



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

February 28, 2019

Ms. Barbara L. Quirk  
Counsel for City of Burkburnett  
Shanan, Guevara, Decker and Arrott  
201 South Lakeline Boulevard, Suite 202  
Cedar Park, Texas 78613

OR2019-05624

Dear Ms. Quirk:

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# 753988.

The City of Burkburnett (the "city"), which you represent, received a request for (1) the policies and procedures of the city's police department; (2) the city's employee handbook; (3) information pertaining to a named individual for a defined period of time; and (4) e-mail communications and phone records of a named city official during a defined period of time. You state the city has released some information to the requestor. We understand you argue some of the submitted information is not subject to the Act. You also claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.108, 552.117 and 552.1175 of the Government Code.<sup>1</sup> We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>2</sup>

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<sup>1</sup>Although you raise section 552.119 of the Government Code, you make no arguments to support this exception. Therefore, we assume you have withdrawn your claim this section applies to the information at issue. *See* Gov't Code §§ 552.301, .302. Further, we note you did not raise sections 552.117 and 552.1175 of the Government Code within ten business days of the date the city received the first request. *See id.* § 552.301(b). However, because sections 552.117 and 552.1175 can provide compelling reasons to overcome the presumption of openness, we will address the applicability of these exceptions to the submitted information, notwithstanding the city's violation of section 552.301(b) in raising these exceptions. *See id.* § 552.302.

<sup>2</sup>We 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

Initially, we note some of the submitted information, a representative sample of which we marked, is not responsive to the instant request because it is outside the specified period of time or was created after the date the instant request was received. This ruling does not address the public availability of any information that is not responsive to the request and the city is not required to release such information in response to this request.

Next, you argue the information you have indicated is not subject to the Act. The Act is only applicable to “public information.” *See* Gov’t Code § 552.021. Section 552.002(a) defines “public information” as the following:

[I]nformation that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body;
- (2) for a governmental body and the governmental body:
  - (A) owns the information;
  - (B) has a right of access to the information; or
  - (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or
- (3) by an individual officer or employee of a governmental body in the officer’s or employee’s official capacity and the information pertains to official business of the governmental body.

*Id.* § 552.002(a). Information is “in connection with the transaction of official business” if it is “created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer’s or employee’s official capacity, or a person or entity performing official business or a government function on behalf of a governmental body, and pertains to official business of the governmental body.” *Id.* § 552.002(a-1). Thus, virtually all of the information in a governmental body’s physical possession constitutes public information and is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). You explain the phone records you have marked contain purely personal exchanges that have no connection with the transaction of official business of the city. *See* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state

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

employee involving *de minimis* use of state resources). Upon review of the information at issue, we agree the information does not constitute “information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business” by or for the city. *See* Gov’t Code § 552.021. Thus, we conclude the phone records you have indicated are not subject to the Act and need not be released in response to this request.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This section encompasses 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. This office has found a compilation of an individual’s criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual’s privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one’s criminal history). Furthermore, we find a compilation of a private citizen’s criminal history is generally not of legitimate concern to the public.

The present request, in part, seeks all reports pertaining to a named individual. This portion of the request requires the city to compile the named individual’s criminal history and implicates the named individual’s right to privacy. Therefore, to the extent the city maintains law enforcement records listing the named individual as a suspect, arrestee, or criminal defendant, the city must withhold such information under section 552.101 of the Government Code in conjunction with common-law privacy.

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). 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).

You state some of the remaining responsive information consists of communications involving attorneys for the city, city officials, and other privileged parties. You state the communications were made in confidence for the purpose of facilitating the rendition of professional legal services to the city and these communications have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to some of the information at issue. Thus, the city may withhold the information, a representative sample of which we have marked, under section 552.107(1) of the Government Code.<sup>3</sup> We find, however, the remaining information at issue has been shared with individuals you have not demonstrated are privileged parties or you have failed to demonstrate the information at issue constitutes a communication between or among attorneys for the city and city officials for the purposes of section 552.107(1). Therefore, we conclude you have failed to establish this information constitutes privileged attorney-client communications for the purpose of section 552.107(1). Thus, the city may not withhold any portion of the remaining responsive information on the basis of section 552.107(1) of the Government Code.

Section 552.108(a)(1) 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 . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body that claims an exception to disclosure under section 552.108(a)(1) must explain how and why this exception is applicable to the information at issue. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the information at issue pertains to ongoing criminal investigations. Based upon your representation and our

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<sup>3</sup>As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

review, we find release of the information we have marked would interfere with the detection, investigation, or prosecution of crime. See *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Accordingly, the city may withhold the information, a representative sample of which we have marked, under section 552.108(a)(1) of the Government Code.<sup>4</sup> However, we find you have not demonstrate the remaining responsive information relates to a pending criminal investigation or prosecution, nor have you explained how its release would interfere with the detection, investigation, or prosecution of crime. Thus, you have failed to demonstrate the applicability of section 552.108(a)(1) to the remaining information at issue. Therefore, the city may not withhold any portion of the remaining responsive information under section 552.108 of the Government Code.

Section 552.108(b)(1) of the Government Code excepts from disclosure “[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]” Gov’t Code § 552.108(b)(1). 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.” *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). 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).

