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[DATE]

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

[METHOD SENT]

Re: Request for Open Records Decision: City of _____/[REQUESTOR]

Honorable Attorney General Paxton:

On behalf of the City of _____, I respectfully submitted a request for decision from the Office of the Attorney General regarding the City's authority to withhold from the public certain requested information on [DATE OF 10 DAY BRIEF]. See **Exhibit A**. This request was submitted pursuant to the Texas Public Information Act, Tex. Gov't Code §552.301.¹

On [DATE], the City received a public information request from [NAME OF REQUESTOR] ("Requestor") for the following:

[CUT AND PASTE REQUEST]. See **Exhibit B**.

The City believes that the information responsive to this request, submitted as **Exhibit D and Exhibit E**,² is confidential and excepted from public release and therefore requests a decision as to whether the responsive documents are excepted from disclosures pursuant to the following:

- Tex. Gov't Code § 552.101 – Confidential Information
- Tex. Gov't Code § 552.108 – Certain Law Enforcement Information.
- Tex. Gov't Code § 552.130 – Confidentiality Of Certain Motor Vehicle Records

The City submits the following written comments in support of its reasons why the stated exceptions apply in accordance with Texas Government Code Section 552.201(e) below.

¹ Please note the City was closed for the Good Friday holiday on Friday, March 30, 2018. See **Exhibit C**. Therefore, this day was not "business days" for the purposes of calculating deadlines.

² Exhibit E is a copy of the body worn camera footage responsive to the request and submitted separately via USPS.

Brief in Support

I. TEX. GOV'T CODE § 552.108 – Certain Law Enforcement, Corrections, and Prosecutorial Information, i.e., the “Law Enforcement Exception”

The City asserts that the information at issue, (*see Exhibits D and E*) are excepted from disclosure pursuant to section 552.108(a)(1) and/or 552.108(b)(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;
 - ...
- (b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matter 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.

Exhibits D and E contains information held by a law enforcement agency that deals with the detection and investigation of crime and/or internal records or notations of a law enforcement agency or prosecutor that are maintained for internal use in a matter relating to law enforcement or prosecution. The Department is still investigating the incident in the requested report to determine how to proceed. *See Exhibit F*. Where an investigation or prosecution is still pending at the time of the request, your office has found a presumption exists that release of the investigatory information would interfere with law enforcement or prosecution. *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 prosecution of 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 possible future prosecution. Therefore, the City asserts that the information in **Exhibits D and E** is excepted from disclosure pursuant to section 552.108 (a)(1) and/or (b)(1) of the Government Code.

II. TEX. GOV'T CODE § 552.101 – Information Confidential by Law

Occupations Code – Body Worn Cameras

The requests seek police officers’ body worn camera recordings. Body worn cameras are subject to chapter 1701 of the Occupations Code. Chapter 1701 provides the procedures a requestor must follow when seeking a body worn camera recording. Section 1701.661 provides, in relevant parts, the following:

(a) A member of the public is required to 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). In this instance, the requestors are seeking body camera footage regarding an incident involving a minor child. The requestors do not give the requisite information under section 1701.661(a)(1) for the incident reported in the requested case.

Primarily, the City asserts that all of the body camera footage is excepted from disclosure pursuant to section 552.108 discussed above, however, additionally the City believes it is prohibited from releasing the body camera footage related to the incident at issue as the requestors do not properly request this information.

Family Code Section 261.001

Section 552.101 encompasses information made confidential by other statutes, including section 261.201 of the Family Code, which provides in relevant part:

(a) Except as provided by Section 261.203, the following information is confidential, is not subject to public release under [the Act] and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). Section 261.001 of the Family Code defines "abuse" for purposes of section 261.201 to include, among other things, an offense described by section 22.011 of the Penal Code and section 22.021 of the Penal Code. *Id.* § 261.001(1)(E). Section 101.003(a) of the Family Code defines a "child" for purposes of section 261.201 as a "person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes." *Id.* § 101.003(a). However, the Penal Code defines a "child" for purposes of section 22.011 as "a person younger than 17 years of age who is not the spouse of the actor." Penal Code § 22.011(c)(1). This office has previously held that when read together, sections 261.001(1)(E) of the Family Code and 22.011(c)(1) of the Penal Code proscribe that sexual abuse of a child under chapter 261 requires the child be under the age of 17.

As evidenced by the documents themselves we believe this provision applies to this request and none of the exceptions in section 261.201(k) apply. Accordingly, pursuant to section 261.201 of the Family Code the submitted information must be withheld in its entirety.

Common Law Privacy

Section 552.101 encompasses the common-law right of privacy, which protects information if it (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. *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 established. *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 City believes releasing the contents of report at issue would violate the subject's right to common-law privacy. Accordingly, the City believes this requested report must be withheld in its entirety.

Common Law Privacy – Dates of Birth

Additionally, 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 public 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.' *Tex. 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 public citizens, and thus, public citizens' dates of birth are also protected by common-law privacy pursuant to section 552.101. *City of Dallas*, 2015 WL 3394061, at *3. Thus, the city believes it must withhold the citizen dates of birth in the documents at issue.

III. TEX. GOV'T CODE § 552.130 – Confidentiality Of Certain Vehicle Records

Section 552.130 of the Government Code provides that information related to a motor vehicle operator's license or driver's license, title, or registration issued by a Texas agency, or an agency of another state or country, is excepted from public release. Gov't Code § 552.130(a)(1), (2). Therefore, the Texas motor vehicle information included in the information at issue is generally subject to section 552.130 of the Government Code and must be redacted.

Conclusion

For the reasons explained above, the City seeks permission to withhold the submitted information. A copy of this correspondence, without exhibits, will be provided to the Requestors. Please contact me if you have any questions regarding this matter. Thank you for your consideration.

Sincerely,

Attachments: Exhibit A – Copy of 10 Day Letter Request for Decision
Exhibit B – Request
Exhibit C – Holiday Schedule
Exhibit D – Documents at Issue
Exhibit E – Videos at Issue
Exhibit F – Memo regarding Pending Investigation

Cc: [NAME OF REQUESTOR] Requestor – via E-mail