



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 19, 2022

Ms. Jerris Penrod Mapes
Assistant City Attorney
City of Baytown
P.O. Box 424
Baytown, Texas 77522-0424

OR2022-28812

Dear Ms. Mapes:

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# 969855 (Ref. No. 24714).

The City of Baytown (the "city") received a request for e-mails sent or received by employees of the city or the city's police department mentioning specified terms during a stated period of time, and e-mails sent or received by a named city official containing a specified term during a stated period of time. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.108, and 552.152 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you assert the information you indicated is not responsive to the present request. Additionally, we note some additional information, which we have marked, is not responsive to the present request for information because it either: (1) does not consist of the types of e-mails specified in the present request, (2) was sent or received outside the time periods specified in the present request, or (3) was created after the date the city received the request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983). 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 the present request.¹

¹ As we are able to make this determination, we need not address your arguments against disclosure of this information.

Next, we note some of the responsive information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2022-25964 (2022). In that ruling, we concluded the city: may withhold certain information under section 552.107 of the Government Code, may withhold certain information under section 552.108(a)(1) of the Government Code, must withhold certain information under section 552.152 of the Government Code, and must release the remaining information. We have no indication the law, facts, and circumstances on which Open Records Letter No. 2022-25964 was based have changed. Accordingly, to the extent the responsive information is identical to the information previously requested and ruled upon by this office, the city must continue to rely on Open Records Letter No. 2022-25964 as a previous determination and withhold or release the identical information in accordance with that ruling.² *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the responsive information is not encompassed by the previous ruling, we will consider whether such information is excepted from disclosure.

Next, we must address the city's obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. Gov't Code § 552.301(b). Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). The city received the present request for information on May 27, 2022. However, the envelopes in which the city provided the information required by sections 552.301(b) and 552.301(e) were postmarked June 27, 2022, and July 8, 2022, respectively. *See id.* § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Consequently, we conclude the city failed to comply with the procedural requirements mandated by section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons*

² In that instance, as we are able to make this determination, we need not address your arguments against disclosure of this information.

v. Kuzmich, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). You claim section 552.108 of the Government Code for the information at issue. Because sections 552.101, 552.107, 552.117, 552.137, and 552.152 of the Government Code can provide compelling reasons to overcome the presumption of openness, we will address the applicability of these sections to the remaining responsive information.³ However, we find you have failed to establish a compelling reason to address your remaining argument against disclosure of the information at issue.

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. 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 assert portions of the responsive information consist of communications between attorneys for the city and city employees and officials that were made for the purpose of providing legal services to the city. We understand the communications were intended to

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).

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 information at issue. Accordingly, the city may withhold the information you marked under section 552.107(1) of the Government Code.⁴

You seek to withhold the remaining responsive 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.

Gov't Code § 552.152. You state the release of the identities of undercover officers would subject the officers to a substantial threat of physical harm. Thus, we find section 552.152 is applicable to the identities of the undercover officers within the information at issue. Accordingly, to the extent the officers at issue are undercover officers, the city must withhold the identifying information of the undercover officers within the remaining responsive information under section 552.152 of the Government Code.⁵ To the extent the officers at issue in the remaining responsive information are not undercover officers, we find you have not demonstrated the release of the information at issue would subject a city employee to a substantial risk of physical harm, and the city may not withhold any portion of the remaining responsive information under section 552.152 of the Government Code. Additionally, we find you have failed to demonstrate the release of any of the remaining information would subject an employee of the city to a substantial threat of physical harm. Therefore, the city may not withhold any portion of the remaining responsive information under section 552.152 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This section 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. We note the public has a legitimate interest in knowing the details of a crime. *See Lowe v. Hearst Commc'ns, Inc.*, 487 F.3d 246, 250 (5th Cir. 2007) (noting a “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 any of the

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

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

remaining information at issue is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city may not withhold any portion of the remaining responsive information under section 552.101 in conjunction with common-law privacy.

Section 552.117(a)(1) 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 current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code* § 552.117(a)(1). We note section 552.117 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. 506 at 5-6 (1988)* (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). 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, if the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code and a governmental body did not pay for the cellular telephone services, then the city must withhold the cellular telephone numbers of city employees within the remaining responsive information under section 552.117(a)(1) of the Government Code.

Section 552.137 of the Government Code provides, "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). *Gov't Code* § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or a personal e-mail address belonging to a city employee or official used to conduct official government business. *See id.* § 552.137(c); *Austin Bulldog v. Leffingwell*, 490 S.W.3d 240 (Tex. App.—Austin 2016, no pet.) (holding personal e-mail addresses of government officials used to conduct official government business are not e-mail addresses of "members of the public" for purposes of *Gov't Code* § 552.137(a)). However, we note the requestor has a right of access to his own e-mail address under section 552.137(b). *See Gov't Code* § 552.137(b). Accordingly, to the extent the e-mail addresses within the remaining responsive information belong to members of the public, are not excluded by section 552.137(c) of the Government Code, and do not belong to the requestor, the city must withhold such e-mail addresses under section 552.137 of the Government Code, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. *See id.* However, to the extent an e-mail address within the remaining responsive information is excluded by section 552.137(c), belongs to

a city employee or official, or belongs to the requestor, the city may not withhold that e-mail address under section 552.137 of the Government Code.

In summary, to the extent the responsive information is identical to the information previously requested and ruled upon by this office, the city must continue to rely on Open Records Letter No. 2022-25964 as a previous determination and withhold or release the identical information in accordance with that ruling. The city may withhold the information you marked under section 552.107(1) of the Government Code. To the extent the officers at issue are undercover officers, the city must withhold the identifying information of the undercover officers within the remaining responsive information under section 552.152 of the Government Code. If the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code and a governmental body did not pay for the cellular telephone services, then the city must withhold the cellular telephone numbers of city employees within the remaining responsive information under section 552.117(a)(1) of the Government Code. To the extent the e-mail addresses within the remaining responsive information belong to members of the public, are not excluded by section 552.137(c) of the Government Code, and do not belong to the requestor, the city must withhold such e-mail addresses under section 552.137 of the Government Code, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. 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,

Blake Brennan
Assistant Attorney General
Open Records Division

BBX/mo

Ref: ID# 969855

Enc. Submitted documents

c: Requestor
(w/o enclosures)