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November 8, 2016

Via Certified Mail, Return Receipt Requested  
No. 7016 0910 001 2749 5046

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

Re: Public Information Request Received by Village of Salado on October 18, 2016  
Requestor: **Tim Fleischer**  
AG Identification No. (not yet received)

Honorable Attorney General Paxton:

This firm serves as legal counsel to the Village of Salado, Texas ("City"). On October 18, 2016 the City received a public information request pursuant to the Texas Public Information Act, Tex. Gov't Code §552.001, et. seq. ("the Act") from **Tim Fleischer** ("Requestor") seeking:

- A list of complaints made against and/or about city administrator Kim Foutz
- A list of the names of those interviewed by the city attorney who was authorized to conduct the investigation into Kim Foutz
- The final recommendation and/or summary resulting from the investigation into Kim Foutz
- Communication between the Village and its insurers regarding the employment agreement with Foutz
- Invoice line items from the Village Attorney regarding the investigation into Kim Foutz. In particular, the number of hours and hourly rate charged to the Village for conducting the investigation into Kim Foutz. If the Village has not yet been billed for these hours, please release the information as soon as possible after it has been billed by the Village Attorney for this work.

On November 1, 2016 I submitted a copy of the request and a request for a decision from your office concerning whether the City may withhold some or all of the requested information

from disclosure. That request has not yet been assigned an AG Identification number. On November 1, 2016 I also notified the requestor by copy of the letter to your office that the City was seeking a decision from your office.

On behalf of the City, I respectfully submit this brief and written comments stating the reasons why the referenced exceptions apply that would allow the information to be withheld. Also, I have attached as Exhibits A – C, the specific information requested labelled to indicate which exceptions apply to which parts of the copy.

### **I. Brief in Support of Request to Withhold Information**

The City contends that part or all of the information requested is excepted from public disclosure under applicable law found in Chapter 552, Subchapter C, §552.101 through §552.156 of the Act, including without limitation, §552.101 – Confidential Information; §552.103 - Litigation or Settlement Negotiations; §552.107 – Certain Legal Matters; and §552.111 – Agency Memoranda.

#### **A. List of Complaints made against and/or about city administrator.**

The documents responsive to the request for “a list of the complaints filed against the village administrator” are attached hereto as Exhibit A. These documents consist of email correspondence from me, in my capacity as Assistant City Attorney concerning the complaints against the Administrator. These documents constitute attorney work product because it was part of the process of conducting the investigation and also are privileged communication intended to provide legal advice to the Mayor.

1. **Section 552.111 of the Act.** The City contends that the documents in Exhibit A are excepted from disclosure pursuant to Section 552.111 of the Act – Agency Memoranda. Section 552.111 of the Act excepts from required public disclosure:

An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency...

This includes both the deliberative process privilege and the work product privilege. The deliberative process privilege protects from disclosure intraagency communications consisting of advice, opinion, or recommendations on policymaking matters of the governmental body at issue. The purpose of this section is to encourage frank and open discussion among City staff members and legal representatives.

The documents attached hereto as Exhibit A constitute correspondence with the Mayor about the complaints, advice about releasing them to the employee that was the subject of the complaints, as well as the accompanying results of that advice in communication to the Administrator. The advice to the Mayor should be excepted in its entirety and the City also contends that the other correspondence representing the action taken on that advice which would reveal the advice, should also be excepted from disclosure as intra-agency communications. The list and the correspondence containing them are part of the file and investigation by this law firm regarding the contract of the Village Administrator. The case is currently in the status that the Board of Aldermen have voted to invoke unilateral severance of the Village Administrator’s contract, however, until certain associated payments are made and documentation signed and completed, the matter is still considered an open matter and the documents at issue form a part of the analysis. Also, the advice given is of the nature of general advice concerning employee investigations and so should remain

confidential. Accordingly, the Village asserts that the documents contained in Exhibit A are confidential intraagency communications and as such are excepted from disclosure.

**2. Section 552.107 of the Act.** In addition, the City contends that the correspondence with the Mayor contained in Exhibit A is excepted from disclosure pursuant to Tex. Gov't Code § 552.107 – Certain Legal Matters.

Under Section 552.107 of the Act, information is excepted from required public disclosure if it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct. The Texas Supreme Court has held the Texas Rules of Evidence are “other law” that make information expressly confidential under Section 552.101 of the Act. This relates to and protects information within the attorney-client privilege. To prove the privilege applies, it must be shown that

1. the information constitutes or documents a communication;
2. the communication was made for the purpose of facilitating the rendition of professional legal services;
3. the communication was between or among clients, client representatives, lawyers, and lawyer representatives;
4. the communication was confidential, meaning not intended to be disclosed to third persons other than those to whom the 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; and
5. the communication remained confidential.

