



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

March 1, 2016

Mr. Edgar J. Garrett, Jr.  
Counsel for the City of Commerce  
Faires & Garrett, Attorneys at Law  
1109 Main Street  
Commerce, Texas 75428

OR2016-04900

Dear Mr. Garrett:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 600087.

The City of Commerce (the "city"), which you represent, received two requests from the same requestor for (1) a specified audio recording, and (2) all correspondence sent to a named city employee pertaining to open records requests related to the specified audio recording. You state you do not have information responsive to the second portion of the request.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.109 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2015-25657 (2015). In Open Records Letter No. 2015-25657, we determined, in relevant part, the city must release the information you have submitted for our review in response to the instant request. We note the city now raises sections 552.103, 552.107, and 552.109 of the

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<sup>1</sup>The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

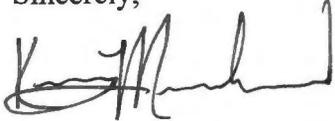
Government Code for this information. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the city may not now withhold the previously released information unless its release is expressly prohibited by law or the information is confidential under law. Although you raise sections 552.103 and 552.107 of the Government Code, these sections do not prohibit the release of information or make information confidential. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) and rule 503 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the city may not now withhold the submitted information under section 552.103 or section 552.107 of the Government Code. However, because section 552.109 of the Government Code makes information confidential under the Act, we will consider the applicability of this exception to the previously released information.

Section 552.109 of the Government Code excepts from disclosure “[p]rivate correspondence or communications of an elected office holder relating to matters the disclosure of which would constitute an invasion of privacy[.]” Gov't Code § 552.109. This office has held the test to be applied to information under section 552.109 is the same as the common-law privacy standard under section 552.101 of the Government Code, 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. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Upon review, we find you have failed to demonstrate any of the information at issue constitutes highly intimate or embarrassing information that is of no legitimate concern to the public. Therefore, the city may not withhold the submitted information under section 552.109 of the Government Code. As you raise no further exceptions to disclosure, the city must release the submitted information.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kenny Moreland', written over a horizontal line.

Kenny Moreland  
Assistant Attorney General  
Open Records Division

KJM/som

Ref: ID# 600087

Enc. Submitted documents

c: Requestor  
(w/o enclosures)