

September 19, 2016

The Honorable Ken Paxton, Attorney General **CMRRR #7015 0640 0000 9923 6789**
Office of the Attorney General
Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548

Re: Request for Attorney General Decision Under TEX. GOV'T CODE § 552.301
Requestor: Ty Clevenger
Entity: City of Hearne (hereinafter, the "City")
Date received: July 25, 2016
Date clarifications received: July 27, 2016, August 4, 2016 and August 26, 2016
AG I.D. No.: 634668

Dear Attorney General Paxton:

On July 25, 2016, the City received a public information request from Ty Clevenger via fax (see **Exhibit A**). On July 27, 2016, the Requestor faxed a clarification to his request to the City (see **Exhibit A-1**).

On August 4, 2016, City requested clarification from Requestor, (see **Exhibit B**). On August 4, 2016, the City received Requestor's response, dated August 4, 2016, via email (see **Exhibit B-1**). On that same date, the City sent the Requestor a second clarification, (see **Exhibit C**). On August 26, 2016, the City received the Requestor's second response, via email, dated August 25, 2016 and sent at 11:17 p.m., (see **Exhibit C-1**).

Further, I hereby certify that all City administrative offices were closed on Monday, September 5, 2016, in observance of the Labor Day holiday (see **Exhibit D**). As such, this particular calendar day is not included in the statutory time frame in which the City must comply with section 552.301 of the Government Code in requesting this decision from the Attorney General.

Pursuant to section 552.301 of the Government Code, the City hereby requests a decision from the Attorney General about whether the requested information is excepted from disclosure under the Public Information Act (the "Act"). In our letter to the Attorney General dated September 12, 2016, regarding the subject matter of this request (see **Exhibit E**), the City claimed that the requested information is not information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by a governmental body or for a governmental body or is excepted from disclosure under one of the enumerated exceptions in Chapter 552. This letter will serve as the City's brief in its request for a decision from the Attorney General as to whether the requested information and/or any portions thereof are excepted from disclosure under the Act. See Tex. Gov't Code § 552.301(a), (b). The City asserts that the requested information is excepted from disclosure pursuant to sections 552.101, 552.104, 552.108, 552.111, 552.117, 552.119, 552.133, and 552.139 of the Government Code.

Background

In his initial request, the Requestor sought from the City a copy of:

1. *All documents, records and communications (e.g., emails) indicating whether the City of Hearne has already accepted grant money from the U.S. Department of Agriculture for the purpose of building an events center in Hearne. If the City of Hearne accepted any such money, I wish to view all documents records and communications indicating where the money was deposited and who signed any agreements on behalf of the City of Hearne.*
2. *All emails sent or received by John Naron in his capacity as interim city manager. This request covers the entire period that he has served as interim city manager.*

On July 27, 2016, the Requestor then clarified his request with, "...if possible, I would like to receive all requested emails in searchable electronic format." On August 4, 2016, City sought clarification from Requestor, (see **Exhibit B**). On August 4, 2016, the City received Requestor's response, dated August 4, 2016, via email (see **Exhibit B-1**), in which he stated that he was "willing to exclude any attorney-client communications, but I would have to know more about what common-law privacy privileges are being asserted."

On that same date, the City sent the Requestor a second clarification, (see **Exhibit C**) and advised him that, after it had made a good faith effort to comply with Item No. 1 of his original request, the City "has not identified any information in existence that is responsive to your request because the City has stated that it did not accept 'grant money from the U.S. Department of Agriculture for the purpose of building an events center in

Hearne'. Further, the City informed the Requestor as to what it was referring to in its' letter was "references or information relating to health/medical issues". On August 26, 2016, the City received the Requestor's second response, via email, dated August 25, 2016 and sent at 11:17 p.m., (see **Exhibit C-1**), in which he stated "*I do not object to the withholding of medical information under a common-law privacy exception.*"

Documents requested but not included in this request for ruling are being made available to Requestor, through a cost estimate cost letter, (see, **Exhibit F**) which will be sent to Requestor contemporaneously with this request for opinion. Thus, only documents which the City believes to be excepted from disclosure are being submitted. The City believes that all responsive documents at issue are being submitted. However, if additional documents are located, the City would like to submit **Exhibits G to G-12** as a representative sample of the Interim City Manager's emails for review by the Attorney General, pursuant to Government Code Section 552.301(e). Once the Attorney General has decided what information is to be released by the City and if the City is in agreement, subsequent records will follow the parameters set forth by the Attorney General for the time period requested, absent an appeal of that decision.

