



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 28, 2017

Ms. Linda Pecina
City Secretary
City of Hearne
209 Cedar Street
Hearne, Texas 77859

OR2017-14486

Dear Ms. Pecina:

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# 664171.

The City of Hearne (the "city") received two requests for information pertaining a named city police officer and a subpoena duces tecum for information pertaining to the same named officer. You state you have released some of the information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.108, 552.117, 552.1175, and 552.1325 of the Government Code.¹ We have also received and considered comments submitted by the first requestor. *See* Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

We note section 552.0055 of the Government Code provides "[a] subpoena duces tecum or a request for discovery that is issued in compliance with a statute or a rule of civil or criminal procedure is not considered to be a request for information under this chapter." *Id.* § 552.0055. The subpoena duces tecum reflects it was issued under the authority of

¹Although you also raise sections 552.132 and 552.152 the submitted information, you provide no arguments explaining how these exceptions are applicable to the information at issue. Therefore, we assume you no longer assert these exceptions. *See* Gov't Code §§ 552.301, .302.

article 24.01 of the Code of Criminal Procedure. Accordingly, we conclude the city did not receive a written request for public information that triggered the Act when it received the subpoena. Because the Act is not implicated, we will not address your claimed exceptions to disclosure for the requested information in regards to the subpoena. However, we will address your exceptions to disclosure for the requested information in regards to the two requests for information the city received.

Next, we note the first requestor asks the city to answer several questions. The Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). However, a governmental body must make a good-faith effort to relate a request to any responsive information that is within its possession or control. Open Records Decision Nos. 561 at 8-9 (1990), 555 at 102. We assume the city has made a good-faith effort to do so.

Next, we address the first requestor's claim the city failed to comply with the section 552.301 of the Government Code in requesting a ruling from this office with respect to his request. Section 552.301 prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See* Gov't Code § 552.301(b). Further, pursuant to section 552.301(e) of the Government Code, the governmental body is required to submit to this office within fifteen business days of receiving the request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e).

The city received a prior request from the first requestor for information on March 21, 2017. Accordingly, the city's initial ten-business day deadline for the prior request under section 552.301(b) of the Government Code was April 4, 2017. The city requested a clarification on March 24, 2017. The requestor responded to the request for clarification on March 24, 2017, making the new ten-business day deadline for the prior request April 7, 2017. *See id.* § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *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 over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). You inform us the city provided the requestor an opportunity to review the information at issue in that request on April 7, 2017. After reviewing the provided information, this requestor made one of the present requests asking

for additional information on April 7, 2017. Thus, April 7, 2017, is the date the city is deemed to have received the present request from the first requestor. You state the city was closed on April 14, 2017. This office does not count the date the request was received or holidays for the purpose of calculating a governmental body's deadlines under the Act. Accordingly, the ten-business-day deadline for requesting a ruling from this office was March April 24, 2017, and the fifteen-business-day deadline was May 1, 2017.

The envelope in which the city submitted to this office the information required by section 552.301(b) bears a meter-mark of April 20, 2017, and the envelope in which the city submitted to this office the information required by section 552.301(e) bears a meter-mark of April 25, 2017. *See* Gov't Code § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Therefore, we find the city complied with the procedural requirements of section 552.301 of the Government Code in requesting this decision. Accordingly, we will address the city's arguments.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated 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. Open Records Decision No. 455 at 4 (1987). 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. *Id.* 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.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 at 492 (5th Cir. 1985)).

We note the submitted information contains a photograph of an identifiable adult individual in a state of undress. Therefore, we find the city must withhold the marked photograph which depicts an identifiable individual who is partially or completely nude under section 552.101 of the Government Code in conjunction with constitutional privacy.

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. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* ORD 455.

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.* Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released under *Ellen*, along with the statement of the accused. However, the identities of the victims and witnesses of the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. *See* Open Records Decision Nos. 393 (1983), 339 (1982). However, when no adequate summary exists, detailed statements regarding the allegations must be released, but the identities of victims and witnesses must still be redacted from the statements. In either case, the identity of the individual accused of sexual harassment is not protected from public disclosure. We also note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

Some of the remaining information relates to an investigation into alleged sexual harassment. Upon review, we determine the submitted information does not contain an adequate summary of the alleged sexual harassment. Because there is no adequate summary of the investigation, the city must generally release any information pertaining to the sexual harassment investigation. However, the information at issue contains identifying information of victims and witnesses of the alleged sexual harassment. Accordingly, the city must withhold such information, which we marked, under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. *See Ellen*, 840 S.W.2d at 525.

Further, upon review, we conclude the additional information we marked meets the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the city must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find no portion of the remaining information is highly intimate or embarrassing and of no legitimate public concern, and the city may not withhold any of the remaining information under section 552.101 of the Government Code on the basis of common-law privacy.

Section 552.102(a) 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). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the Third Court of Appeals held the test to be applied to information claimed to be protected under section 552.102(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the act. *See Indus. Found.*, 540 S.W.2d 668, at 683-85. However, the Texas Supreme Court expressly disagreed with *Hubert*’s interpretation of section 552.102(a) and held its privacy standard differs from the *Industrial Foundation* test under section 552.101. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The supreme court then considered the applicability of section 552.102 and 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. *Id.* at 347-48. Upon review, we find no portion of the remaining information is subject to section 552.102(a) of the Government Code, and the city may not withhold any of the remaining information on that basis.

