

OLSON & OLSON^{LLP}

ATTORNEYS AT LAW

June 24, 2024

Requestor, _____

Via e-mail: _____

RE: Public Information Request June 10, 2024

Requestor: _____

Ref: Fulshear24-002

Dear _____

This letter is in response to your above-referenced public information request to the City of Fulshear, Texas (the "City"). The City contends that some of the information you requested is excepted from public disclosure under the Texas Government Code, Chapter 552, and that such information may be withheld. Because the City asserts that the information requested is excepted from disclosure under said law and should, therefore, be withheld, the City has submitted a request for a decision from the Texas Attorney General in accordance with Section 552.301(a) of the Government Code. Enclosed is the City's request to the Attorney General along with the public portion of the information responsive to your request.

Very truly yours,

OLSON & OLSON, LLP

/s/ Paige Bailey

Paige Bailey

PB/jn

enclosures

cc.: Mariela Rodriguez

VIA E-MAIL

Byron L. Brown

VIA E-MAIL

OLSON & OLSON^{LLP}

ATTORNEYS AT LAW

June 24, 2024

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

VIA E-FILE

RE: Public Information Request Received June 10, 2024
Requestor:
Reference: Fulshear24-002

Dear Attorney General:

The City of Fulshear, Texas, (the "City") received a public information request on June 10, 2024. [EXHIBIT 1] The 10th business day after the date of the request is June 24, 2024. In accordance with Texas Government Code § 552.301(e), the City now timely submits this brief or other written comments stating the reasons why the information requested is excepted from disclosure. The public portion of the information responsive to this request has been released to the requestor. The remaining responsive information is attached for your review. [EXHIBIT 2]

Section 552.101 w/ Common Law Privacy.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional statutory or by judicial decision." Tex. Gov't Code § 552.101. Section 552.101 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. The type 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. The records in Exhibit 2 include reports of sexual harassment in the workplace.

§552.101 w/ Informer's Privilege.

Portions of the submitted information are excepted under § 552.101 of the Texas Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." § 552.101 encompasses information protected by the informer's privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those 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." Open Records Decision No. 279 at 2 (1981); Wigmore, *Evidence*, § 2374, at 767 (McNaughton rev. ed. 1961). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). The responsive information contains a report of an alleged violation of state law. The law carries with it a penalty of a criminal nature. The report reveals the identity of this informant.

Section 552.107 - Attorney-Client Privilege.

Section 552.107(1) of the Code protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, the City has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, the City 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. *See* 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. *See In re Texas 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 capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* Tex. R. Evid. 503(b)(1)(A), (B), (C), (D), (E). Thus, the City must inform your 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.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made

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in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Moreover, because the client may elect to waive the privilege at any time, the City must explain that the confidentiality of a communication has been maintained. Section 552.107(1) of the Code 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).

The submitted information includes communications between City officials in their roles as clients and their City Attorney, Byron Brown. Other City employees and officials were included in correspondence in their official capacities. Those individuals include Mayor Groff who received these communications in their official capacity as mayor. The communications were made in confidence for the purpose of facilitating the rendition of professional legal services to the City. The communications were 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. Further, these communications were between client and lawyer, and lawyer representatives and confidentiality has been maintained. Therefore, the attorney-client privilege remains applicable to the submitted information, and the City may withhold the submitted information under section 552.107(1) of the Government Code. Of note, pursuant to Texas Government Code Section 552.302, attorney-client privilege is also a compelling reason to withhold the information. Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third-party interests are at stake. Open Records Decision No. 150 at 2 (1977). Section 552.107 of the Government Code can be a compelling reason to withhold the responsive information.

Thank you for your consideration of this matter. If you should require more information, please do not hesitate to contact me.

Respectfully submitted,
OLSON & OLSON, LLP

/s/ Paige Bailey
Paige Bailey

PB/jn
Enclosures

VIA E-MAIL

Mariela Rodriguez, City Secretary

VIA E-MAIL