Automatic Redactions¹

If necessary, the City will automatically redact Vehicle Identification Numbers, License Plate Numbers, Driver's License Numbers, and Title information contained in the documents at issue as allowed by Tex. Gov't Code Section 552.130(c). The City will provide the Requestor with the form prescribed by the attorney general as required by section 552.130(e). In addition, social security numbers will be redacted pursuant to section 552.147, as well as email addresses of the general public pursuant to section 552.137 of the Tex. Gov't Code.

Arguments for Attorney General Review

§ 552.108 Certain Law Enforcement, Corrections, and Prosecutorial Information:

The City asserts that the requested information (see **Exhibit G-2** and **Exhibit G-12**) is excepted from disclosure pursuant to § 552.108(a)(1) which states:

(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[.]

¹ See grey highlighted information in **Exhibits G to G-12**

Exhibit G-2 contains information to be held by a law enforcement agency that deals with the detection, investigation and prosecution of a crime. It pertains to the possible prosecution of the criminal offense of Driving While License Invalid with a Previous Conviction. You are referred to **page 10** of **Exhibit G-2**, a correspondence from Kaufman County Criminal District Attorney's Office dated August 8, 2016, indicating "*in the process of prosecuting*" the suspect in said charge. Where an investigation by a law enforcement agency is active at the time of the request, your office has found a presumption exists that release of the investigatory information would interfere with law enforcement. See *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases); Tex. Att'y Gen. ORD-216 (1978). Because the investigation into this matter is pending, the nature and contents of the documents at issue must be withheld to preserve the integrity of the aforementioned investigation and future prosecution. As to **Exhibit G-12**, the information contained therein pertains to an internal investigation which may result in criminal charges against former City staff by the local District Attorney. This investigation is in the early stages at this point.

Therefore, the City asserts that the information at issue (see **Exhibits G-2** and **G-12**) may be excepted from disclosure pursuant to section 552.108(a)(1) of the Government Code.

In addition, the City believes that the documents at issue in **Exhibit G-3, G-4** and **G-13**, should be excepted from public disclosure under this section pursuant to Section 552.108(a)(2) of the Government Code which states, "it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that *did not result in conviction or deferred adjudication*" and pursuant to Section 552.108(b)(2) which states, "the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication".

The documents at issue contains information which relates to criminal matters that did not result in a conviction or deferred adjudication. (See **Exhibit G-3, G-4** and **G-13**). The documents at issue describe the investigative and evidentiary gathering techniques of law enforcement officials which if disclosed could interfere with other future investigations.

§ 552.101 Information Confidential by Law

The City believes that the information at issue, (see **Exhibits G, G-2, G-3, G-5, G-7** and **G-13**), should be excepted from public disclosure under this section due to information held confidential under case law. Pursuant to the Texas Supreme Court decision in *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977), section 552.101 applies to information when its disclosure of private facts constitutes a wrongful publicizing of such information. To be within this common law tort, the information must (1) contain highly

intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and (2) be of no legitimate concern to the public.

The documents at issue in **Exhibit G** contains photographs of minor children. The City does not have the consent from the minors' respective parents/guardians for release their photographs. The City believes that the release of the photographs would be an invasion of common-law privacy for the minors as well as their respective parents/guardians.

The documents at issue in **Exhibits G-2** and **G-3** relate to issues that could be highly embarrassing to the person who stood accused of crimes alleged and/or to the person who was a victim of a crime. Further, the facts and issues contained within the documents may contain highly intimate and embarrassing facts about the accused private affairs and could cause serious harm to those persons' reputation if released to the public.

The documents contained in **Exhibit G-5** relate to City employees, personnel issues such the hiring and firing of individuals, insurance inquiries, employee appearance and tardiness which may have references to facts that may be embarrassing to the person being hired or terminated.

Dates of Birth of General Public

The City asserts that dates of birth of the general public and not belonging to the Requestor are excepted from disclosure. In a recent finding in *Ken Paxton, Attorney General of Texas v. City of Dallas*, Cause No. 03-13-00546-CV, in the Third Court of Appeals, in Austin, Texas, the Court of Appeals determined that dates of birth are now excepted from disclosure. Therefore, the dates of birth (see yellow highlights in **Exhibits G-2, G-3** and **G-13**) should be excepted from disclosure.

