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December 5, 2023

Honorable Ken Paxton  
Attorney General of Texas  
Supreme Court Building  
P.O. Box 12548  
Austin, Texas 78711-2548

*Re: Public Information Act Request of Corey LaRue Received by the City of Aledo on  
November 17, 2023*

Dear General Paxton:

I represent the City of Aledo in regard to the above-referenced matter. On November 17, 2023 the City received the public information request from Corey LaRue attached hereto as Exhibit A. Please note that the City offices were closed on Thursday November 23, 2023 and Friday November 24, 2023 in observance of the Thanksgiving holiday.

Pursuant to Section 552.301 of the Public Information Act (the "Act"), the City requests your determination regarding whether the responsive information falls within an exception to disclosure. In particular, the City believes that the following exceptions may apply:

**I. Section 552.101: Confidential by Law**

**A. Common Law Privacy**

Section 552.101 of the Act encompasses the common law right to privacy. Information must be withheld from the public under Section 552.101 in conjunction with common law privacy when the information is:

- (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and
- (2) of no legitimate public interest.

*See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976).

The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In addition, your office has found that some kinds of medical information or information indicating disabilities or specific illnesses is

excepted from required public disclosure under common law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps).

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. In considering whether a private citizen's date of birth is private, the Third Court of Appeals looked to the supreme court's rationale in *Texas Comptroller of Public Accounts v. Attorney General of Texas*, 354 S. W.3d 336 (Tex. 2010). *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at 3 (Tex. App.-Austin May 22, 2015, pet. denied) (mem. op.). The supreme court concluded public employees' dates of birth are private under section 552.102 of the Government Code because the employees' privacy interest substantially outweighed the negligible public interest in disclosure. *Texas Comptroller*, 354 S.W.3d at 347-48. Based on *Texas Comptroller*, the court of appeals concluded the privacy rights of public employees apply equally to private citizens, and thus, private citizens' dates of birth are also protected by common-law privacy pursuant to section 552.101. *City of Dallas*, 2015 WL 3394061, at 3.

The responsive materials may contain information subject to the common law right to privacy. As such the City believes it must withhold that information under Section 552.101 in conjunction with common law privacy.

#### **B. Common Law Informer's Privilege**

The City believes that portions of the responsive information may be subject to Section 552.101 of the Act in conjunction with the common law informer's privilege, which Texas courts have long recognized. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer's privilege protects the identities of persons who report activities over which the governmental body has criminal law enforcement authority, provided that the subject of the information does not already know the informer's identity. *See* Tex. Att'y Gen. ORD-515 at 3 (1998), 208 at 1-2 (1978). The privilege also protects the identities of individuals who report violations of statutes to the police agencies and who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." *See* Tex. Att'y Gen. ORD-279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). For the privilege to apply, the individual must report a violation of a criminal or civil statute. *See* Tex. Att'y Gen. ORD-582 at 2 (1990), 515 at 4-5 (1988). The privilege excepts the informer's statement only to the extent necessary to protect the informer's identity. *See* Tex. Att'y Gen. ORD-549 at 5 (1990).

The City believes the responsive information may be subject to the Common Law Informer's Privilege. Therefore, it seeks to withhold such information under Section 552.101.

#### **C. Work Product Privilege**

The Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of Section 552.022." *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); *see also* Open Records Decision No. 676 (2002). Therefore, the City asserts that the Texas Rules of Civil Procedure constitute "other law" under the Act in general and should be considered in conjunction with Section 552.101 of the Act.

Texas Rule of Civil Procedure 192.5 encompasses the attorney work product privilege. Information is confidential under Rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. *See* ORD 677 at 9-10. Rule 192.5 defines core work product as the work product of an attorney or an attorney's representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney's representative. *See* TEX. R. CIV. P. 192.5(a),(b)(1).

Accordingly, in order to withhold attorney core work product from disclosure under Rule 192.5, a government body must demonstrate the material was (1) create for trial or in anticipation of litigation and (2) consists of the mental impressions, opinions, conclusions, or legal theories of any attorney or an attorney's representative. *Id.*

The first prong of the work product test, which requires a government body to show the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation there was a substantial chance litigation would ensue, and (2) the party resisting discovery believed in good faith there was a substantial chance litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. The second part of the work product test requires the governmental body to show the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. A document containing core work product information that meets both parts of the work product test is confidential under rule 192.5, provided the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c).

