

San Antonio | Austin | Rio Grande Valley | Texas Gulf Coast
2517 N. Main Avenue | San Antonio, Texas 78212-4685
V 210-227-3243 | F 210-225-4481

June 16, 2022

The Honorable Ken Paxton, Attorney General
Office of the Attorney General
Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548

Via Hand Delivery

Re: Request for Attorney General Decision Under Tex. Gov't Code Ann. § 552.301
Requestors: Exhibit A (UV 22-001 through UV 22-148)
Entity: City of Uvalde (hereinafter, the "City")
Date received: May 25, 2022¹ through June 7, 2022
Texas.gov ID No: 66151040

Dear Attorney General Paxton:

Our law firm represents the City of Uvalde ("City") in the above-referenced matters. During the time period of May 25, 2022, through June 8, 2022, the City received numerous public information requests as listed in **Exhibit A**, attached hereto and incorporated by reference.

In the City's letter to the Attorney General dated June 9, 2022, regarding the subject matter of the requests, the City claimed that the requested information is excepted from disclosure. *See Exhibit B*. This correspondence will serve as the City's brief in its request for a decision from the Attorney General. Pursuant to Section 552.301 of the Public Information Act (the "Act"), the City hereby requests a decision from the Attorney General regarding whether the requested information is excepted from disclosure under the Act. *See TEX. GOV'T CODE ANN. §552.301(a), (b) (West 2012)*.

Further, I hereby certify that the City's administrative offices were closed on May 30, 2022, in observance of the Memorial Day holiday. *See Exhibit C*. As such, this calendar day is not included in the statutory time frame that the City must comply with in requesting this decision from the Attorney General pursuant to Section 552.301 of the Act.

¹ City offices are open Monday through Friday 8:00 am – 5:00 pm. Any requests received after these hours or on a weekend are considered received the next business day.

Background

There are 148 requests for information related to the May 24, 2022, mass shooting at the Rob Elementary School in Uvalde, Texas. Please refer to **Exhibit A**.

The City has made a good faith effort to relate each request to information that it holds. Open Records Decision No. 561 at 8 (1990).

The City has not voluntarily released any information to a member of the public. Information provided to the Texas Rangers was in the form of an intergovernmental transfer of records for law enforcement purposes. As such, the transfer of records is not considered a release of information to a member of the public.

The City asserts that **Exhibits G01-G38²**, which consists of the Requested Information, is subject to exception from disclosure pursuant to Sections 552.101, 552.103, 552.107, 552.108, 552.1175, 552.130, 552.136, and 552.152 of the Texas Government Code.

Briefing to the Attorney General³

Section 552.108 of the Act: Certain Law Enforcement, Corrections, and Prosecutorial Information

Sections 552.108(a)(1) and (b)(1) of the Act. Sections 552.108(a)(1) and (b)(1) state, in pertinent part, the following:

“(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;” [and]

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution....”

TEX. GOV'T CODE ANN. § 552.108 (West 2012).

² Exhibits G01-G38 are representative samples of the information responsive to the requests.

³ Exceptions that apply to specific categories of information are noted with the briefing.

The Public Information 2022 Handbook published by the Office of the Attorney General states that “[i]nformation relating to a pending criminal investigation or prosecution is one example of information that is excepted under sections 552.108(a)(1) and 552.108(b)(1) of the Act because release of such information presumptively would interfere with the detection, investigation, or prosecution of a crime.” TEXAS ATTORNEY GENERAL PUBLIC INFORMATION 2022 HANDBOOK, at 91 (2022). Furthermore, your office has previously stated that when a police file relates to a pending criminal investigation or prosecution, the release of that police file would interfere with the detection, investigation, or prosecution of crime. Tex. Att’y Gen. ORL-08338 (2005); Tex. Att’y Gen. ORL-3062 (2000).

The City of Uvalde Police Department has confirmed that the incident is currently pending investigation by the Texas Rangers, the Uvalde County District Attorney, and the Federal Bureau of Investigation. The City has received notices of objection to the disclosure of the responsive information. See **Exhibit D**. In consideration of the objections, the City believes that releasing the Responsive Information may interfere with the ongoing investigation. Therefore, the City asks to withhold the Requested Information from the Requestors pursuant to Sections 552.108(a)(1) and 552.108(b)(1) of the Act.

