



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 22, 2015

Mr. Grant Jordan
Assistant City Attorney
Office of the City Attorney
City of Fort Worth
1000 Throckmorton Street, Third Floor
Fort Worth, Texas 76102

OR2015-07746

Dear Mr. Jordan:

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# 560586 (Fort Worth PIR No. W040042).

The City of Fort Worth (the "city") received a request for information relating to the city's and the city's police department's relationship with Taser International ("Taser") and its Evidence.com unit, including information regarding the purchase of body cameras. The city states it is releasing some of the requested information. The city claims the submitted information is excepted from disclosure under section 552.107 of the Government Code. We have considered the exception the city claims and reviewed the submitted information, a portion of which consists of a representative sample.¹

Initially, the city contends some of the submitted information, which it has marked, is not responsive to the request because it does not pertain to "body cameras" or "Evidence.com." We note a governmental body has a duty to make a good-faith effort to relate a request for information to information the governmental body holds. Open Records Decision No. 561 (1990). The information at issue consists of communications between the Chief of Police and a representative of Taser. Upon review of the request for information, we find the city has made a good-faith effort to relate the request for information to the information

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 city maintains. Therefore, we address the claimed exceptions with respect to this information.

The city states some of the submitted information, which it has marked, was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2015-03813 (2015). In Open Records Letter No. 2015-03813, we determined the city (1) may generally withhold certain information under section 552.107(1) of the Government Code; however, to the extent the non-privileged e-mails at issue exist separate and apart from the otherwise privileged e-mail strings in which they appear, the city must release those non-privileged e-mails; (2) may withhold certain information under section 552.111 of the Government Code; and (3) must release the remaining responsive information. We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Accordingly, the city must continue to rely on Open Records Letter No. 2015-03813 as a previous determination and withhold or release the identical information in accordance with that ruling. *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 submitted information that is not encompassed by Open Records Letter No. 2015-03813.

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)(A), (B), (C), (D), (E). 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).

The city states the submitted information consists of communications involving city attorneys and other employees and officials. The city states the communications were made for the purpose of facilitating the rendition of professional legal services to the city and these communications have remained confidential. The city also informs us some of the communications at issue involve representatives of Taser. The city states it shares a common legal interest with Taser with respect to the information at issue. Upon review, we find the city has demonstrated the applicability of the attorney-client privilege to the information we have marked. Thus, the city may generally withhold the information we have marked under section 552.107(1) of the Government Code. However, we note the e-mail string we have marked includes e-mails received from and sent to a representative of Taser. During the time these communications were made, the city and Taser were engaged in contract negotiations; thus, their interests were adverse. Accordingly, at the time the communications at issue were made, the parties did not share a common interest that would allow the attorney-client privilege to apply. *See TEX. R. EVID. 503(b)(1)(c); In re XL Speciality Ins. Co.*, 373 S.W.3d 46, 51 (Tex. 2012) (discussing common interest rule under attorney-client privilege). Furthermore, if the e-mails received from or sent to Taser are removed from the e-mail string and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails, which we have marked, are maintained by the city separate and apart from the otherwise privileged e-mail string in which they appear, then the city may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code. We also note the city and Taser were engaged in negotiations during the time the remaining communications were made. Accordingly, at the time the remaining communications at issue were made, the parties did not share a common interest that would allow the attorney-client privilege to apply. *See TEX. R. EVID. 503(b)(1)(c); In re XL Speciality Ins. Co.*, 373 S.W.3d at 51. Thus, we find the city has not demonstrated the remaining information consists of privileged attorney-client communications for the purposes of section 552.107(1). Therefore, the city may not withhold the remaining information under section 552.107(1).

We note some of the remaining information may be subject to section 552.117(a)(1) of the Government Code, which excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code.² *See Gov't Code* § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See Open Records Decision No. 530 at 5* (1989). Thus,

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

information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the individual whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code. Conversely, to the extent the individual whose information is at issue did not timely request confidentiality under section 552.024, the city may not withhold the information under section 552.117(a)(1).

In summary, the city must continue to rely on Open Records Letter No. 2015-03813 as a previous determination and withhold or release the identical information in accordance with that ruling. The city may generally withhold the information we have marked under section 552.107(1) of the Government Code. However, to the extent the non-privileged e-mails we have marked exist separate and apart from the otherwise privileged e-mail string in which they appear, the city must release those non-privileged e-mails. The city must withhold the information we have marked under section 552.117(a)(1) of the Government Code, to the extent the individual whose information is at issue timely requested confidentiality under section 552.024 of the Government Code. The city must release the remaining 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, 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,



David L. Wheelus
Assistant Attorney General
Open Records Division

DLW/bhf

Ref: ID# 560586

Enc. Submitted documents

c: Requestor
(w/o enclosures)