We understand you to assert some of the remaining information at issue is subject to section 552.108(b)(1) of the Government Code. You state the release of this information “could reveal safety tactics that are not known to the public and could pose a threat to officer safety

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

if given to the general public.” Upon review, we find you have demonstrated release of some of the information at issue would interfere with law enforcement. Therefore, the city may withhold the information we have marked under section 552.108(b)(1) of the Government Code.<sup>5</sup> However, we find you have not demonstrated release of any portion of the remaining responsive information would interfere with law enforcement or crime prevention. Consequently, the city may not withhold the remaining information under section 552.108(b)(1).

Section 552.108(a)(2) of the Government Code 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:

...

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

(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:

...

(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(a)(2), (b)(2). Sections 552.108(a)(2) and 552.108(b)(2) protect information that relates to a concluded criminal investigation or prosecution that did not result in a conviction or a deferred adjudication. 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). Upon review, we find you have not demonstrated the remaining information at issue pertains to investigations that concluded in final results other than convictions or deferred adjudications. Thus, you have failed to demonstrate the applicability of section 552.108(a)(2) or section 552.108(b)(2). Therefore, the city may not withhold any of the remaining responsive information under section 552.108(a)(2) or section 552.108(b)(2) of the Government Code.

As stated above, section 552.101 of the Government Code encompasses the doctrine of common-law privacy, which is subject to the two-part test discussed above. *Indus.*

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

*Found.*, 540 S.W.2d at 685. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. In addition, we note the public has a legitimate public interest in the details of a crime. *See* Open Records Decision No. 400 at 4 (1983). *See generally* *Lowe v. Hearst Communications, Inc.*, 487 F.3d 246, 250 (5th Cir. 2007) (noting “legitimate public interest in facts tending to support an allegation of criminal activity” (citing *Cinel v. Connick*, 15 F.3d 1338, 1345-46 (1994))). Upon review, we find you have failed to demonstrate the remaining responsive information is highly intimate or embarrassing and not of legitimate public concern. Thus, none of the remaining responsive information may be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.117(a)(2) of the Government Code excepts from disclosure the home address, home telephone number, emergency contact information, social security number, and family member information of a peace officer, regardless of whether the peace officer complies with section 552.024 or section 552.1175 of the Government Code. 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(a)(2) is applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 670 at 6 (2001) (Gov’t Code § 552.117(a)(2) excepts from disclosure peace officer’s cellular telephone number if officer pays for service), 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). In this instance, however, it is unclear whether some of the individuals whose information is at issue are currently licensed peace officers as defined by article 2.12. If the individuals at issue 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 have marked under section 552.117(a)(2) of the Government Code; however, the city may only withhold the cellular telephone numbers if a governmental body did not pay for the cellular telephone service. 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 individuals whose information is at issue are not currently a licensed peace officers, then their personal information may be subject to section 552.117(a)(1) of the Government Code, which excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024. Gov’t Code § 552.117(a)(1). As previously mentioned, section 552.117(a) is applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for 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). The city may only withhold information under section 552.117(a)(1) on behalf of current or former employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Therefore, if the individuals whose information is at issue timely

requested confidentiality under section 552.024 of the Government Code and a governmental body does not pay for the cellular telephone service, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code. Conversely, if the individuals at issue did not timely request confidentiality under section 552.024 the city may not withhold the information we have marked under section 552.117(a)(1) of the Government Code.

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. *See* Gov't Code § 552.1175. Upon review, we find you have failed to demonstrate any of the remaining information at issue is confidential under section 552.1175 of the Government Code. Therefore, the city may not withhold any of the remaining responsive information on that basis.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c).<sup>6</sup> *See id.* § 552.137(a)-(c). The e-mail addresses at issue do not appear to be the type specifically excluded by subsection (c). Upon review, we find the city must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

In summary, the phone records you have marked are not subject to the Act and need not be released in response to this request. To the extent the city maintains law enforcement records listing the named individual as a suspect, arrestee, or criminal defendant, the city must withhold such information under section 552.101 of the Government Code in conjunction with common-law privacy. The city may withhold the information, a representative sample of which we have marked, under section 552.107(1) of the Government Code. The city may withhold the information, a representative sample of which we have marked, under section 552.108(a)(1) of the Government Code. The city may withhold the information we have marked under section 552.108(b)(1) of the Government Code. If the individuals at issue 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 have marked under section 552.117(a)(2) of the Government Code; however, the city may only withhold the cellular telephone numbers if a governmental body did not pay for the cellular telephone service. If the individuals whose information are not currently licensed peace officers, but timely requested confidentiality under section 552.024 of the Government Code, the city must withhold the information we have marked under section 552.117(a)(1) of the Government

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<sup>6</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Code; however, the city may only withhold the cellular telephone numbers if a governmental body did not pay for the cellular telephone service. The city must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The city must release the remaining responsive 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](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, appearing to read 'Jahana Ward', with a stylized flourish extending to the right.

Jahana Ward  
Assistant Attorney General  
Open Records Division

JW/jxd

Ref: ID# 753988

Enc. Submitted documents

c: Requestor  
(w/o enclosures)