



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 21, 2016

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

OR2016-28238

Dear Ms. Nicholson:

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# 639804 (PIR# 29724).

The City of Austin (the "city") received a request for all e-mails sent or received by four named employees during a specified time period. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we must address the requestor's claim the city failed to comply with the procedural requirements a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. *See id.* § 552.301. Pursuant to section 552.301 (b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See id.* § 552.301(b). Further, pursuant to section 552.301(e), a governmental body must submit to

¹We assume that 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 that those records contain substantially different types of information than that submitted to this office.

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 city states, and the requestor agrees, the city received the request for information after business hours on September 28, 2016. Therefore, for purposes of section 552.301, the city received the request for information on September 29, 2016. We note the city sought clarification of the request on September 29, 2016, and received clarification of the request on the same day. *See id.* § 552.222 (providing 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) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). Thus, September 29, 2016, is the date on which the city is deemed to have received the request. This office does not count the date the request was received or holidays for the purpose of calculating a governmental body's deadlines under the Act. Accordingly, the city's ten- and fifteen-business-day deadlines were October 13, 2016 and October 20, 2016, respectively. The envelope containing the information required by section 552.301(b) is meter-marked October 13, 2016, and the envelope containing the information required by section 552.301(e) is meter-marked October 20, 2016. *See id.* § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Therefore, we find the city complied with the procedural requirements of section 552.301 of the Government Code in requesting this decision.

The requestor further asserts some of the information now at issue was responsive to the requestor's previous requests for information regarding a temporary replacement for a specified department director. Thus, the requestor argues the city violated section 552.301 by failing to either release this information in response to the earlier requests or timely seeking a decision from this office. In support of his arguments, the requestor provided this office with documents received from the city in response to the previous requests. Upon review of this information from the requestor, we note this information was responsive to the previous requests. We also note the information provided to this office by the city in response to the requestor's current request is not responsive to the previous requests, but is responsive to the requestor's current request. A governmental body must make a good-faith effort to relate a request to information held by the governmental body. *See Open Records Decision No. 561 at 8 (1990)*. Further, 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, where an issue cannot be resolved as a matter of law, we must rely upon the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernible from the documents submitted for our inspection. *See ORD 552 at 4*. Therefore, based on the city's representations and our review of the

information provided to this office by both the requestor and the city, we are unable to conclude the city failed to comply with section 552.301 of the Government Code with respect to the requestor's earlier requests, and we will consider the city's arguments against disclosure of the submitted information.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses the informer's privilege, which has long been recognized by Texas courts. *Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided the subject of the information does not already know the informer's identity. See Open Records Decision No. 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 1-2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. See Open Records Decision Nos. 582 at 2 (1990), 515 at 4 (1988). The privilege excepts the informer's statement only to the extent necessary to protect that informer's identity. Open Records Decision No. 549 at 5 (1990).

You state the information you have marked identifies a complainant who reported possible violations of the city code. You explain that a violation of the relevant section of the city code is punishable by fine. You also state the department to which the complaint was made has the authority to enforce the applicable section of the city code. We have no indication the subject of the complaint already knows the identity of the informer. Based upon your representations and our review, we conclude the city has demonstrated the applicability of the common-law informer's privilege to the information at issue. Therefore, the city may withhold the information you marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege.

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).

You state the information you marked consists of communications between city attorneys and city employees. You state the information at issue was communicated for the purpose of facilitating the rendition of professional legal services to the city. You further state the confidentiality of the information at issue 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 at issue. Thus, the city may generally withhold the information you marked under section 552.107(1) of the Government Code. We note, however, the information at issue includes an e-mail received from a party with whom you have not demonstrated the city shares a privileged relationship. Furthermore, if the e-mail received from the non-privileged party is removed from the e-mail string and stands alone, it is responsive to the request for information. Therefore, if the non-privileged e-mail, which we have marked, is maintained by the city separate and apart from the otherwise privileged e-mail string in which it appears, then the city may not withhold this non-privileged e-mail under section 552.107(1) of the Government Code.

We note a portion of the non-privileged e-mail is subject to section 552.137 of the Government Code.² Section 552.137 of the Government Code 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 id.*

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

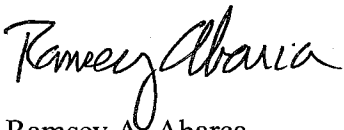
§ 552.137(a)-(c). The e-mail address at issue is not of a type excluded by subsection (c). Therefore, the city must withhold the personal e-mail address we marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.

In summary, the city may withhold the information you have marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. The city may generally withhold the information you marked under section 552.107(1) of the Government Code. However, if the non-privileged e-mail, which we marked, is maintained by the city separate and apart from the otherwise privileged e-mail string in which it appears, then the city may not withhold this information under section 552.107(1) of the Government Code. To the extent the non-privileged e-mail exists separate and apart from the otherwise privileged e-mail string in which it appears, the city must withhold the personal e-mail address we marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure. 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,



Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/bw

Ref: ID# 639804

Enc. Submitted documents

c: Requestor
(w/o enclosures)