



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

June 11, 2019

Ms. Ileana Fernandez  
Assistant City Attorney  
City of Mesquite  
P.O. Box 850137  
Mesquite, Texas 75185-0137

OR2019-15681

Dear Ms. Fernandez:

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# 769969.

The City of Mesquite (the "city") received two requests from the same requestor for all e-mails during a specified time period sent to or received from the requestor or containing the requestor's name. You state the city will release some information to the requestor. You also state the city is withholding dates of birth pursuant to the previous determination issued in Open Records Letter No. 2015-24970 (2015).<sup>1</sup> You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.107, 552.117, and 552.147 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information.

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.

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<sup>1</sup>Open Records Letter No. 2015-24970 is a previous determination issued to the city authorizing it to withhold the dates of birth of public citizens under section 552.101 of the Government Code in conjunction with common-law privacy without requesting a decision from this office.

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.*, 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 Exhibit 2 consists of communications between city attorneys and city staff that were made in furtherance of the rendition of professional legal services to the city. You also state these communications were intended to be confidential and have remained confidential. Based upon your representations and our review, we find Exhibit 2 consists of privileged attorney-client communications. Accordingly, the city may withhold Exhibit 2 under section 552.107(1) of the Government Code.

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.” 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. 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 found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See, e.g., Open Records Decision Nos. 600 at 9-10* (1992) (employee’s withholding allowance

certificate, designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). However, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 at 9 (information revealing employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure), 423 at 2 (1984) (scope of public employee privacy is narrow).

Upon review, we agree some of the information you marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. However, it is not clear whether the listed payroll deductions and benefits reflect mandatory participation by the employees at issue or are the employee's voluntary financial decisions. Thus, to the extent this information reflects an employee's voluntary allocations of salary to optional investment, retirement, or other financial programs offered by the city, the city must withhold the information you marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, to the extent the information at issue reflects an employee's mandatory participation in the city's retirement program or benefits paid by the city, the information at issue may not be withheld on that basis.

Section 552.117(a)(2) of the Government Code applies to records a governmental body holds in an employment capacity and excepts from public disclosure the current and former home addresses and telephone numbers, emergency contact information, social security number, and family member information of a peace officer, regardless of whether the peace officer made an election under section 552.024 or section 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 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). You marked information under section 552.117 that consists of the personal information of individuals who were employed by the city and the information is held in the employment context. In this instance, however, it is unclear whether the individuals whose information is at issue are currently-licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, with the exception of the information we indicated for release, and to the extent the individuals whose information is at issue are currently-licensed peace officers as defined by article 2.12, the city must withhold the information you marked, and the additional information we marked, under

section 552.117(a)(2) of the Government Code.<sup>2</sup> Conversely, if the individuals whose information is at issue are not currently-licensed peace officers as defined by article 2.12, the information you marked may not be withheld under section 552.117(a)(2) of the Government Code. However, we find the information we indicated for release is not subject to section 552.117(a)(2), and it may not be withheld on that basis.

If the individuals whose information is at issue 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) applies to records a governmental body holds in an employment capacity and excepts from public disclosure the current and former home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). As noted above, a post office box number is not a "home address" for purposes of section 552.117(a). *See* ORD 622 at 4. 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. Accordingly, with the exception of the information we indicated for release, 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 you marked, and the additional information we marked, under section 552.117(a)(1) of the Government Code.<sup>3</sup> Conversely, to the extent the employees at issue did not timely request confidentiality under section 552.024, the city may not withhold the information at issue under section 552.117(a)(1) of the Government Code. However, we find the information we indicated for release is not subject to section 552.117(a)(1), and it may not be withheld on that basis.

Section 552.147 of the Government Code excepts from disclosure the social security number of a living person. *See* Gov't Code § 552.147. To the extent the social security numbers of the employees at issue are not confidential under section 552.117 of the Government Code, the city may withhold them under section 552.147 of the Government Code.

In summary, the city may withhold Exhibit 2 under section 552.107(1) of the Government Code. To the extent the information you marked reflects the employee's voluntary

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<sup>2</sup>As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

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allocations of salary to optional investment, retirement, or other financial programs offered by the city, the city must withhold the information you marked under section 552.101 of the Government Code in conjunction with common-law privacy. With the exception of the information we indicated for release, and to the extent the individuals whose information is 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 you marked and we marked under section 552.117(a)(2) of the Government Code. With the exception of the information we indicated for release, 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 you marked and we marked under section 552.117(a)(1) of the Government Code. To the extent the social security numbers of the employees at issue are not confidential under section 552.117 of the Government Code, the city may withhold them under section 552.147 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](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,



James M. Graham  
Assistant Attorney General  
Open Records Division

JMG/gw

Ref: ID# 769969

Enc. Submitted documents

c: Requestor  
(w/o enclosures)