code). A portion of the remaining information involves a juvenile offender, so as to fall within the scope of section 58.008(b). It does not appear any of the exceptions in section 58.008 apply. Accordingly, the department must generally withhold the information we marked under section 552.101 of the Government Code in conjunction with section 58.008(b) of the Family Code. However, as previously noted, the requestor is a representative of the OCFW and may generally have a right of access to CHRI in the submitted information pursuant to sections 411.087(a)(2) and 411.1272. *See* Gov’t Code §§ 411.087(a)(2), .1272. Accordingly, we must address the conflict between section 58.008(b) of the Family Code and sections 411.087 and 411.1272 of the Government Code.

Where information falls within both general and specific statutory provisions, the specific provisions prevail over the general statutes. *See id.* § 311.026 (where general statutory provision conflicts with specific provision, specific provision prevails as exception to general provision unless the general provision is the later enactment and the manifest intent is that the general provision prevail); *Cuellar v. State*, 521 S.W.2d 277 (Tex. Crim. App. 1975) (under well-established rule of statutory construction, specific statutory provisions prevail over general ones); Open Records Decision Nos. 598 (1991), 583 (1990), 451.

Although section 58.008(b) generally makes juvenile law enforcement records confidential, sections 411.1272 and 411.087 of the Government Code give the OCFW access to particular information in specific situations. *See* Gov't Code §§ 411.087, .1272. Thus, the statutory right of access granted to the OCFW by sections 411.087 and 411.1272 of the Government Code prevails over the more general confidentiality provision of section 58.008(b) of the Family Code.

Therefore, if the department determines the information at issue relates to a criminal case in which an attorney compensated by the OCFW is appointed, then the department must release CHRI from the information we marked and must withhold the remaining information at issue under section 552.101 of the Government Code in conjunction with section 58.008(b) of the Family Code.<sup>6</sup> However, if the department determines the information at issue does not relate to a criminal case in which an attorney compensated by the OCFW is appointed, then the department must withhold the information at issue in its entirety under section 552.101 of the Government Code in conjunction with section 58.008(b) of the Family Code.<sup>7</sup>

Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov't Code § 552.102(a). The Texas Supreme Court held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Accordingly, the department must withhold all employees' dates of birth in the remaining information under section 552.102(a) of the Government Code.<sup>8</sup>

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 and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. In *Ellen*, the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). This office has held common-law privacy protects the identity of a juvenile offender. *See* Open Records Decision No. 394 (1983); *cf.* Fam. Code § 58.008(b). The Third Court of Appeals

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<sup>6</sup> In this instance, as our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

<sup>7</sup> In this instance, as our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

<sup>8</sup> As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

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.). However, this office has concluded the public has a legitimate interest in information that relates to public employees and their conduct in the workplace. *See, e.g.*, Open Records Decision Nos. 562 at 10 (personnel file information does not involve most intimate aspects of human affairs but in fact touches on matters of legitimate public concern), 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of government employees), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest), 392 (1982) (reasons for employee's resignation ordinarily not private).

You seek to withhold some of the remaining information under common-law privacy and the ruling in *Ellen*. We note the ruling in *Ellen* was applicable to investigations involving sexual harassment in the workplace. In this instance, we find the information at issue does not pertain to a sexual harassment investigation in the employment context for the purposes of *Ellen*. Accordingly, the department may not withhold the information at issue under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. Nevertheless, we find some of the remaining information satisfies the standard articulated by the Texas Supreme Court in the *Industrial Foundation* decision. However, we note some of the information at issue pertains to individuals who will be de-identified and whose privacy interests are thus protected. Accordingly, the department must withhold the information we have marked and indicated and all identifiable public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. However, the department has failed to demonstrate any of the remaining information is highly intimate or embarrassing and not of legitimate concern to the public. Therefore, the department may not withhold any of the remaining information under section 552.101 in conjunction with common-law privacy.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or a personal identification document issued by an agency of this state or another state or country is excepted from public release. Gov't Code § 552.130(a). Accordingly, the department must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

