



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

September 20, 2022

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

OR2022-28871

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# 973296 (ORR 34892).

The City of Baytown (the "city") received a request for the following: (1) information pertaining to a specified investigation during a specified time period and (2) e-mails to or from city employees pertaining to the requestor, the requestor's business, two named individuals, a specified property, and a specified entity during a specified time period, excluding e-mails sent directly to or from the requestor or his business.<sup>1</sup> You claim 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. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note some of the submitted information, which we have marked, is not responsive to the present request because it does not consist of the types of e-mails specified in the present request. This ruling does not address the public availability of any

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<sup>1</sup>You state the city sent the requestor a cost estimate of charges pursuant to section 552.2615 of the Government Code. *See* Gov't Code § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). You inform us the city received the required deposit on June 29, 2022. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit).

information that is not responsive to the request and the city is not required to release such information in response to the present request.<sup>2</sup>

Next, we note some of the responsive information may have been the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2022-25964 (2022) and 2022-28812 (2022). In Open Records Letter No. 2022-25964, 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. In Open Records Letter No. 2022-28812, we concluded the following: (1) to the extent the responsive information is identical to the information previously requested and ruled upon by this office, the city may 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) the city must withhold certain information it marked under section 552.107(1) of the Government Code; (3) 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; (4) 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; (5) 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; and (6) the city must release the remaining responsive information. We have no indication the law, facts, and circumstances on which Open Records Letter Nos. 2022-25964 or 2022-28812 were 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 Nos. 2022-25964 and 2022-28812 as previous determinations and withhold or release the identical information in accordance with those rulings. *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 rulings, we will consider whether such information is excepted from disclosure.

Next, we address the requestor's assertion that the city failed to comply with its obligations under section 552.301 of the Government Code, which prescribes the procedures a

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<sup>2</sup> As we are able to make this determination, we need not address your arguments against disclosure of this information.

governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(e-1) provides:

A governmental body that submits written comments to the attorney general under [s]ubsection (e)(1)(A) shall send a copy of those comments to the person who requested the information from the governmental body not later than the 15th business day after the date of receiving the written request. If the written comments disclose or contain the substance of the information requested, the copy of the comments provided to the person must be a redacted copy.

Gov't Code § 552.301(e-1). In the city's comments submitted to this office, you state, and the requestor submitted documentation demonstrating, you redacted portions of your comments to the requestor pursuant to section 552.301(e-1). We note the city redacted the entirety of its arguments in the copy of the comments sent to the requestor. We further note most of the redacted portions of these comments neither disclose nor contain the substance of the information at issue. Consequently, we find the city failed to comply with the requirements of section 552.301(e-1).

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 v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); Tex. Att'y Gen. ORD-630 at 2 (1994). Because section 552.101 of the Government Code in conjunction with common-law privacy and sections 552.107 and 552.152 of the Government Code can provide compelling reasons to overcome the presumption of openness, we will consider the applicability of these exceptions to the responsive information. However, we find you have failed to establish a compelling reason to address your remaining claimed exception.

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 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.<sup>3</sup>

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. 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 Communications, 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 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 552.152 of the Government Code provides,

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<sup>3</sup> In this instance, as our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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. The city argues the release of some of the remaining information would subject officers and employees to a substantial threat of physical harm. Upon review, we find you have failed to demonstrate release of any of the remaining information would subject an employee or officer to a substantial risk of physical harm. Therefore, the city may not withhold any of the remaining information under section 552.152 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 Nos. 2022-25964 and 2022-28812 as previous determinations and withhold or release the identical information in accordance with those rulings. The city may withhold the information you marked under section 552.107(1) of the Government Code. 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,

Jennifer Copeland  
Assistant Attorney General  
Open Records Division

JC/jm

Ref: ID# 973296

Enc. Submitted documents

c: Requestor  
(w/o enclosures)