



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 10, 2017

Mr. Ryan Mitchell
Assistant City Attorney
City of Arlington
P. O. Box 90231
Arlington, Texas 76004-3231

OR2017-07548

Dear Mr. Mitchell:

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# 652518 (ORR No. 33940).

The City of Arlington (the "city") received a request for the entire internal affairs investigation file concerning the requestor, and all e-mails between named individuals associated with the investigation. You state you have released some information. 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.

Initially, we note a portion of the submitted information, which we marked, is not responsive to the instant request because the requestor did not ask for this specific topic of information. 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.

Next, we must address the city's procedural obligations under section 552.301 of the Government Code when requesting a decision from this office under the Act. Pursuant to section 552.301(b), within ten business days after receiving a written request the governmental body must request a ruling from this office and state the exceptions to disclosure that apply. Gov't Code § 552.301(b). You state the city received the request for information on January 13, 2017. The city states it was closed on January 16, 2017 in observance of Martin Luther King, Jr. Day. This office does not count the date the request was received or holidays as business days for the purpose of calculating a governmental

body's deadlines under the Act. Accordingly, the city's ten-business-day deadline was January 30, 2017. Although you timely raised section 552.107 of the Government Code, you did not raise section 552.111 of the Government Code until after the ten-business-day deadline passed. Consequently, we find the city failed to comply with the procedural requirements of section 552.301 with respect to its claims under section 552.111.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ). By failing to timely raise section 552.111 of the Government Code, we find the city has failed to establish a compelling reason to address its claims under this section. Accordingly, the city may not withhold any portion of the submitted information under section 552.111 of the Government Code. However, we will consider the city's timely raised claim under section 552.107 of the Government Code for the submitted information.

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 claim the information you indicated is protected by section 552.107(1) of the Government Code. You state the information at issue consists of communications involving the city's attorneys and city staff. You indicate the communications were made for the purpose of facilitating the rendition of professional legal services to the city and that these communications have remained confidential. 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 e-mails we have marked under section 552.107(1) of the Government Code. However, we note some of these otherwise privileged e-mail strings include an e-mail or attachment received from or sent to a non-privileged party. Furthermore, if the e-mail and attachment received from or sent to the non-privileged party are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if the non-privileged e-mail or attachment, which we marked, are maintained by the city separate and apart from the otherwise privileged e-mail strings in which they appear, then the city may not withhold the non-privileged e-mail or attachment under section 552.107(1) of the Government Code. As no further exceptions to disclosure have been raised, the city must release the remaining responsive 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,



D. Michelle Case
Assistant Attorney General
Open Records Division

DMC/eb

Ref: ID# 652518

Enc. Submitted documents

c: Requestor
(w/o enclosures)