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ATTORNEY GENERAL OF TEXAS

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Ms. Alicia Kreh
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6000 Western Place, Suite 200
Fort Worth, Texas 76107

OR2022-26303

Dear Ms. Kreh:

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# 966544.

The City of Maypearl (the "city"), which you represent, received a request for information pertaining to a named former city police officer, including a specified incident. You state the city will redact certain information pursuant to sections 552.130(c) and 552.147(b) of the Government Code and Open Records Decision No. 684 (2009).¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, and 552.117 of the Government Code.² We have considered the exceptions you

¹ Section 552.130(c) of the Government Code allows a governmental body to redact the information described in section 552.130(a) without the necessity of seeking a decision from the attorney general. Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). 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 under the Act. *Id.* § 552.147(b). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold specific categories of information, including an e-mail address of a member of the public subject to section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. ORD 684.

² We note, although you raise initially raised sections 552.552.108, 552.111, 552.119, 552.122, and 552.152 of the Government Code, you make no argument to support these exceptions. Therefore, we presume you have withdrawn your claim these exceptions apply to the submitted information. *See* Gov't Code §§ 552.301, .302. Additionally, although you do not raise section 552.117 of the Government Code, we understand you to assert this exception based on your markings.

claim and reviewed the submitted information, a portion of which you state constitutes a representative sample.³

Initially, we note the submitted information contains a peace officer's Texas Commission on Law Enforcement ("TCOLE") identification number. Section 552.002(a) of the Government Code defines "public information" as information 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.

Gov't Code § 552.002(a). In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. We understand an officer's TCOLE identification number is a unique computer-generated number assigned to peace officers for identification in the commissioner's electronic database and may be used as an access device number on the TCOLE website. Accordingly, we find the officer's TCOLE identification number in the submitted information does not constitute public information under section 552.002. Therefore, the TCOLE identification number is not subject to the Act and need not be released to the requestor.

Next we note you have marked two e-mails as not responsive to the present request. The e-mail we have marked is not responsive to the request because it was created after the request was received.⁴ This ruling does not address the public availability of any

³ **Error! Main Document Only.** This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

⁴ The Act does not require a governmental body to release information that did not exist when it received a request, create responsive information, or obtain information that is not held by the governmental body or on its behalf. See *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San

information that is not responsive to the request, and the city need not release such information in response to this request. However, we note the other e-mail you marked is responsive because it is contained within a responsive e-mail chain. We will therefore address your claimed exception for this information.

Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This section encompasses information protected by other statutes, such as section 1701.454 of the Occupations Code. Section 1701.454 governs the public availability of information submitted to TCOLE under subchapter J of chapter 1701 of the Occupations Code. Section 1701.454 provides as follows:

- (a) All information submitted to [TCOLE] under this subchapter is confidential and is not subject to disclosure under [the Act] unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.
- (b) Except as provided by this subchapter, a [TCOLE] member or other person may not release information submitted under this subchapter.

Occ. § 1701.454. The responsive information includes F-5 forms submitted to TCOLE pursuant to subchapter J of chapter 1701 of the Occupations Code. Some of the F-5 forms do not reflect the officer at issue resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses. Therefore, the city must withhold the information we have marked under section 552.101 in conjunction with section 1701.454.⁵ However, with respect to the remaining F-5 form, the officer was dishonorably discharged. We are unable to determine whether the officer resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses. Thus, we must rule conditionally. If the officer did not resign or was not terminated due to substantiated incidents of excessive force or violations of law other than traffic offenses, the city must withhold the remaining F-5 form under section 552.101 in conjunction with section 1701.454. However, if the officer resigned or was terminated due to substantiated incidents of excessive force or violations of law other than traffic offenses, the city may not withhold the remaining F-5 form on that ground.

Section 552.101 of the Government Code also encompasses section 261.201 of the Family Code, which provides, in relevant part, the following:

- (a) [T]he following information is confidential, is not subject to public release under [the Act], and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

Antonio 1978, writ *dism'd*); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

⁵ As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

(1) a report of alleged or suspected abuse or neglect made under [chapter 261 of the Family Code] and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under [chapter 261 of the Family Code] or in providing services as a result of an investigation.

