



KEN PAXTON

ATTORNEY GENERAL OF TEXAS

November 30, 2017

Ms. Lola Dada-Olley
Assistant City Attorney
City of Plano
P.O. Box 860358
Plano, Texas 75086-0358

OR2017-27290

Dear Ms. Dada -Olley:

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# 686012 (File 17-073).

The City of Plano (the "city") received a request for information pertaining to a specified investigation.¹ You state you will release some information after the payment of a cost estimate. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

¹We note the city sought and received multiple clarifications of the information requested. *See* Gov't Code § 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 when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

²We note, and you acknowledge, the city failed to comply with the procedural requirements of section 552.301 of the Government Code in requesting a decision from this office. *See* Gov't Code § 552.301(b). Nevertheless, section 552.101 of the Government Code can provide a compelling reason to overcome the presumption of openness caused by a failure to comply with section 552.301. *See id.* §§ 552.007, .302. Furthermore, the attorney-client privilege is also a compelling reason to overcome the presumption of openness. *See id.* § 552.302; *see also* *Paxton v. City of Dallas*, 509 S.W.3d 247 (Tex. 2017). Thus, we will consider the applicability of sections 552.101 and 552.107(1) of the Government Code to the submitted information. *See id.* § 552.302

³We 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.

Section 552.107(1) protects information that comes 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. *Tex. Att’y Gen. ORD-676 (2002)* at 6–7. First, a governmental body must demonstrate that “the information constitutes or documents a communication.” *Id.* at 7. Second, the communication must have been made for the purpose of facilitating “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, such as acting as an administrator, investigator, or manager. *See In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding), *mand. denied*, 12 S.W.3d 807 (Tex. 2000) (stating that the attorney-client “privilege does not apply if the attorney is acting in a capacity other than that of an attorney”). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *TEX. R. EVID. 503(b)(1)*. 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, meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made to further the rendition of professional legal services to the client [or those] 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 [mand. denied]). 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) (orig. proceeding) (stating that the privilege extends to an “entire communication, including facts contained therein”).

You state the submitted information constitutes or reveals communications between city attorneys and personnel made for the purpose of providing professional legal services to the city. You explain that the information includes e-mails and notes between city attorneys and personnel for the purpose of obtaining legal advice from city attorneys. You also state the submitted information was intended to be, and has remained, confidential. Based on your representations and our review, we conclude that the submitted information is subject to the attorney-client privilege and may generally be withheld under section 552.107 of the Government Code.⁴ We note, however, an otherwise privileged e-mail string includes an

⁴As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

e-mail received from a non-privileged party. Furthermore, if the e-mail received from a non-privileged party is removed from the otherwise privileged e-mail string in which it appears and stands alone, it is responsive to the request for information. Therefore, if the city maintains the non-privileged e-mail, which we marked, separate and apart from the otherwise privileged e-mail string in which it appears, then the non-privileged e-mail is not excepted under section 552.107(1). Thus, we will address your remaining argument for this information.

Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. We note, however, the public generally has a legitimate interest in information relating to public employment and public employees. *See* Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 470 (1987) (public employee’s job performance does not generally constitute employee’s private affairs), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find none of the remaining information is highly intimate or embarrassing and of no legitimate public interest and, thus, none of it may be withheld under section 552.101 of the Government Code on that basis.

In summary, the city may generally withhold the submitted information under section 552.107 of the Government Code; however, if the city maintains the non-privileged e-mail we marked separate and apart from the otherwise privileged e-mail string in which it appears, then the non-privileged e-mail must be released.

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,

A handwritten signature in black ink, appearing to read "Ramsey A. Abarca", with a long, sweeping flourish extending to the right.

Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/gw

Ref: ID# 686012

Enc. Submitted documents

c: Requestor
(w/o enclosures)