However, as previously noted, the requestor is a representative of the OCFW and may be seeking the requested information in her official capacity. In that event, the department has the discretion to release some of the information at issue pursuant to an intergovernmental transfer. This office has concluded that information subject to the Act may be transferred between governmental bodies without waiving exceptions to the public disclosure of that information or affecting its confidentiality. *See* Attorney General Opinion JM-590 (1986); Open Records Decision Nos. 655 (1997), 567 (1990), 561 (1990), 516 (1989). These decisions are based on the well-settled policy of this state that governmental agencies should cooperate with each other in the interest of the efficient and economical administration of their statutory duties. *See* ORD 516. However, the transfer of

confidential information from one governmental body to another is prohibited where a relevant confidentiality statute authorizes release of the confidential information only to specific entities, and the requesting governmental body is not among the statute's enumerated entities. *See* Attorney General Opinions DM-353 at 4 n.6 (1995) (intergovernmental transfer permitted under statutory confidentiality provision only where disclosure to another governmental agency is required or authorized by law), JM-590 at 4-5 (1986) (where governmental body is not included among expressly enumerated entities to which confidential information may be disclosed, information may not be transferred to that governmental body); *see also* Open Records Decision Nos. 655, 650 (1996) (transfer of confidential information to federal agency impermissible unless federal law requires its disclosure).

We note sections 552.102, 552.117, 552.1175, 552.134, and 552.147 of the Government Code and the doctrine of common-law privacy do not have specific release provisions governing public release of information. Thus, pursuant to the intergovernmental transfer doctrine, the department has the discretion to release the information we marked under these sections. Furthermore, the release of information pursuant to an intergovernmental transfer does not constitute a release of information to the public for the purposes of section 552.007 of the Act. *See, e.g.*, Attorney General Opinion Nos. H-917 at 1 (1976), H-242 (1974); *see also* Gov't Code §§ 552.007, .352. *But see* TEX. R. EVID. 503(b)(1). 511(a)(1) (providing privilege is waived if holder of privilege "voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged"). Thus, the department does not waive its interests in withholding this information by exercising its discretion under the intergovernmental transfer doctrine. However, we note the MPA, section 58.008 of the Family Code, and section 552.130 of the Government Code have access provisions governing release of information and they specifically permit release to certain parties and in certain circumstances that do not include the request for information in this instance. *See generally* Attorney General Opinions DM-353 at 4 n. 6, JM-590 at 4-5. Thus, the information we marked under these sections may not be released pursuant to the intergovernmental transfer doctrine. We also note CHRI generated by the National Crime Information Center or by the Texas Crime Information Center is subject to section 411.083 of the Government Code, which authorizes release of such information only to specific entities. *See* Gov't Code §§ 411.083(c), 411.114(a). Thus, the CHRI may only be released to this requestor if the information at issue relates to a criminal case in which an attorney compensated by the OCFW is appointed. *See id.* §§ 411.087, 1272.

In summary, the department may withhold the information we marked under section 552.107(1) of the Government Code. The department must withhold the information we marked under section 552.101 of the Government Code in conjunction with the MPA. If the department determines the information at issue does not relate to a criminal case in which an attorney compensated by the OCFW is appointed, then the department must withhold the FBI numbers under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code and the information we marked under section 552.101 of the Government Code in conjunction with section 58.008 of the Family Code. If the department determines the information at issue relates to a criminal case in which an attorney compensated by the OCFW is appointed, then the department must release the FBI

numbers and the CHRI from the information at issue and must withhold the remaining information at issue under section 552.101 of the Government Code in conjunction with section 58.008 of the Family Code. The department must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code. The department has the discretion to release the remaining information pursuant to the intergovernmental transfer doctrine. Otherwise, the department must withhold the following information: (1) the inmate identifying information we marked and indicated under section 552.134 of the Government Code; (2) all employees' dates of birth in the remaining information under section 552.102(a) of the Government Code; and (3) the information we marked and indicated and all identifiable public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. The department 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Chase D. Young  
Assistant Attorney General  
Open Records Division

CDY/mo

Ref: ID# 926296

Enc. Submitted documents

c: Requestor  
(w/o enclosures)