The email to the Mayor included in Exhibit A, was clearly written communication made for the purpose of rendering professional legal services, was between the client representative (the Mayor) and myself, the Assistant City Attorney and was confidential – not intended to be disclosed except in the rendition of legal services and has remained confidential. Therefore, the City requests that it be allowed to withhold the document from disclosure.

**B. List of Persons Interviewed by Attorney During Investigation, Final Recommendation of Attorney, and Summary of Recommendation.**

The documents contained in Exhibit B consist of communications from myself in my capacity as Assistant City Attorney to another attorney in the firm who was part of conducting the investigation; the Legal Opinion resulting from the investigation prepared by an attorney in our firm; a supplement to that Legal Opinion and finally a Summary of the investigation in the form of a Memorandum from me to the Mayor of the City.

The City contends that all of the above documents are excepted from disclosure pursuant to Sections 552.107 and 552.111 of the Act

- 1. The communication from myself to another attorney in the Bojorquez firm.**

a. **Section 552.111 of the Act.** Incorporating by reference the authorities set forth above in paragraph A-1, the email in question is excepted from disclosure pursuant to Section 552.111 of the Act because it is clearly information that would not be available to a party in litigation with the agency, includes both the deliberative process privilege and the work product privilege. The deliberative process privilege protects from disclosure intraagency communications consisting of advice, opinion, or recommendations on policymaking matters of the governmental body at issue. The purpose of this section is to encourage frank and open discussion amongst legal staff members. The communication also consists of discussions about the persons to interview, methods of interviewing and possible information to be obtained. It therefore encompasses attorney work product privilege.

b. **Section 552.107 of the Act.** Incorporating by reference the authorities set forth above in paragraph A-2, the email in question is excepted from disclosure under Section 552.107 because it is 1) written communication; 2) made for the purpose of rendering legal services; 3) was communication among lawyers for the City; 4) was confidential and not intended to be disclosed to third parties; and 5) has in fact remained confidential. The information has only been disclosed to party representatives, including the Mayor, the City Secretary Christina Lee and the attorneys in the communication.

## 2. **The Legal Opinion of Assistant City Attorney Laura Mueller, Supplemental Legal Opinion and Summary Memorandum by Assistant City Attorney Linda Sjogren.**

The City contends that the Legal Opinion and Supplemental Opinion prepared by Laura Mueller contained in Exhibit B, concerning the investigation into the Village Administrator as well as the Summary Memorandum of such Opinions are excepted from disclosure pursuant to Section 552.107 and 552.111 of the Act.

### a. **Section 552.107 of the Act.**

Information is excepted from the requirements of Section 552.021 if it is information that the Attorney General or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct. The attorney-client privilege is found in Texas Rule of Evidence 503.

In the instant case an Internal Inquiry into allegations of misconduct by the Village of Salado Administrator was conducted by an attorney selected by City Attorney Alan Bojorquez. The attorney was selected due to demonstrated abilities as a lawyer, and ample experience specifically in Municipal Law. The attorney's legal training and experience influenced the methodology and content of the report, which reflected professional judgment as a lawyer. After investigation, a Legal Opinion based on Inquiry Report captioned, "CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGE" (attached) was tendered to City Attorney Bojorquez. The City Attorney commissioned the inquiry to inform him and assist him in undertaking his duties to the City in this particular instance (i.e., to facilitate the rendition of professional legal services). The City Attorney specifically expressed to the investigating attorney that the report would be used by him to confer with the Mayor about the subject matter, and to advise the Village Board of Aldermen. He

explicitly advised that it was his objective to treat the report as confidential and subject to the Attorney-Client Privilege. The information gathered to prepare the report and the report to Mr. Bojorquez were always explicitly intended to be confidential and privileged internal communications. The Legal Opinion itself has never been released to the City elected officials, but Assistant City Attorney Linda Sjogren did provide them with an executive summary in the form of a Memorandum, also included in Exhibit B. The Memo was also clearly captioned as "Confidential/Privileged Attorney-Client Communication." That summary memo was transmitted via electronic mail, which communication was also specifically stated to be confidential and not to be further distributed. Neither the electronic communications between and among the City Attorney, the author of the Legal Opinion Inquiry Report and Supplement, and the author of the Summary Memorandum, City elected officials, and the City administrative staff, nor any of the three documents themselves have ever been divulged outside of that circle of persons.