Section 552.101 of the Act: Information Confidential Under Common Law or Constitutional Privacy Doctrine – Common-Law Privacy

Section 552.101 of the Act excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” TEX. GOVT. CODE ANN. § 552.101 (West 2012). The Texas Supreme Court recognizes that Section 552.101 of the Act applies to the common-law tort of invasion of privacy through the disclosure of private facts. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). Specifically, the Texas Supreme Court holds that common-law privacy protects information that (1) contains highly intimate [...] facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. See *id.* at 683. If the information qualifies as highly intimate, there is a presumption that the information is not of legitimate concern to the public unless the requestor of the information can show otherwise. See *id.* at 685. The Attorney General’s office has also recognized that information regarding drug overdoses, acute alcohol intoxication, obstetrical/gynecological illnesses, convulsions/seizures, or emotional/mental distress is protected by common-law privacy. See Tex. Att’y Gen. ORD-262 (1980).

When considered in light of the previous guidance of the attorney general and the nature of the responsive information, the Requested Information may fall within the protected class of emotional/mental distress. Consequently, the City believes that the exception may apply to this category of information.

Section 552.103 of the Act: Litigation or Settlement Negotiations Involving the State or a Political Subdivision

Section 552.103(a) of the Texas Government Code, the “litigation exception,” excepts from disclosure information relating to litigation to which the state or a political subdivision is or

may be a party. The City has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body receives the request for information and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.-Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.-Houston [1st Dist.] 1984, writ ref'd n.r.e.); *Open Records Decision No. 551 at 4* (1990).

Your office has previously determined that the reasonably anticipated prong of the test is determined on a case-by-case basis. *Open Records Decision No. 452 at 4* (1986). Additionally, a claim letter is a factor the Attorney General will consider in determining from the totality of the circumstances presented whether the governmental body has established that litigation is reasonably anticipated. *Texas Attorney General Public Information 2022 Handbook*, at 81 (2022).

The City believes it meets both prongs of this test, making the information excepted from disclosure under section 552.103(a). The City has received Letters of Representation from legal counsel, which include evidence preservation demand and corresponding spoliation of evidence language, attached as **Exhibit E**. A demand for evidence preservation is a recognized procedural standard in preparation of filing suit. Under the standard, the notice letters may be considered as a factor in conjunction with the nature of the incident in determining if this exception is applicable. The documents responsive to this request, **Exhibits G01-G38**, relate to the anticipated litigation and may be utilized in the lawsuit.

Section 552.101 of the Act and Chapter 1701 of the Occupations Code (Exhibit G02)

Body worn cameras are subject to Subchapter N of Chapter 1701 of the Occupations Code. A member of the public must provide the following information when submitting a written request to a law enforcement agency for information recorded by a body worn camera:

- (1) the date and approximate time of the recording;
- (2) the specific location where the recording occurred; and
- (3) the name of one or more persons known to be a subject of the recording.

Occ. Code § 1701.661(a).

Section 552.101 of the Act excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Tex. Govt. Code Ann. § 552.101* (West 2012). The City is required to comply with the requirements of the Occupations Code. For requests that did not provide the requisite information under section 1701.661(a), the City contends that it is not permitted to release the Requested Information pursuant to Section 552.101 of the Act and Chapter 1701 of the Occupations Code.

Section 552.101 of the Act: Information Confidential Under Common Law or Constitutional Privacy Doctrine – Common-Law Privacy

Section 552.101 of the Act excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” TEX. GOVT. CODE ANN. § 552.101 (West 2012). The Texas Supreme Court recognizes that Section 552.101 of the Act applies to the common-law tort of invasion of privacy through the disclosure of private facts. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). Under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Id.* at 682. The court of appeals has concluded public citizens’ dates of birth are protected by common-law privacy pursuant to section 552.101. *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App. – Austin May 22, 2015, pet. Denied) (meme. Op.).

The Requested Information contains birth dates. Therefore, the City believes that it must withhold the dates of birth from the Requestor pursuant to Section 552.101.

Section 552.101 of the Act and the Common Law Right to Privacy (Exhibits G18, G19, G20)

In addition to protecting from disclosure information that is confidential by law, Section 552.101 applies to information that is protected under the common law right to privacy. The Texas Supreme Court holds that common-law privacy protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). If the information qualifies as highly intimate or embarrassing, there is a presumption that the information is not of legitimate concern to the public unless the requestor of the information can show otherwise. *See id.* at 685.