Fam. Code § 261.201(a). You state the information you have marked was used or developed in an investigation of alleged or suspected child abuse or neglect and falls within the scope of section 261.201 of the Family Code. *See id.* §§ 101.003(a) (defining “child” for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes), 261.001(1), (4) (defining “abuse” and “neglect” for purposes of chapter 261 of the Family Code). As you do not indicate the city has adopted a rule that governs the release of this type of information, we assume no such regulation exists. Given that assumption, and based on our review, we determine the information you have marked must be withheld under section 552.101 in conjunction with section 261.201(a).

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). 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. *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 the information you have indicated constitutes communications between attorneys for the city and a city official that were made for the purpose of providing legal services to the city. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the information you indicated consists of privileged attorney-client communications the city may withhold under section 552.107(1).

Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” Gov’t Code § 552.102(a). The Texas Supreme Court held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The city must withhold the date of birth you marked under section 552.102(a).⁶

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 or embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. *See generally* Open Records Decision Nos. 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983). Whether the public’s interest in obtaining personal financial information is sufficient to justify its disclosure must be determined on a case-by-case basis. *See* ORD 373. Upon review, we find the information you have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the city must withhold the information you have marked under section 552.101 in conjunction with common-law privacy.

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 home telephone numbers, emergency contact information, and social security number of a current or honorably retired peace officer as defined by article 2.12 of the Code of Criminal Procedure, as well as information that reveals whether the officer has family members, regardless of whether the officer made an election under section 552.024 or section 552.1175 of the Government Code to keep such information confidential. Gov’t Code § 552.117(a)(2); *see also id.* § 552.003(1-b) (defining “honorably retired” for purposes of the Act). 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. *Id.* § 552.117(c)

⁶ As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

(providing “family member” has meaning assigned by Fin. Code § 31.006(d)). 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, it is unclear whether the individual whose information is at issue is a current or honorably retired peace officer as defined by article 2.12. If the individual at issue is a current or honorably retired peace officer as defined by article 2.12, the city must withhold the information you marked and we marked under section 552.117(a)(2), including the personal cellular telephone number if the cellular telephone service is not paid for by a governmental body.

If the individual at issue is not a current or honorably retired peace officer, the individual’s information may be subject to section 552.117(a)(1) of the Government Code, which applies to records a governmental body holds in an employment capacity and excepts from disclosure the 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. Gov’t Code § 552.117(a)(1). As noted above, section 552.117 is also 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. Additionally, as previously noted, for purposes 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). 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 body must withhold information under section 552.117 on behalf of a current or former official or 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. Accordingly, if the individual whose information is at issue timely requested confidentiality pursuant to section 552.024, the city must withhold the information you marked and we marked under section 552.117(a)(1), including the personal cellular telephone number if the cellular telephone service is not paid for by a governmental body.

In summary, the officer’s TCOLE identification number is not subject to the Act and need not be released to the requestor. The city must withhold the F-5 forms we marked under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code. If the officer did not resign or was not terminated due to substantiated incidents of excessive force or violations of law other than traffic offenses, the city must withhold the remaining F-5 form under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code. The city must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code. The city may withhold the information you indicated under section 552.107(1) of the Government Code. The city must withhold the date of birth you marked under section 552.102(a) of the Government Code. The city must withhold the information you have marked under section 552.101 of the Government Code in conjunction with common-law privacy. If the individual at issue is a current or honorably retired peace officer 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, including the personal cellular telephone number if the cellular telephone service is not paid for by a governmental body. If the individual whose information is at issue timely requested confidentiality pursuant to 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, including the personal cellular telephone number if the cellular telephone service is not paid for by a governmental body. 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 <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,

Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/jm

Ref: ID# 966544

Enc. Submitted documents

c: Requestor
(w/o enclosures)