



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 25, 2019

Ms. Tiffany N. Evans
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2019-05292

Dear Ms. Evans:

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# 751763 (GC No. 25625).

The City of Houston (the "city") received a request for all correspondence between named individuals during a specified time period.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.104, 552.107, and 552.111 of the

¹We understand the city sought and received clarification of the request for information. See Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

Government Code. We have considered the exceptions you claim and reviewed the submitted representative samples of information.²

Initially, you state some of the requested information was the subject of a previous request for a ruling, as a result of which this office issued Open Records Letter Ruling No. 2019-04025 (2019). In that ruling, we determined (1) the city must release the information not submitted to this office, (2) the city may withhold the information subject to section 552.022 of the Government Code marked under Texas Rule of Evidence 503, (3) the city may withhold the information marked under section 552.103 of the Government Code, (4) the city may withhold the information marked under section 552.107 of the Government Code, (5) to the extent the individuals at issue made timely elections under section 552.024 of the Government Code, the city must withhold the information marked under section 552.117(a)(1) of the Government Code; however, the cellular telephone numbers may only be withheld if a governmental body does not pay for the cellular telephone service, and (6) the city must release the remaining information. You state the law, facts, or circumstances on which the prior ruling was based have not changed. Thus, the city must continue to rely on Open Records Letter Ruling No. 2019-04025 as a previous determination and withhold or release the information at issue in accordance with that ruling. See 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). To the extent the requested information is not subject to the previous ruling, we will address your arguments against release of the submitted information.

Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 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. You assert Exhibit 2 is protected by common-law privacy. Upon review, however, we find no portion of the information at issue is highly intimate or embarrassing and of no legitimate public

²We assume that the “representative samples” of records submitted to this office are 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.

concern, and the city may not withhold any of portion of Exhibit 2 under section 552.101 of the Government Code on the basis of common-law privacy.

Section 552.101 of the Government Code also encompasses information protected by chapter 418 of the Government Code. As part of the Texas Homeland Security Act, sections 418.176 through 418.182 were added to chapter 418 of the Government Code. These provisions make confidential certain information related to terrorism. Section 418.176(a) provides:

Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:

- (1) relates to staffing requirements of an emergency response provider, including law enforcement agency, a fire-fighting agency, or an emergency services agency;
- (2) relates to a tactical plan of the provider; or
- (3) consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers, of the provider.

Gov't Code § 418.176(a). The fact that information may relate to a governmental body's security concerns does not make the information *per se* confidential under the Texas Homeland Security Act. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the Texas Homeland Security Act must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You state Exhibit 3 pertains to information maintained by the city for the purpose of conducting the city's Fourth of July celebration (the "celebration"). You state portions of this information relate to "security information utilized by the [c]ity's police department to prevent, detect, and respond to terroristic and criminal activities." You further state a portion of this information "relates to the staffing requirements of law enforcement agencies, fire-fighting agencies, and emergency services" used at the celebration. You argue release of Exhibit 3 would "compromise law enforcement efforts by enabling terror or criminal suspects to anticipate weaknesses in law enforcement" which would allow the suspects to avoid detection. Upon review, we find Exhibit 3 was collected, assembled, or maintained

for the purposes of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and that it relates to staffing requirements of an emergency response provider. Accordingly, the city must withhold Exhibit 3 under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code.

Section 552.103 of the Government Code provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Id. § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and provide documentation showing, a lawsuit styled *Houston Professional Firefighters' Ass'n v. City of Houston*, Cause No. 2017-42885, was pending against the city in the 234th Judicial District Court of Harris County, Texas, when the city received the instant request for information. You state Exhibit 4 is related to the pending lawsuit. Based on your representations, the submitted documentation, and our review of Exhibit 4, we find litigation was pending when the city received this request for information, and Exhibit 4 is related to the pending litigation for the purposes of section 552.103. Therefore, the city may withhold Exhibit 4 under section 552.103(a) of the Government Code.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that

has either been obtained from or provided to the opposing parties in the pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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). 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 state Exhibits 6 and 7 consist of communications between attorneys for the city, their authorized representatives, and city employees that were made for the purpose of providing legal services to the city. You state the communications were intended to be and have remained confidential. Based on your representations and our review, we find Exhibits 6 and

7 consist of privileged attorney-client communications. Therefore, the city may withhold Exhibits 6 and 7 under section 552.107(1) of the Government Code.³

We note a portion of Exhibit 2 may be subject to section 552.117 of the Government Code.⁴ Section 552.117(a)(2) of the Government Code excepts from public disclosure a peace officer's home address, home telephone number, emergency contact information, and social security number, 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). 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.

If the marked information pertains to individuals who are not currently licensed peace officers, then the marked 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 current and former home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). 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 piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental

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

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision No. 481 (1987), 480 (1987), 470 (1987).

body must withhold information under section 552.117(a)(1) on behalf of a current or former employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Thus, to the extent the individuals whose information is at issue are not currently licensed peace officers as defined by article 2.12 and 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.⁵ Conversely, to the extent the individuals whose information is at issue are not currently licensed peace officers as defined by article 2.12 and 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).

In summary, the city must continue to rely on Open Records Letter Ruling No. 2019-04025 as a previous determination and withhold or release the information at issue in accordance with that ruling. The city must withhold Exhibit 3 under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code. The city may withhold Exhibit 4 under section 552.103 of the Government Code. The city may withhold Exhibits 6 and 7 under section 552.107(1) of the Government Code. To the extent the individuals whose information we marked are currently licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure, 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. To the extent the individuals whose information is at issue are not currently licensed peace officers as defined by article 2.12 and 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 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/>

⁵Regardless of the applicability of section 552.117 of the Government Code, we note 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 Gov't Code § 552.147(b).

[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, appearing to read "Patrick P. Mehaffy". The signature is fluid and cursive, with the first name "Patrick" being the most prominent.

Patrick P. Mehaffy
Assistant Attorney General
Open Records Division

PPM/mo

Ref: ID# 751763

Enc. Submitted documents

c: Requestor
(w/o enclosures)