



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

May 1, 2019

Ms. Michelle Buendia  
Assistant City Attorney  
City of Dallas  
1400 South Lamar, 6Fl. 6W  
Dallas, Texas 75215

OR2019-11551

Dear Ms. Buendia:

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# 762979 (DPD ORR# D029271-110818).

The Dallas Police Department (the "department") received a request for communications between specified individuals or groups of individuals relating to specified topics and search terms.<sup>1</sup> The department states it will release some information to the requestor. The department claims the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.108, 552.117, 552.1175, and 552.152 of the Government Code. We have considered the exceptions the department claims and reviewed the submitted information.

Initially, we must address the department's obligations under the Act. Section 552.301 of the Government Code prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. *See* Gov't Code § 552.301. Pursuant to section 552.301(b), a governmental body

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<sup>1</sup>The department states, and provides documentation showing, it sought and received clarification 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 that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

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 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 department received the clarified request for information on November 15, 2018. We understand the department was closed on November 22, 2018, and November 23, 2018. This office does not count the date the request was received or holidays for purposes of calculating a governmental body's deadlines under the Act. Accordingly, the department was required to provide the information required by section 552.301(b) by December 3, 2018. Moreover, you were required to provide the information required by section 552.301(e) by December 10, 2018. However, the envelope in which the department provided the information required by sections 552.301(b) and 552.301(e) was postmarked February 25, 2019. *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). Consequently, we conclude the department failed to comply with the requirements of section 552.301.

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). The department claims sections 552.101, 552.107, 552.108, 552.117, 552.1175, and 552.152 of the Government Code for the submitted information. Because sections 552.101, 552.107, 552.117, 552.1175, and 552.152 can provide compelling reasons to overcome the presumption of openness, we will address the department's arguments under these sections for the submitted information. However, we find the department has failed to establish a compelling reason to address its remaining exception.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses section 418.176 of the Government Code, which provides:

- (a) Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:

(1) relates to the staffing requirements of an emergency response provider, including a law enforcement agency, a fire-fighting agency, or an emergency services agency[.]

(2) relates to a tactical plan of the provider; or

(3) consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers, of the provider.

*Id.* § 418.176(a). The fact that information may generally be related to emergency preparedness does not make the information *per se* confidential under section 418.176. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provisions controls scope of its protection). As with any confidentiality statute, a governmental body asserting this section must adequately explain how the responsive information falls within the scope of the provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies). The department states the information it marked “relates to detailed lists of officer telephone numbers, tactical plans, and staffing requirements for the State Fair of Texas.” The department also states this information was “collected and maintained by [the department] for the purpose of properly detecting, responding to, or investigating terrorism or related criminal activity.” Upon review, we conclude the information at issue was collected, assembled, or maintained by or for the department for the purpose of responding to an act of terrorism or related criminal activity and relates to the staffing requirements of an emergency response provider, or relates to a tactical plan maintained by the department. Accordingly, the department must withhold the information it marked under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code.<sup>2</sup>

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov't Code § 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 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

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<sup>2</sup>As our ruling is dispositive, we need not address the department's remaining arguments against disclosure of this information.

professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact 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 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 department states the remaining information consists of communications involving attorneys for the department and department employees in their capacities as clients. The department also states these communications were made in furtherance of the rendition of professional legal services to the department. Further, the department states these communications were intended to be, and have remained, confidential. Based on the department’s representations and our review, we find the department has demonstrated the applicability of the attorney-client privilege to some of the remaining information. Accordingly, with the exception of the information we have marked for release, the department may withhold the remaining information under section 552.107(1) of the Government Code. However, we note the communications we have marked for release are with individuals the department has not demonstrated are privileged parties or consist of communications that are not for the purposes of providing legal services to the department. Therefore, we find the department has not demonstrated this information constitutes privileged attorney-client communications for the purposes of section 552.107. Thus, the department may not withhold the information we have marked for release on that basis.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home address, home telephone number, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code. *See Gov’t Code* § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See Open Records*

Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Accordingly, if the cellular telephone service is not paid for by a governmental body, the department must withhold the cellular telephone numbers we have indicated under section 552.117(a)(2) of the Government Code.

In summary, the department must withhold the information it marked under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code. With the exception of the information we have marked for release, the department may withhold the remaining information under section 552.107(1) of the Government Code. In releasing the information we have marked, if the cellular telephone service is not paid for by a governmental body, the department must withhold the cellular telephone numbers we have indicated under section 552.117(a)(2) 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,



Gerald A. Arismendez  
Assistant Attorney General  
Open Records Division

GAA/mo

Ref: ID# 762979

Enc. Submitted documents

c: Requestor  
(w/o enclosures)