



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 27, 2015

Ms. Cynthia Trevino
Counsel for the City of Plano
Denton, Navarro, Rocha, Bernal, Hyde & Zech, P.C
2517 North Main Avenue
San Antonio, Texas 78212-4685

OR2015-05908

Dear Ms. Trevino:

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# 559569.

The City of Plano (the "city") received a request for information showing city "staff has thoroughly vetted" a specified proposed ordinance during a specified time period. You state the city has released some of the requested information. You claim some of the submitted information is excepted from disclosure under sections 552.106, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we address the requestor's assertion that the city did not meet its procedural obligations under section 552.301 of the Government Code with respect to his December 11, 2014, request. Section 552.301 prescribes the procedures a governmental body must follow in asking this office to determine whether information is excepted from public disclosure under the Act. *See id.* § 552.301(a). Pursuant to section 552.301(b), within ten business days of receipt of the request, the governmental body must ask for a decision from this office and state which exceptions apply to the requested information. *Id.* § 552.301(b). The requestor asserts that the city did not comply with the requirement that a governmental body must request a decision from this office within ten business days from

receipt of a request. You state, and we agree, the city received the present request for information on December 8, 2014. We note the city sought clarification of this request on December 22, 2014, and received clarification from the requestor on January 20, 2015. *See id.* § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified). Therefore, the tenth business day after the receipt of the clarified request was February 3, 2015. The envelope in which the city submitted its request for a ruling is post-marked February 2, 2015. Therefore, we conclude the city complied with the requirement to seek a decision from this office to withhold the requested information within ten business days after receipt of the requestor's clarification. However, the requestor asserts the city must release the information responsive to the December 8, 2014, request because the city failed to respond to a second request, dated December 11, 2014. On December 11, 2014, the requestor sought the same information responsive to the December 8, 2014, request. Thus, because the second request is for the same information as the information the requestor sought in his first request and the city complied with section 552.301 when it sought a decision for the first request, the Act does not require the city to submit another request for a decision to withhold the information responsive to the second request. Consequently, the Act does not require the city to release the information due to any procedural violation of the Act.

Section 552.107(1) of the Government Code protects information subject to the attorney-client privilege. Gov't Code § 552.107(1). When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body 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. 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. *In re Tex. 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 a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies to only communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies to only a confidential communication, *id.*, meaning it was "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.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) 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).

You state the information you have marked constitutes communications between city attorneys and city employees that were made for the purpose of facilitating the rendition of professional legal services to the city. The requestor contends the city has waived the attorney-client privilege because employees of the city communicated the content of portions of the submitted information to non-privileged parties. Whether the city waived the attorney-client privilege is a question of fact. This office is unable to resolve disputes of fact in the open records ruling process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Accordingly, we must rely upon the facts alleged to us by the governmental body requesting our opinion. *See* ORD 552 at 4. You state the communications you have marked were intended to be confidential and have remained confidential. Based on your representations and our review, we find the city may withhold the information you have marked under section 552.107(1) of the Government Code.¹

We note some of the remaining information consists of personal e-mail addresses subject to section 552.137 of the Government Code.² Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). The e-mail addresses at issue are not a type specifically excluded by section 552.137(c). Accordingly, the city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure.

In summary, the city may withhold the information you have marked under section 552.107(1) of the Government Code. The city must withhold the e-mail addresses

¹As our ruling on this information is dispositive, we need not address your remaining arguments against its disclosure.

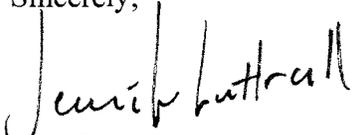
²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure. The remaining information must be released.

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, 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/akg

Ref: ID# 559569

Enc. Submitted documents

c: Requestor
(w/o enclosures)