



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 29, 2019

Mr. Omar Ochoa
City Attorney
City of Edinburg
P.O. Box 1079
Edinburg, Texas 78540

OR2019-24202

Dear Mr. Ochoa:

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# 783289 (PIR No. 05-295-19 and 06-375-19).

The City of Edinburg (the "city") received a request for all e-mails between the city manager and a named individual during a defined time period. Additionally, the city received a request from a different requestor for eight categories of information, including e-mails between the city manager and the same named individual during a defined time period. We understand the city is releasing some information to the second requestor upon payment of costs. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note most of the submitted information is not responsive to either of the present requests because it does not consist of communications between the city manager and the named individual or does not fall within the defined time periods. This ruling does not address the public availability of the non-responsive information and the city need not release it in response to this request. Additionally, we note the requests differ with respect to the relevant time periods. Thus, the city need not release information to either requestor that is not responsive to their respective requests.

Next, we must address the city's obligations under section 552.301 of the Government Code, which prescribes the procedures 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 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). We understand the city received the first request for information on May 6, 2019. You inform us on May 20, 2019, and June 13, 2019, the city sent the first requestor a "Notice for Extension of Time" regarding the request. However, we note these notices do not effect the city's deadlines under section 552.301 of the Government Code. Accordingly, you were required to provide the information required by section 552.301(b) by May 20, 2019. Moreover, you were required to provide the information required by section 552.301(e) by May 28, 2019. However, the envelope in which the city provided the information required by sections 552.301(b) and 552.301(e) was postmarked June 21, 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). We understand the city received the second request for information on June 10, 2019. You inform us on June 20, 2019, the city sent the second requestor a "Notice for Extension of Time" regarding the second request. As noted above, this notice does not affect the city's deadlines under section 552.301 of the Government Code. Accordingly, you were required to provide the information required by section 552.301(b) by June 24, 2019. Moreover, you were required to provide the information required by section 552.301(e) by July 1, 2019. However, the envelope in which the city provided the information required by sections 552.301(b) and 552.301(e) was postmarked July 12, 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). Accordingly, we conclude the city failed to comply with the procedural requirements mandated by section 552.301 of the Government Code.

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 city claims sections 552.103 and 552.107 of the Government Code for the submitted information. Because section 552.107 of the Government Code can provide a compelling reason to overcome the presumption of openness, we will address your argument under this section for the submitted information. We note section 552.117 of the Government Code can

provide compelling reasons to overcome the presumption of openness.¹ Therefore, we will address the applicability of this section to the submitted information. Upon review, however, we find the city has failed to establish a compelling reason to address your remaining exception.

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.* 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. *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).

While you generally assert “certain of the documents” are protected by the attorney-client privilege, upon review, we find you have failed to demonstrate any of the information at issue constitutes communications between privileged parties made in furtherance of the rendition of professional legal services to the city for the purposes of section 552.107(1) of

¹ 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).

the Government Code. Thus, the city may not withhold any of the information at issue on that basis.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code* § 552.117(a)(1). Section 552.117(a)(1) also applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid by a governmental body. *See Open Records Decision No. 506 at 5-6 (1988)*. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See Open Records Decision No. 530 at 5 (1989)*. Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the employee at issue timely requested confidentiality under section 552.024 of the Government Code, the city must withhold the information we marked under section 552.117(a)(1) of the Government Code; however, the city may only withhold the marked cellular telephone number if the cellular telephone service is not paid for by a governmental body. Conversely, to the extent the employee at issue did not timely request confidentiality under section 552.024, the city may not withhold the information under section 552.117(a)(1) of the Government Code.

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). *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). We are unable to determine whether the personal e-mail addresses within the remaining information at issue, which are located within e-mails communicating official business of the city, belong to city officials or employees. Thus, we rule conditionally. To the extent the e-mail addresses within the remaining information are the personal e-mail addresses of city officials or employees, or to the extent subsection (c) applies, this information is not subject to section 552.137 and may not be withheld on that basis. *See Austin Bulldog v. Leffingwell*, 490 S.W.3d 240 (Tex. App.—Austin 2016, no pet.) (holding personal e-mail addresses of government officials used to conduct official government business are not e-mail addresses of "members of the public" for purposes of *Gov't Code* § 552.137(a)). However, to the extent the e-mail addresses within the

remaining information are not the personal e-mail addresses of city officials or employees and subsection (c) does not apply, this information is subject to section 552.137 and must be withheld under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release.

In summary, to the extent the employee at issue timely requested confidentiality under section 552.024 of the Government Code, the city must withhold the information we marked under section 552.117(a)(1) of the Government Code; however, the city may only withhold the marked cellular telephone number if the cellular telephone service is not paid for by a governmental body. To the extent the e-mail addresses within the remaining information are not the personal e-mail addresses of city officials or employees and subsection (c) does not apply, this information is subject to section 552.137 of the Government Code and must be withheld under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release. 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 <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,



Ashley Crutchfield
Assistant Attorney General
Open Records Division

AC/mo

Ref: ID# 783289

Enc. Submitted documents

c: 2 Requestor
(w/o enclosures)