The attorney general has determined that the compilation of an individual’s criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person and not of legitimate concern to the public. *See* OR2018-06345, citing *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (finding significant privacy interest in compilation of individual’s criminal history by recognizing distinction between public records found in courthouse files and local police stations and compiled summary of criminal history information).

The Requested Information contains a compilation of an individual’s criminal history and therefore, the City believes that it must withhold the Requested Information.

Section 552.107 of the Act: Certain Legal Matters (Exhibit G30)

Section 552.107 of the Act excepts from disclosure “information that . . . an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct.” Tex. Gov’t Code Ann. § 552.107 (West 2012). In Open Records Decision Number 676, the Texas Attorney General

interpreted Section 552.107 of the Act to protect the same kind of information protected under Texas Rule of Evidence 503. Tex. Att’y Gen. ORD No. 676 at 4 (2002). Essentially, Section 552.107 protects from disclosure information that reveals client confidences to the attorney and information that reveals legal advice, opinions, and recommendations from the attorney. Tex. Att’y Gen. ORD No. 574 (1990) (attorney notes documenting client confidences or the attorney’s legal advice or opinion to the client may be withheld); Tex. Att’y Gen. ORD No. 163 (1994) (memorandum containing legal advice and recommendations to an ACC official, in the context of an attorney-client relationship with ACC may be withheld).

The Attorney General has stated that the standard for demonstrating the attorney-client privilege under the Act is the same as the standard used in discovery under Texas Rule of Evidence 503. Tex. Att’y Gen. ORD No. 676 at 4 (2002). The government must meet five elements to demonstrate the elements of the attorney-client privilege. First, the governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made for the purpose of facilitating the rendition of professional legal services to the client governmental body. *Id.* Third, the governmental body must demonstrate that the communication was between or among clients, client representatives, lawyers, and lawyer representatives. *Id.* at 8. Fourth, the governmental body must show that the communication was confidential and was not “intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* at 10. Fifth, the governmental body must demonstrate that the communication has remained confidential. *Id.*

The City asserts that portions of the Requested Information constitute a communication for purposes of the Act because the information consists of electronic messages communicated between the City and the counsel for the City.

The City argues that the portion of the Requested Information consists exclusively of communications that were made for the purpose of facilitating legal counsel to the City. These communications consist of legal advice, legal strategy, legal analysis, opinions, and legal recommendations.

The communications in the portion of Requested Information are between the City staff and Counsel. The “client” as defined by Rule 503 is the City of Uvalde and the following individuals are individuals included in the confidential communications and are considered by the City to be representatives of the client.

City Representatives:

Vice DiPiazza (City Manager)
Donald McLaughlin (Mayor)
Paul Tarski (City Attorney)

The following are attorneys, paralegals, and/or staff of legal counsel retained by the City. Each of the individuals listed is either a lawyer authorized to engage in the practice of law, or a

non-lawyer employed to assist the firm's layers in the rendition of professional legal services; therefore, each person is either a "lawyer" or "representative of the lawyer" as those terms are defined in Rule 503 of the Texas Rules of Evidence.

Legal Counsel for the City:

Clarissa Rodriguez (lawyer)

The City asserts that the portion of the Requested Information constitutes privileged communications, as defined by Texas Rule of Evidence 503, because these communications were not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. As indicated, the portion of the Requested Information contains legal advice, facts obtained on the request of counsel to provide legal advice, legal strategy, opinion, analysis, and legal recommendations, all of which was provided by counsel to the City staff in furtherance of the rendition of professional legal services to the City and was not intended to be disclosed to third persons. Finally, the portion of the Requested Information has remained confidential and has not been waived through disclosure to a third party or otherwise. As such, the portion of the Requested Information constitutes confidential communications between the City and Counsel and may not be disclosed. The City, therefore, requests that the portion of the Requested Information be withheld under Section 552.107 of the Act.

For the above stated reasons, the City respectfully requests that your office issue an opinion that the marked portion of the Requested Information, should be excepted from disclosure pursuant to Section 552.107 of the Act.

Section 552.108 of the Act: Certain Law Enforcement, Corrections, and Prosecutorial Information (Exhibits G25, G28)

Sections 552.108(b)(1) state, in pertinent part, the following:

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

- (1) release of the internal record or notation would interfere with law enforcement or prosecution...."

TEX. GOV'T CODE ANN. § 552.108 (West 2012).

