



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

August 12, 2019

Mr. Tad Cleaves  
Counsel for the City of Lago Vista  
Bojorquez Law Firm, PC  
12325 Hymeadow Drive, Suite 2-100  
Austin, Texas 78750

OR2019-22194

Dear Mr. Cleaves:

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# 779462.

The City of Lago Vista (the "city"), which you represent, received a request for all documents and communications related to a specified entity's involvement regarding specified topics, including all communications between the city, the specified entity, and a named individual regarding a specified topic. The city claims the submitted information is excepted from disclosure under section 552.107 of the Government Code.<sup>1</sup> Additionally, the city states release of the information at issue may implicate the proprietary interests of the following: Nuveen, LLC and Preston Hollow Capital, LLC. Accordingly, the city states, and provides documentation showing, it notified these interested third parties of the request for information and of their right to submit arguments to this office. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered the exception you claim and reviewed the submitted information.

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<sup>1</sup>Although the city also raises section 552.101 of the Government Code, the city provides no arguments explaining how this exception is applicable to the information at issue. Therefore, we assume the city no longer asserts this exception. *See* Gov't Code §§ 552.301, .302.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from any interested third party explaining why the information at issue should not be released. Thus, we have no basis to conclude any of the interested third parties have a protected proprietary interest in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Therefore, the city may not withhold the submitted information on the basis of any proprietary interest any interested third party may have in the 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. *See* 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 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). 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.*, 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. *See 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 city states the submitted information consists of communications between and among city attorneys, city officials, city staff, and other privileged parties that were made for the purpose of facilitating the rendition of professional legal services to the city. The city also states these were intended to be confidential and have remained confidential. Based upon your representations and our review, we find the city demonstrated the applicability of the attorney-client to the communications at issue. Accordingly, the city may generally withhold the submitted information under section 552.107(1) of the Government Code. However, we note some of these otherwise privileged e-mail strings include e-mails and attachments sent to or received from non-privileged parties. Furthermore, if these e-mails and attachments are removed from the otherwise privileged e-mail strings and stand alone, they are responsive to the instant request. Therefore, if the city maintains the non-privileged e-mails and attachments, which we marked, separate and apart from the otherwise privileged e-mail strings in which they appear, then these non-privileged e-mails and attachments are not excepted under section 552.107(1) of the Government Code, and the city may not withhold them on that basis.

To the extent the non-privileged e-mails we marked are maintained separate and apart from the otherwise privileged e-mail strings in which they appear, the e-mails also include e-mail addresses subject to section 552.137 of the Government Code.<sup>2</sup> Section 552.137 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). Gov’t Code § 552.137(a)-(c). Section 552.137 does not apply to an institutional e-mail address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). The e-mail addresses at issue are not excluded by subsection (c). Accordingly, in the event the non-privileged e-mails we marked are maintained separate and apart from the otherwise privileged e-mail strings in which they appear, the city must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

In summary, the city may generally withhold the submitted information under section 552.107(1) of the Government Code; however, if the city maintains the non-privileged e-mails and attachments we marked separate and apart from the otherwise privileged e-mail strings in which they appear, then these non-privileged e-mails and attachments may not be withheld under section 552.107 of the Government Code. In the event the non-privileged

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

e-mails we marked are maintained separate and apart from the otherwise privileged e-mail strings in which they appear, the city must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



James M. Graham  
Assistant Attorney General  
Open Records Division

JMG/be

Ref: ID# 779462

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

cc: 2 Third Parties  
(w/o enclosures)