



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 1, 2022

Ms. Stacie White
Counsel for the City of Flower Mound
Taylor Olson Adkins Sralla Elam L.L.P.
6000 Western Place, Suite 200
Fort Worth, Texas

OR2022-19077

Dear Ms. White:

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# 957040.

The Town of Pantego (the "town") received three requests from the same requestor for information pertaining to named individuals, records pertaining to the investigation and termination of a named individual, and all e-mails from both current and former employees pertaining to the termination of a named individual. You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.107, and 552.117 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.²

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov't Code § 552.107(1). 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

¹ Although you raise section 552.1175 of the Government Code, we note section 552.117 of the Government Code is the correct exception to raise for information the city holds in its capacity as an employer.

² We note, and you acknowledge, the town did not comply with the procedural requirements of section 552.301 of the Government Code in requesting this decision. *See* Gov't Code § 552.301(b), (e). Nonetheless, because sections 552.101, 552.107, 552.117, and 552.159 of the Government Code can provide compelling reasons to overcome the presumption of openness, we will consider their applicability to the submitted information. *See id.* §§ 552.007, .302, .352; *see also Paxton v. City of Dallas*, 509 S.W.3d 247 (Tex. 2017).

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. *See* 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. *See 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. *See* 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. Finally, 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 a portion of the submitted information consists of communications involving attorneys for the town and towns employees in their capacities as clients. You state these communications were made in furtherance of the rendition of professional legal services to the town. You state these communications were intended to be, and have remained, confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the submitted information at issue. Accordingly, the town may generally withhold the information we marked under section 552.107(1) of the Government Code. We note, however, the e-mail string at issue includes an e-mail sent to a non-privileged party. Furthermore, if this e-mail is removed from the e-mail string and stands alone, it is responsive to the request for information. Therefore, if the town maintains this non-privileged e-mail, which we have marked, separate and apart from the otherwise privileged e-mail string in which it appears, then the town may not withhold this non-privileged e-mail under section 552.107(1) of the Government Code.

Section 552.159 of the Government Code excepts from disclosure “[a] work schedule or a time sheet of a firefighter or volunteer firefighter or emergency medical services personnel as defined by [s]ection 773.003, Health and Safety Code[.]” Gov’t Code § 552.159. Upon review, we find some of the remaining information may be subject to section 552.159 of

the Government Code.³ Accordingly, to the extent any of the individuals at issue are firefighters or volunteer firefighters or emergency medical services personnel as defined by section 773.003 of the Health and Safety Code, the town must withhold the information we marked under section 552.159 of the Government Code.⁴ However, to the extent any of the individuals at issue are not firefighters or volunteer firefighters or emergency medical services personnel as defined by section 773.003, the town may not withhold the information at issue under section 552.159.

Section 552.101 of the Government Code excepts from 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). Upon review, we find some of the remaining information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, to the extent the information at issue is not subject to section 552.159 of the Government Code, the town must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the town has not demonstrated any of the remaining information at issue is highly intimate or embarrassing and not of legitimate public concern. Thus, the town may not withhold any portion of the remaining information under section 552.101 in conjunction with common-law privacy.

Section 552.117(a)(19) 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 firefighter or volunteer firefighter or emergency medical services personnel as defined by Section 773.003 of the Health and Safety Code, regardless of whether the current or former employee complies with section 552.024 or 552.1175. Gov’t Code § 552.117(a)(19). We note, for purposes of section 552.117, “family member” means a spouse, minor child, or adult child who resides in the person’s home. *See id.* § 552.117(c) (providing that “family member” has meaning assigned by Fin. Code § 31.006(d)). Accordingly, the town must withhold the information you marked under section 552.117(a)(19) of the Government Code.

In summary, the town may withhold the information we marked under section 552.107(1) of the Government Code; however, if the marked non-privileged e-mail is maintained

³ The 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 Nos. 481 (1987), 480 (1987), 470 (1987).

⁴ As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

separate and apart from the otherwise privileged e-mail string in which it appears, the town may not withhold the information at issue. To the extent any of the individuals at issue are firefighters or volunteer firefighters or emergency medical services personnel as defined by section 773.003 of the Health and Safety Code, the town must withhold the information we marked under section 552.159 of the Government Code. To the extent the information is not subject to section 552.159 of the Government Code, the town must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The town must withhold the information you marked under section 552.117(a)(19) of the Government Code. The remaining information must be released.

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,

Cesar Mata
Attorney
Open Records Division

CM/jm

Ref: ID# 957040

Enc. Submitted documents

c: Requestor
(w/o enclosures)