The responsive documents contain privileged attorney work product. Therefore, the City seeks to withhold such information under Rule 192.5.

## **II. Section 552.107: Information within the Attorney-Client Privilege**

Section 552.107 of the Act excepts from required public disclosure attorney-client communications. Your office has determined that Section 552.107(1) of the Government Code protects information within Texas Rules of Evidence ("TRE") 503, which encompasses the attorney-client privilege. Open Records Decision No. 676 (2002). Thus, the standard for demonstrating the attorney-client privilege under the Act is the same as the standard used in discovery under Rule 503.

In meeting this standard, a governmental body bears the burden of providing the necessary facts to demonstrate the elements of the attorney-client privilege which are as follows:

- the information constitutes or documents a communication;
- the communication was to render professional legal services to the client City;
- the communication was between or among clients, client representatives, lawyers, and lawyer representatives;
- the communication was and stayed confidential; and
- the communication has remained confidential.

The responsive information may contain protected attorney-client communications. The City seeks a ruling that it may withhold any responsive attorney-client communications.

### **III. Section 552.103(a): Litigation Exception**

Section 552.103(a), the “litigation exception,” excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. A party may not use the Public Information Act to avoid the rules of discovery used in litigation. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App. – Austin 2002, no pet.); Attorney General Opinion JM-1048. The exception enables a governmental body to protect its interest in litigation “by forcing parties seeking information related to that litigation to obtain it through discovery”. Open Records Decision No. 551 at 3 (1990).

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, and
- (2) the information at issue is related to that litigation.

*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). The City must meet both prongs of this test for information to be excepted under Section 552.103(a).

The City believes that the litigation exception applies to the responsive information and seeks a ruling that it may withhold the information it can demonstrate is subject to Section 552.103.

### **IV. Section 552.105: Location or Price of Property**

Information is excepted from the requirements of Section 552.021 if it is information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

This exception protects a governmental body’s planning and negotiating position with respect to particular real or personal property transactions, and its protection is therefore limited in duration. The protection of Section 552.105(1) expires upon the public announcement of the project for which the property is being acquired, while the protection of Section 552.105(2) expires upon the governmental body’s acquisition of the property in question.

Because Section 552.105(2) extends to “information relating to” the appraisals and purchase price of property, it may protect more than just the purchase price or appraisal of a specific piece of property. For example, your office has held that appraisal information about

parcels of land acquired in advance of others to be acquired for the same project could be withheld where this information would harm the governmental body's negotiating position with respect to the remaining parcels. Similarly, the location of property to be purchased may be withheld under Section 552.105(2) if releasing the location could affect the purchase price of the property.

To the extent the responsive documents contain information relating to the appraisals or purchase price of real property for a public purpose prior to the formal award of the contracts for the property, the City seeks to withhold such information under Section 552.105.

## V. Previous Determination

Your office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information without the necessity of requesting an Attorney General decision. Additionally, your office has held that a governmental body may redact a living person's social security number without the necessity of requesting an Attorney General decision. Therefore, the City has not raised arguments regarding this which may be contained in the responsive material. To the extent this information is included in the responsive material, this information will be withheld in the event of a ruling requiring the City to release any portion of the responsive documents.

Section 552.130(c) provides that subject to Chapter 730 of the Transportation Code, a governmental body may redact information, without the necessity of requesting an Attorney General decision, if it relates to a driver's license, a personal identification document, or a motor vehicle title or registration issued by an agency of this state or another state or country. If the City redacts such information, it will notify the requestor as required by Section 552.130(e). The City, therefore, has not raised arguments regarding these types of information.

The requestor has been notified by copy of this letter that the City has chosen to seek an Attorney General decision on this matter. The City will supplement this letter with the responsive information/a representative sample of the responsive information no later than the fifteenth day after the date the request was received. Please contact me at the above address with any questions regarding this matter.

Sincerely,



Alicia K. Kreh

AKK:mg  
Enclosure

cc: Cory LaRue (w/o enclosure)  
[cory.larue22@gmail.com](mailto:cory.larue22@gmail.com)