



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 16, 2015

Ms. Sandra Kim
Assistant City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-8828

OR2015-07435

Dear Ms. Kim:

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# 560290.

The City of Austin and the Austin Police Department (collectively, the "city") received eleven requests for various specified written and electronic communications sent by specified individuals during specified time periods. You state you will release some information to the requestor. You claim some of the submitted information is excepted from disclosure under section 552.107 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹

Initially, we note you have marked portions of some of the submitted e-mail strings as not responsive to the present request for information. Upon review, however, we find a portion of these e-mails, while not separately responsive to the request, are located within responsive e-mail strings and, thus, are responsive to the request for information. As you raise no exceptions to disclosure for this information, it must be released. However, we note the information we have marked is not responsive to the instant request for information because

¹We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

the information does not relate to the specified individuals in the request. This ruling does not address the public availability of non-responsive information, and the city is not required to release non-responsive information in response to this request. We will address your arguments against disclosure of the remaining information.

Next, you inform us some of the requested information was the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2014-12924 (2014) and 2014-19124 (2014). In these rulings, we determined, in part, the city may withhold the information at issue under section 552.107 of the Government Code. We have no indication the law, facts, or circumstances on which the prior rulings were based have changed. Accordingly, the city may continue to rely on Open Records Letter Nos. 2014-12924 and 2014-19124 as previous determinations and withhold the identical information in accordance with those rulings. *See* Open Records Decision No. 673 at 6-7 (2001) (discussing criteria for first type of previous determination). We will address the city's arguments against release of the responsive information that is not encompassed by Open Records Letter Nos. 2014-12924 and 2014-19124.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. 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 "to facilitate 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 only to 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 only to a *confidential* communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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 claim the information you have marked is protected by section 552.107(1) of the Government Code. You state the information at issue consists of communications between and among attorneys for the city and various city employees within the city's Law Department, Police Department, and Human Resources Department. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the city, and the confidentiality of these communications has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information you have marked. Thus, the city may withhold the information you have marked under section 552.107(1) of the Government Code.

We note some of the remaining information may be subject to section 552.117(a)(2) of the Government Code.² Section 552.117(a)(2) excepts from public disclosure the home addresses, home telephone numbers, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with section 552.024 of the Government Code or section 552.1175 of the Government Code.³ Gov't Code § 552.117(a)(2). We note section 552.117 also encompasses a personal pager number, unless the pager service is paid for by a governmental body. *See Open Records Decision No. 506 at 5-7 (1988)* (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Accordingly, the city must withhold the pager number we marked under section 552.117(a)(2) of the Government Code if the service is not paid for by a governmental body.

In summary, the city may continue to rely on Open Records Letter Nos. 2014-12924 and 2014-19124 as previous determinations and withhold the identical information in accordance with those rulings. The city may withhold the information you have marked under section 552.107(1) of the Government Code. The city must withhold the pager number we marked under section 552.117(a)(2) of the Government Code if the service is not paid for by a governmental body. The remaining responsive information must be released.

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).*

³"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

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,



Rustam Abedinzadeh
Assistant Attorney General
Open Records Division

RA/dls

Ref: ID# 560290

Enc. Submitted documents

c: Requestor
(w/o enclosures)