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. *See Open Records Decision No. 676* at 6-7 (2002). First, a governmental body must demonstrate 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 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. *See 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 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 assert Exhibit D consists of privileged attorney-client communications. However, you failed to establish the information at issue constitutes privileged attorney-client communications for the purposes of section 552.107(1). Accordingly, the city may not withhold Exhibit D under section 552.107(1) of the Government Code.

Section 552.108(a) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime.” Gov’t Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108(a)(1) must explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by any proper custodian of information relating to a pending investigation or prosecution of criminal conduct. *See Open Records Decision No. 474 at 4-5 (1987)*. Where a non-law enforcement agency has custody of information that would otherwise qualify for exception under section 552.108 as information relating to the pending case of a law enforcement agency, the custodian of the records may withhold the information if it provides this office with a demonstration that the information relates to the pending case and a representation from the law enforcement agency that it wishes to have the information withheld. The city states the requested information relates to a criminal investigation by the Texas Rangers. However, the city has not provided our office with a representation from the Texas Rangers, which is the entity with the pertinent law enforcement interest, objecting to the release of the information at issue. *See Open Records Decision Nos. 586 (1991), 474 (1987)*. Therefore, the city may not withhold any portion of the remaining information under section 552.108(a)(1) of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home address, home telephone number, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code. *See Gov’t Code § 552.117(a)(2)*. We note a post office box number is not a “home address” for purposes of section 552.117(a). *See Open Records Decision No. 622 at 4 (1994)* (legislative history makes clear that purpose of Gov’t Code § 552.117 is to protect public employees from being harassed at home). 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 also encompasses a personal cellular telephone number, unless the cellular service is paid for by a governmental body. *See Open*

Records Decision No. 506 at 5-7 (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). In this instance we are unable to determine whether the individuals whose information is at issue are currently licensed peace officers as defined by article 2.12; therefore, we must rule conditionally. If the individuals at issue are currently licensed peace officers as defined by article 2.12, then the city must withhold the information we marked under section 552.117(a)(2) of the Government Code. However, the city may only withhold the marked cellular telephone number if the cellular telephone service is not paid for by a governmental body. Conversely, if the individuals at issue are not currently licensed peace officers as defined by article 2.12, the city may not withhold the information at issue under section 552.117(a)(2) of the Government Code.

In that instance, some of the remaining information may be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). We note a post office box number is not a "home address" for purposes of section 552.117(a). *See* ORD 622 at 4. Section 552.117(a)(1) 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 by a governmental body. *See* ORD 506 at 5-6. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the employees at issue timely requested confidentiality under section 552.024 of the Government Code, the city must withhold the information we marked under section 552.117(a)(1) of the Government Code; however, the city may only withhold the marked cellular telephone number if the cellular telephone service is not paid for by a governmental body. Conversely, to the extent the employees at issue did not timely request confidentiality under section 552.024, the city may not withhold the information under section 552.117(a)(1).

Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family member information of certain individuals when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential. Gov't Code § 552.1175. Section 552.1175 applies, in part, to "peace officers

as defined by Article 2.12, Code of Criminal Procedure[.]” *Id.* § 552.1175(a)(1). Upon review, we find the city has failed to establish section 552.1175 is applicable to any of the remaining information. Thus, the city may not withhold any of the remaining information under section 552.1175.

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 personal identification document issued by an agency of this state or another state or country is excepted from public release.² *See id.* § 552.130. Accordingly, the city must withhold the motor vehicle record information we marked under section 552.130 of the Government Code.

Section 552.1325 of the Government Code provides, in relevant part, the following:

(a) In this section:

(1) “Crime victim” means a person who is a victim as defined by Article 56.32, Code of Criminal Procedure.

(2) “Victim impact statement” means a victim impact statement under Article 56.03, Code of Criminal Procedure.

(b) The following information that is held by a governmental body or filed with a court and that is contained in a victim impact statement or was submitted for purposes of preparing a victim impact statement is confidential:

(1) the name, social security number, address, and telephone number of a crime victim; and

(2) any other information the disclosure of which would identify or tend to identify the crime victim.

Id. § 552.1325. The definition of a victim under article 56.32 of the Code of Criminal Procedure includes an individual who suffers physical or mental harm as a result of criminally injurious conduct. Crim. Proc. Code § 56.32(a)(10), (11). Upon review, we find the information at issue does not include a victim impact statement for purposes of section 552.1325, nor has the city demonstrated any of the information at issue was submitted for purposes of preparing a victim impact statement. Accordingly, the city may

²The 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).

not withhold any of the remaining information under section 552.1325 of the Government Code.

In summary, the city must withhold the marked photograph under section 552.101 of the Government Code in conjunction with constitutional privacy. The city must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*, and must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent individuals at issue are currently licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure, the city must withhold the information we marked under section 552.117(a)(2) of the Government Code; however, the city may only withhold the marked cellular telephone number if the cellular telephone service is not paid for by a governmental body. In the event the individuals at issue are not currently licensed peace officers, to the extent the employees at issue timely requested confidentiality under section 552.024 of the Government Code, the city must withhold the information we marked under section 552.117(a)(1) of the Government Code; however, the city may only withhold the marked cellular telephone number if the cellular telephone service is not paid for by a governmental body. The city must withhold the motor vehicle record information we marked under section 552.130 of the Government Code. The city 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 "Emily Kunst". The signature is written in a cursive, flowing style.

Emily Kunst
Attorney
Open Records Division

EK/tdw

Ref: ID# 664171

Enc. Submitted documents

c: 4 Requestors
(w/o enclosures)