The attorney general previously held that release of routine investigative procedures, techniques that are commonly known, and routine personnel information would not interfere with law enforcement and crime prevention. *See* Open Records Decision Nos. 216 at 4 (1978), 133 at 3 (1976). However, the Court have ruled that the release of some categories of internal records could interfere with law enforcement such as those that would divulge a police department's

methods, techniques, and strategies for preventing and predicting crime. *See A & T Consultants, Inc.*, 904 S.W.2d at 678.

Examples of these types of documents include police officer training guides, policy and procedure manuals, shift change schedules, security details, and blueprints of secured facilities. *See, e.g.* Tex. Att'y Gen. LR2002–0159 (2002) (shift rosters); Tex. Att'y Gen. LR2001–32 (2001) (policy and procedure manuals); Tex. Att'y Gen. ORD–413 (1984) (security details at execution); Open Records Decision No. 531 (1989) (detailed guidelines regarding a police department's use of force policy [...]).

Portions of the responsive information fall within the categories of information that the attorney general has previously found to be excepted from release. Additionally, the City believes that this information may be subject to the objection to disclosure notices.

Section 552.1175 of the Act: Confidentiality of Addresses, Telephone Numbers, Social Security Numbers, and Personal Family Information of Peace Officers, County Jailers, Security Officers, and Employees of the Texas Department of Criminal Justice (Exhibits G08, G25, G27, G33)

Section 552.1175 excepts from public disclosure certain personal information of peace officers including a peace officer's home address, home telephone number, emergency contact information, date of birth, social security number, and family member information.

A peace officer as defined by Article 2.12, Code of Criminal Procedure includes marshals or police officers of an incorporated city, town, or village, and those reserve municipal police officers who hold a permanent peace officer license issued under Chapter 1701, Occupations Code. TEX. CRIM. PROC. CODE. ANN. art. 2.12(3).

Portions of the Requested Information contains some of the above information regarding a peace officer. The City believes that the information must be withheld from public disclosure because it is information that meets the criteria for Section 552.1175.

Section 552.130 of the Act: Confidentiality of Certain Motor Vehicle Records

As previously noted, Section 552.101 of the Act excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." TEX. GOVT. CODE ANN. § 552.101 (West 2012). The Attorney General's office has previously recognized that certain motor vehicle records are confidential under Section 552.130 of the Act. *See* Tex. Att'y Gen. OR2000-4847. Specifically, Section 552.130 states, in pertinent part, the following:

- (a) Information is excepted from the requirements of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state or another state or country;

(2) a motor vehicle title or registration issued by an agency of this state or another state or country; or

(3) a personal identification document issued by an agency of this state or another state or country or a local agency authorized to issue an identification document.

(b) Information described by Subsection (a) may be released only if, and in the manner, authorized by Chapter 730, Transportation Code.

(c) Subject to Chapter 730, Transportation Code, a governmental body may redact information described by Subsection (a) from any information the governmental body discloses under Section 552.021 without the necessity of requesting a decision from the attorney general under Subchapter G.

TEX. GOV'T CODE ANN. § 552.130 (West 2012)

The Requested Information includes driver license and license plate numbers and other motor vehicle information. Therefore, the City believes it must redact the information prior to disclosure pursuant to Section 552.130 of the Act.

Section 552.136: Confidentiality of Credit Card, Debit Card, Charge Card, and Access Device Numbers (Exhibit G24)

Section 552.136 of the Government Code provides as follows:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

The Requested Information includes information that falls within this exception to disclosure. Therefore, the City believes the information should be withheld from public disclosure.

Section 552.152 of the Act: Confidentiality of Information Concerning Public Employee or Officer Personal Safety (Exhibits G08, G25, G27, G28, G33)

Section 552.152 of the Government Code provides as follows:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 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.

In this instance, there are requests for information that fall within this exception to disclosure. Under the current circumstances, there is reason to believe that a substantial threat of physical harm exists for certain employees or city officials. The information is under review to determine whether the information reaches the threshold for this exception. *See Exhibit F* The City requests that you issue a ruling regarding this category of information.

For the above stated reasons, the City respectfully requests that your office issue a ruling regarding the responsive information, attached as **Exhibits G01-G38**.

Should you have any questions or concerns, please do not hesitate to contact me by telephone at (210) 227-3243.

Very truly yours,

DENTON NAVARRO ROCHA BERNAL & ZECH
A Professional Corporation



CYNTHIA TREVINO

CT/ec

Enclosures: as stated.

cc: Exhibit A – Requests
(w/o enclosures)