



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

April 7, 2015

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

OR2015-06599

Dear Ms. Lock:

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# 558958.

The City of Plano (the "city"), which you represent, received a request for any and all communications between any city council member, mayor, or employee and anyone not employed by the city about a specified ordinance for the past five years. You state you have released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 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 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note some of the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2015-05908 (2015). In Open Records Letter No. 2015-05908, we determined the city (1) may withhold information under section 552.107 of the Government Code; (2) must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure; and (3) must release the remaining 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. 2015-05908 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. 2015-05908.

Next, we address the requestor's contention the city did not comply with the procedural requirements of the Act. Section 552.301 of the Government Code 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* Gov't Code § 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). Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). The requestor informs our office he submitted two requests for information to the city on December 11, 2014 and contends the city did not respond to the second request for information. Thus, the requestor asserts that the city did not comply with the requirement that a governmental body must request a decision from this office within the ten- and fifteen-business-day deadlines of section 552.301 of the Government Code. The city states, and submits documentation demonstrating, it received the instant request for information on December 11, 2014, in response to which the city requested clarification on December 19, 2014. The city states it received clarification from the requestor on January 13, 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). The city informs us it was closed on January 19, 2015. This office does not count the date the request was received or the date the governmental body was closed as business days for the purpose of calculating a governmental body's deadlines under the Act. The city timely submitted a request for a ruling under section 552.301(b) in an envelope postmarked January 28, 2015, and information requested by section 552.301(e) in an envelope postmarked February 4, 2015. *See* Gov't Code § 552.308(a) (prescribing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Therefore, we conclude the city complied with the requirement to seek a decision from this office to withhold the requested information within the ten- and fifteen-business-day deadlines after receipt of the requestor's clarification. However, the requestor asserts the city must release the information responsive to the December 11, 2014, request because the

city failed to respond to a second request, dated on the same day. On December 11, 2014, the requestor submitted two requests for the same responsive information. 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 that comes within the attorney-client privilege. *See id.* § 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 “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 information it has marked consists of communications involving city attorneys and specified employees in their capacities as clients. The city states the

communications 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 the city communicated with business partners and other third parties, which the requestor asserts are not privileged parties. Whether or not 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. The city states the communications it has submitted for our review were not intended to be disclosed and they have remained confidential. We note none of the submitted communications consist of communications with non-privileged parties. Upon review, we find the city has demonstrated the applicability of the attorney-client privilege to the remaining information, which we have marked. Thus, the city may withhold the remaining information under section 552.107(1) of the Government Code.<sup>1</sup>

In summary, the city must continue to rely on Open Records Letter No. 2015-05908 as a previous determination and withhold or release the information in accordance with that ruling. The city may withhold the remaining information under section 552.107(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,



Rustam Abedinzadeh  
Assistant Attorney General  
Open Records Division

RA/dls

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<sup>1</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

Ref: ID# 558958

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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