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ATTORNEY GENERAL OF TEXAS

February 14, 2022

Ms. Aliceson Cotton
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OR2022-04338

Dear Ms. Cotton:

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# 930236.

The City of Wylie (the "city"), which you represent, received a request for the general ledger of the city for a specified fiscal year. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.117, 552.136, and 552.152 of the Government Code and privileged under Texas Rule of Evidence 503.¹ We have considered the submitted arguments and reviewed the submitted representative sample of information.²

Section 552.0038(c) of the Government Code provides that a governmental entity that maintains records of a participant in a retirement system's retirement program in cooperation with or on behalf of a retirement system is not required to accept or comply with a request for such information or to seek an opinion from the attorney general because the records are exempt from the provisions of the Act. *See* Gov't Code § 552.0038(c). Therefore, to the extent any portion of the submitted information consists of records of a

¹ Although you do not raise section 552.117 of the Government Code in your brief, we understand you to raise this exception based on your markings.

² 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 extent those records contain substantially different types of information than that submitted to this office.

participant in a retirement system's retirement program maintained in cooperation with or on behalf of a retirement system, then pursuant to section 552.0038(c) of the Government Code the information is not subject to the Act and the city is not required to release it in response to the request. However, to the extent the information at issue does not consist of records of a participant in a retirement system's retirement program maintained in cooperation with or on behalf of a retirement system, we will consider your remaining arguments against disclosure.

Next, we note the information at issue is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

Id. § 552.022(a)(3). The information at issue consists of information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by the city and, thus, is subject to section 552.022(a)(3). Accordingly, the city must release the information at issue unless it is made confidential under the Act or other law. *See id.* You seek to withhold the portions of the information at issue under sections 552.101, 552.107, 552.136, and 552.152 of the Government Code. However, section 552.107 is discretionary in nature and does not make information confidential under the Act. *See Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions).* Therefore, the information at issue may not be withheld under section 552.107 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will consider your argument of the attorney-client privilege under Texas Rule of Evidence 503. In addition, because sections 552.101, 552.117, 552.136, and 552.152 of the Government Code make information confidential under the Act, we will consider the applicability of these exceptions for the information at issue.

Texas Rule of Evidence 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

(A) between the client or the client's representative and the client's lawyer or the lawyer's representative;

(B) between the client's lawyer and the lawyer's representative;

(C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;

(D) between the client's representatives or between the client and the client's representative; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made to further the rendition of professional legal services to the client or reasonably necessary to transmit the communication. *Id.* 503(a)(5). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

Although you generally assert some of the information at issue consists of communications between outside counsel for the city and city employees and officials, we find you have not demonstrated any of the information at issue consists of or documents privileged attorney-client communication for purposes of rule 503. Therefore, we find the city may not withhold any of the information at issue under rule 503 of the Texas Rules of Evidence.

Section 552.101 of the Government Code exempts 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 section 58.008 of the Family Code, which provides, in relevant part, as follows:

(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 (defining “delinquent conduct” and “conduct indicating a need for supervision” 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). You assert portions of the information at issue are confidential under section 58.008(b) of the Family Code. However, upon review, we find the information at issue consists of internal administrative records that do not constitute juvenile law enforcement records for purposes of section 58.008(b). Therefore, the city may not withhold any portion of the information at issue under section 552.101 of the Government Code in conjunction with section 58.008(b) of the Family Code.

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. This office has also found that personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from disclosure under common-law privacy. *See* Open Records Decision No. 600 (1992) (public employee’s withholding allowance certificate, designation of beneficiary of employee’s retirement benefits, direct deposit authorization, and employee’s decisions regarding voluntary benefits programs, among others, protected under common-law privacy). Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Additionally, we note the doctrine of common-law privacy generally protects the identifying information of juvenile offenders. *See* Open Records Decision No. 394 (1983); *cf.* Fam. Code §§ 51.02(2), 58.008. We note, however, the public generally has a legitimate interest in information relating to public employment and public employees. *See* Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 423 at 2 (1984) (scope of public employee privacy is narrow). Furthermore, information pertaining to leave of public employees is generally a matter of legitimate public interest. *See* Open Records Decision No. 336 at (1982) (names of employees taking sick leave and dates of sick leave taken not private).