Therefore, the information remains confidential and privileged pursuant to Texas Government Code Section 552.107 because: 1) the information constitutes or documents a communication; 2) the communication was made for the purpose of facilitating the rendition of professional legal services; 3) the communication was between or among clients, client representatives, lawyers, and lawyer representatives; 4) the communication was confidential, meaning not intended to be disclosed to third persons other than those to whom the 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; and 5) the communication has in fact remained confidential.

**b. Section 552.111 of the Act.**

An intraagency memorandum or letter that would not be available by law to a party in litigation with the agency is excepted from the requirements of Section 552.021. The Attorney General has interpreted section 552.111 to incorporate both the deliberative process privilege and the work product privilege. Open Records Decision Nos. 647 at 5-6 (1996), 615 at 5 (1993); see *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000). The relevant communications and information were created in the context of potential litigation. The subject of the internal investigation had in fact made threats of litigation and hired legal counsel prior to the investigation. A reasonable person would have concluded from the totality of the circumstances that there was a substantial chance that litigation would ensue on the basis of the allegations that were the subject of the inquiry.

Therefore the City contends that the information contained in Exhibit B is excepted from disclosure pursuant to Section 552.111 of the Act.

**C. Communications Between the Village and Its Insurers Regarding the Investigation.**

The City Contends that all of the responsive documents to this portion of the Request (attached hereto as Exhibit C) are communications from the City's lawyers to its insurers for the purpose of providing legal advice and in the course of potential litigation. Therefore the City contends that the information is excepted from disclosure pursuant to Sections 552.107 and 552.111 of the Act.

a. **Section 552.107 of the Act.**

Incorporating by reference the statements and authorities set forth above in paragraph 2(a), the City contends the communications between myself in my capacity as Assistant City Attorney with various representatives of the Texas Municipal League Intergovernmental Risk Pool (“TML-IRP”) were conducted with the intention of providing legal services to the client, the Village of Salado in connection with the investigation and possible contract action regarding the Village Administrator. Once Unilateral Severance had been invoked the discussions concerned various legal matters connected to settlement and release of claims. The communications were always explicitly intended to be confidential and privileged communications with representatives of the client (its insurers).

The communications have never been released to anyone outside of the following persons who are all clients, attorneys or client representatives:

- TML-IRP: M. Vela, claims staff; Holly Whatley, Senior claims specialist; Cindy Arce-Shaddix, Deputy Claims Manager; Mike Rains, Director Claims Services; David Regan, Director of Legal Services; Susie Green, Associate Director Legal Services,
- Bojorquez Law firm: myself, Linda Sjogren; Attorney Laura Mueller; Attorney Dottie Palumbo
- Village of Salado: Mayor Skip Blancett

Therefore, the information remains confidential and privileged pursuant to Section 552.107 of the Act because: 1) the information constitutes or documents a communication; 2) the communication was made for the purpose of facilitating the rendition of professional legal services; 3) the communication was between or among clients, client representatives, lawyers, and lawyer representatives; 4) the communication was confidential, meaning not intended to be disclosed to third persons other than those to whom the 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; and 5) the communication has in fact remained confidential.

b. **Section 552.111 of the Act.**

Incorporating by reference the statements and authorities set forth above in Paragraph 2(b), the City contends that the relevant communications and information were created in the context of potential litigation and were in furtherance of settlement negotiations or avoidance of potential litigation. A reasonable person would have concluded from the totality of the circumstances that there was a substantial chance that litigation would ensue on the basis of the allegations that were the subject of the inquiry.

Therefore the City contends that the information contained in Exhibit C is excepted from disclosure pursuant to Section 552.111 of the Act.

**D. Invoice line items regarding investigation.**

The Requestor has agreed in writing to accept redacted copies of the applicable invoice items to exclude attorney client privileged information and to submit a new request for any items that were not in existence as of the time of this request so the City withdraws its request for an opinion as to those documents.

## II. CONCLUSION

Based on the statements and authorities contained herein, I respectfully request an opinion that the City can withhold the requested information for the reasons stated.

Thank you for your consideration of this matter. Please let me know if you need additional information.

Respectfully submitted,



Linda L. Sjogren  
Assistant City Attorney,  
Village of Salado

cc: Requestor, Tim Fleischer w/o enclosures  
Via email: [news@saladovillagevoice.com](mailto:news@saladovillagevoice.com)

Christina Lee, Village Secretary

encl.