Certain Financial Information

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 also includes the doctrine of common law privacy. Common law privacy protects information if it is highly intimate or embarrassing such that its release would be highly objectionable to a reasonable person and the public has no legitimate interest in it. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Your office has determined that some personal financial information is highly intimate or embarrassing and thus meets the first part of the *Industrial Foundation* test. Open Records Decision Nos. 600 (1992) (personal financial choices concerning insurance are generally confidential), 545 (1990) (common law privacy protects personal financial information not relating to the financial transaction between an individual and a governmental body), 523 (1989) (common law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (common law privacy

protects assets and income source information). Your office has held that voluntary investments made in an option benefits plan offered by a governmental entity may be withheld from public disclosure. ORD-373 (1983). Therefore, we believe that the information in **Exhibits G-5** and **G-7** (see orange highlighted portions) should be withheld from public disclosure under this section.

§ 552.111 Agency Memoranda

The City contends that **Exhibits G-9, G-10, G-11** and **G-12** contain draft internal audit materials which may should be excepted from disclosure under Tex. Gov't Code § 552.111, which excepts an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency. In Open Records Decision No. 615 (1993), the Attorney General's office examined this exception in light of the decision of the Austin Court of Appeals in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). Open Records Decision No. 615 holds that § 552.111 excepts internal communications consisting of advice, recommendations, opinions, and other materials reflecting the policy making processes of the governmental body. ORD-615 (1993) at 1. This decision further holds that factual information that is severable from the opinion portions of the internal memorandum are subject to disclosure. However, in 2000, the Attorney General's office issued OR2000-3226, which recognized a distinction between a final memorandum and the draft of such a document. That opinion found that a draft of a document that has been released or is intended for release in final form necessarily represents the advice, opinion, and recommendation of the drafter as to the form and content of the final document and should therefore be withheld under § 552.111 of the Government Code. OR2000-3226 at 1 (citing ORD-599 (1990)). Furthermore, when a document is a genuine preliminary draft that has been released or is intended for release in final form, factual information in that draft which also appears in a released or releasable final version is excepted from disclosure by § 552.111. *Id.*; ORD-559 (1990); see also ORD-615(1993), OR99-3694, and OR99-3026.

OR2000-3226 involved a request for a "draft copy of the University of Texas-Austin budget for 2000-2001." OR2000-3226 at 1. The University of Texas System claimed the draft was excepted from disclosure under Texas Government Code § 552.111. *Id.* The University stated that the draft budget was a working document which goes through numerous revisions at different levels of the systems administration until it is approved by the Board of Regents in a public meeting, and that the final budget was ultimately subject to release after the Board of Regents' approval. *Id.* at 2. Based on those representations and your office's review of that information, your office concluded that the draft copy of the University of Texas-Austin budget for 2000 and 2001 is excepted from public disclosure under § 552.111. *Id.*

Like the University of Texas' draft budget, the City's draft working papers go through revisions at the staff level and the administrative level until the final versions are presented to the City Council at a public meeting. The final versions will be subject to release after review and approval by the City Council. Therefore, the City believes that

Exhibits G-9, G-10, G-11 and G-12 should be excepted from required public disclosure. OR2000-3226.

Exhibits G-9, G-10, G-11 and G-12 draft documents and/or documents containing background information and working papers which consist of internal communications reflecting the advice, recommendation, and opinions of the consulting experts. These drafts reflect recommendations that may or may not end up in final reports. Often times the draft is a recommendation of how a document or an investigation should be viewed. In other words, the manner and form in which the draft is proposed is itself an editorial position on how to present the recommendation and opinions of the consulting experts, City staff and City Council. Such draft audit background information and working papers are necessarily the opinions, recommendations, and advice of the audit department regarding their eventual final report to the City Council, and are therefore excepted from disclosure under § 552.111. OR2000-3226 *at* 2.

To hold otherwise would jeopardize the integrity of any current drafting of documents and/or investigation and the recommendations of consulting expert, City staff to the City Council. As recognized in *Gilbreath*, § 522.111 “is intended to protect advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes.” 842 S.W.2d *at* 412. The City’s task is to gather the necessary information and draft the analysis to make recommendations and advise the City Council. Clearly, such a draft would concern matters of policy. See OR99-3026 (finding that audit of police department’s recruiting division concerned that city’s policy matters).