Upon review, we find the information we marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Further, some of the information at issue consists of identifying information of individuals who may have been juvenile offenders. However, because the information at issue does not reflect the age of these individuals, we must rule conditionally. Therefore, to the extent the marked information consists of the identifying information of offenders who were ten years of age or older and under seventeen years of age at the time the alleged conduct, the city must withhold this marked information under section 552.101 of the Government Code in conjunction with common-law privacy. Conversely, to the extent the offenders whose identifying information we marked were younger than ten years of age or seventeen years of age or older at the time of the alleged conduct, the marked information may not be withheld under section 552.101 on this basis. Regardless, the city must withhold the remaining information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, you have failed to demonstrate the remaining information is highly intimate or embarrassing and not of legitimate public interest. Therefore, the city may not withhold any portion of the remaining information under section 552.101 in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses section 182.052 of the Utilities Code, which provides, in part, as follows:

- (a) Except as provided by Section 182.054, a government-operated utility may not disclose personal information in a customer's account record, or any information relating to the volume or units of utility usage or the amounts billed to or collected from the individual for utility usage, unless the customer requests that the government-operated utility disclose the information.
- (b) A customer may request disclosure of information described by Subsection (a) by delivering to the government-operated utility an appropriately marked form provided under Subsection (c)(2) or any other written request for disclosure.

Util. Code § 182.052(a)-(b). "Personal information" under section 182.052(a) means an individual's address, telephone number, and social security number, but does not include the individual's name. *See id.* § 182.051(4); *see also* Open Records Decision No. 625 (1994) (construing statutory predecessor). Water, wastewater, sewer, gas, garbage, electricity, and drainage services are included in the scope of utility services covered by section 182.052. *See* Util. Code § 182.051(3). Section 182.054 of the Utilities Code provides six exceptions to the disclosure prohibition found in section 182.052. *See id.* § 182.054.

We understand the city is a government-operated utility for purposes of section 182.052. *See id.* § 182.051(3). Upon review, we find portions of the remaining information at issue contains personal information of utility customers. Accordingly, to the extent the customers did not request that the city disclose information described by subsection (a) of section 182.052, the city must withhold the addresses we marked under section 552.101 of the Government Code in conjunction with section 182.052 of the Utilities Code. However,

we find the remaining information is not confidential under section 182.052 and may not be withheld under section 552.101 of the Government Code on that basis.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, emergency contact information, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a); Open Records Decision No. 622 (1994). 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). We note, for purpose of section 552.117, "family member" means a spouse, minor child, or adult child who resides in the person's home. *See* Gov't Code § 552.117(c) (providing "family member" has meaning assigned by Fin. Code § 31.006(d)). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee 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. We have marked the personal information of city employees. If the employees whose personal information is at issue timely elected to keep their information confidential pursuant to section 552.024, the city must withhold the information we marked under section 552.117(a)(1). The city may not withhold this information under section 552.117(a)(1) if the employees did not timely elect to keep their information confidential pursuant to section 552.024. Additionally, we find the remaining information you marked is not subject to section 552.117(a)(1) and the city may not withhold any of the remaining information at issue on that basis.

Section 552.136(b) of the Government Code provides, "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a government body is confidential." *Id.* § 552.136(b); *see id.* § 552.136(a) (defining "access device"). However, upon review, we find you failed to demonstrate the applicability of section 552.136 of the Government Code to any of the remaining information, and the city may not withhold it on that basis.

The city seeks to withhold some of the remaining information under section 552.152 of the Government Code. Section 552.152 provides,

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from [required public disclosure] if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Id. § 552.152. The city asserts release of the information it marked would subject the employees at issue to a substantial threat of physical harm. Upon review, we find section 552.152 is applicable to portions of the information at issue. Accordingly, the city must withhold the information we marked under section 552.152 of the Government Code. However, we find you have failed to demonstrate the release of the remaining information would subject an employee to a substantial risk of physical harm. Therefore, the city may

not withhold any portion of the remaining information under section 552.152 of the Government Code.

In summary, to the extent any portion of the submitted information consists of records of a participant in a retirement system's retirement program maintained in cooperation with or on behalf of a retirement system, pursuant to section 552.0038(c) of the Government Code the information is not subject to the Act and the city is not required to release it in response to the request. To the extent the information we marked consists of the identifying information of offenders who were ten years of age or older and under seventeen years of age at the time the alleged conduct, the city must withhold this marked information under section 552.101 of the Government Code in conjunction with common-law privacy. Further, the city must withhold the remaining information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the customers did not request that the city disclose information described by subsection (a) of section 182.052, the city must withhold the addresses we marked under section 552.101 of the Government Code in conjunction with section 182.052 of the Utilities Code. If the employees whose personal information is at issue timely elected to keep their information confidential pursuant to section 552.024, the city must withhold the information we marked under section 552.117(a)(1). The city must withhold the information we marked under section 552.152 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 <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# 930236

Enc. Submitted documents

c: Requestor
(w/o enclosures)