



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

June 23, 2016

Ms. Cary Grace  
Assistant City Attorney  
Law Department  
City of Austin  
P.O. Box 1088  
Austin, Texas 78767-8828

OR2016-14310

Dear Ms. Grace:

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# 615736.

The City of Austin and the Austin Police Department (collectively, the "city") received three requests from the same requestor for (1) nine categories of information pertaining to a specified arrest; a specified case number; communications pertaining to the requestor; communications pertaining to a specific request for information by the requestor; all communications sent or received from a specific law firm; all records responsive to all of the requestor's previous requests for information to the city which have been withheld from disclosure, and (2) all archives and emails sent from the social media accounts of a named individual. The city states it will release some information. The city states some information does not exist.<sup>1</sup> The city claims some of the submitted information is excepted from disclosure under sections 552.107 and 552.108 of the Government Code. We have

---

<sup>1</sup>The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

considered the exceptions the city claims and reviewed the submitted representative samples of information.<sup>2</sup>

Initially, the city states some of the responsive information was the subject of several requests for information in response to which this office issued Open Records Letter Nos. 2013-20344 (2013), 2014-12924 (2014), 2014-10449 (2014), 2014-13264 (2014), 2014-13892 (2014), 2014-13786 (2014), 2014-14703 (2014), 2014-13764 (2014), 2014-19124 (2014), 2014-21553 (2014), 2014-21920 (2014), 2014-22425 (2014), 2014-23050 (2014), 2014-23125 (2014), 2015-00033 (2015), 2015-00246 (2015), 2015-00593 (2015), 2015-02284 (2015), 2015-02427 (2015), 2015-02516 (2015), 2015-02600 (2015), 2015-02682 (2015), 2015-02842 (2015), 2015-07669 (2015), and 2016-00394 (2016). As we have no indication the law, facts, and circumstances on which these prior rulings were based has changed, the city must continue to rely on these prior rulings as previous determinations and withhold or release the identical information in accordance with those rulings. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we note the city has marked some of the submitted information as non-responsive to the instant requests. This ruling does not address the public availability of non-responsive information, and the city is not required to release such information in response to these requests.

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

---

<sup>2</sup>We 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.

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 information it has marked consists of confidential communications involving city attorneys, legal staff, and outside counsel. The city states these communications were made in furtherance of the rendition of professional legal services to the city. The city states the confidentiality of these communications has been maintained. Based on these representations and our review, we find the city has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the city may withhold the information it has marked under section 552.107(1) of the Government Code.

Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). The city states the remaining responsive information relates to a pending criminal prosecution and release of the information would interfere with that prosecution. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Based on these representations and our review, we conclude section 552.108(a)(1) of the Government Code is applicable.

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov’t Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-88; Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Thus, with the exception of the basic front-page offense and arrest

information, the city may withhold the remaining responsive information under section 552.108(a)(1) of the Government Code.

In summary, the city must continue to rely on Open Records Letter Nos. 2013-20344, 2014-12924, 2014-10449, 2014-13264, 2014-13892, 2014-13786, 2014-14703, 2014-13764, 2014-19124, 2014-21553, 2014-21920, 2014-22425, 2014-23050, 2014-23125, 2015-00033, 2015-00246, 2015-00593, 2015-02284, 2015-02427, 2015-02516, 2015-02600, 2015-02682, 2015-02842, 2015-07669, and 2016-00394 as previous determinations and withhold or release the identical information in accordance with those rulings. The city may withhold the information it has marked under section 552.107(1) of the Government Code. With the exception of the basic front-page offense and arrest information, which must be released, the city may withhold the remaining responsive information under section 552.108(a)(1) of the Government Code.

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,



Rahat Huq  
Assistant Attorney General  
Open Records Division

RSH/som

Ref: ID# 615736

Enc. Submitted documents

c: Requestor  
(w/o enclosures)