For all of these reasons, the requested information should be excepted from disclosure under Texas Government Code § 552.111.

§ 552.104 Information Related to Competition or Bidding

The City believes that **Exhibit G-10** should be withheld from public disclosure under this section. Section 552.104(a) states:

(a) Information is excepted from the requirement of Section 552.021 if it is information that, if released would give advantaged to a competitor or bidder.

Exhibit G-10 contains information regarding potential bids for the City’s internet/communications services from various companies. At this time the City has not made a final decision, thus bidding is still open. The release of these bids prior to a final decision may have an adverse effect for said companies. Therefore, **Exhibit G-10** should be withheld under section 552.104 of the Government Code.

§ 552.139 Government Information Related to Security Issues for Computers

The City asserts that Section 552.139(a) applies to certain information at issue. Said section states:

(a) Information is excepted from the requirements of Section 552.021 if it is information that relates to computer network security, to restricted information under Section 2059.055, or the design, operation, or defense of a computer network.

(b) The following information is confidential:

- (2) any other assessment of the extent to which data processing, operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use;...

The City asserts that certain information contained in **Exhibit G-1** contains computer screen shots from the City of Bellaire's computer system. Said submitted information contains "incode" instructions for City's use. This type of information would enable an individual to manipulate and alter data on the City's sites within the content management system. This type of information is not available and viewable to the public without a password and user ID.

§ 552.117 Certain Addresses, Telephone Numbers, Social Security Numbers, and Personal Family Information

The information in **Exhibit G-5** (see pink highlights) and **Exhibit G-6** (see blue highlights) should be withheld under section 552.117 because it contains the home addresses, telephone numbers, social security numbers, and personal family information of a current City employee. Section 552.117 of the Texas Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely elect to keep this information confidential pursuant to section 552.024.

§ 552.119 Photographs of Peace Officers or Certain Security Guards

Included among the responsive documents are photographs of the officers and dispatchers (see **Exhibit G-8**). We believe these photographs should be withheld pursuant to section 552.119 of the Government Code. In Open Records Decision No. 502 (1988), your office held that there need not be a threshold determination that release of a photograph would endanger an officer before the statutory predecessor to § 552.119(a) could be invoked. Furthermore, the exception applies to all photographs of peace officers unless the circumstances in the subsections occur or the officer provides a written waiver. ORD No. 502 (1988). Neither of these have occurred.

§ 552.133 Public Power Utility Information Related to Competitive Matters

The information in **Exhibit G-13** should be withheld under section 552.133 because it contains information from an entity providing electric or gas utility services that is subject to the provisions of the Act. Per Section 552.133(a-1), "*competitive matters' means a utility related matter that is related to the public power utility's competitive activity, including commercial information, and would, if disclosed, give advantage to competitors or prospective competitors.*"

The information in **Exhibit G-13**, contains information relating to the provisions of distribution access and transmission service to individuals and their usage of public power utilities. In Open Records Decision No. 666 (2000), your office determined that a municipality may disclose information pertaining to a municipally-owned power utility to a municipally-appointed citizen advisory board without waiving its right thereafter to assert an exception under the act in response to a future public request for information. However, in the matter at hand, the Requestor has informed the City that is an appointed citizen and therefore, **Exhibit G-13** should be excepted from disclosure.

For the above stated reasons, the City respectfully requests that your office issue a ruling on whether the information attached as **Exhibits G, G-1, G-2, G-3, G-4, G-5, G-6, G-7, G-8, G-9, G-10, G-11, G-12 and G-13** is confidential and should be excepted from disclosure per Texas Government Code section 552.101, 552.139, 552.108, and 552.101.

The Honorable Ken Paxton, Attorney General

September 19, 2016

10 | Page

Should you have any questions or concerns, please contact our office at (512) 279-6431.

Very truly yours,

Denton Navarro Rocha Bernal Hyde & Zech, P.C.
attorneys & counselors at law • rampagelaw.com



SARAH M. GRIFFIN
Assistant City Attorney
City of Hearne, Texas

SMG/ha

Enclosures: As stated

cc: Ty Clevenger
21 Bennett Avenue #62
New York, NY 10033
(w/o enclosures)

**Via Email: tyclevenger@yahoo.com
and First Class Mail**