



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

October 2, 2020

Ms. Barbara Boulware-Wells  
Attorney at Law  
Counsel for the City of Leander  
The Knight Law Firm, LLP  
223 West Anderson Lane, Suite A-105  
Austin, Texas 78752

OR2020-24860

Dear Ms. Boulware-Wells:

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# 847787 (ID No. 107681).

The City of Leander (the "city"), which you represent, received a request for e-mail communications pertaining to a specified topic sent or received by seven named individuals during a defined period of time. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note some of the submitted information, which we marked, is not responsive to the instant request for information because it is outside the requested time period. This ruling does not address the public availability of any information that is not responsive to the request and the city is not required to release such information in responsive to this request.<sup>1</sup>

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

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<sup>1</sup> As we are able to make this determination, we need not address the submitted argument against disclosure of this information.

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). 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).

You state the responsive information consists of communications between in-house counsel for the city and city employees and officials that were made for the purpose of providing legal services to the city. You further state the communications were intended to be confidential and have remained confidential. Based upon your representations and our review, we find you have established the applicability of the attorney-client privilege to the information at issue. Accordingly, the city may generally withhold the responsive information under section 552.107(1) of the Government Code. We note, however, some of the otherwise privileged e-mail strings include an e-mail received from or sent to non-privileged parties. Furthermore, if the e-mail received from or sent to the non-privileged parties 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 this non-privileged e-mail, which we marked, separate and apart from the otherwise privilege e-mail strings in which it appears, then this non-privileged e-mail is not excepted under section 552.107(1), and the city may not withhold it on that basis. In that case, the city must release this non-privileged e-mail, which we marked.

In summary, the city may generally withhold the responsive information under section 552.107(1) of the Government Code. However, if the city maintains the non-privileged e-mail, which we marked, separate and apart from the otherwise privileged e-mail strings

in which it appears, then the non-privileged e-mail is not excepted under section 552.107(1), and the city must release it.

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,

Kimbell Kesling  
Assistant Attorney General  
Open Records Division

KK/jm

Ref: ID# 847787

Enc. Submitted documents

c: Requestor  
(w/o enclosures)