



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 30, 2013

Ms. Camila W. Kunau
Assistant City Attorney
Office of the City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283

OR2013-01726

Dear Ms. Kunau:

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# 477574 (COSA File No. W011237-103012).

The City of San Antonio (the "city") received a request for any police and city attorney records pertaining to three named individuals, including any records related to specified criminal trespass warnings and a specified incident.¹ You indicate the city will release most of the requested records with certain information redacted under sections 552.130(c), 552.136(c), and 552.147(b) of the Government Code, and under 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009), upon the

¹You inform us the city sought and received clarification of the request. See Gov't Code § 552.222(b) (providing that 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 governmental entity, acting in good faith, requests clarification or narrowing of unclear or overbroad request for public information, ten-day period to request attorney general ruling is measured from date request is clarified or narrowed).

requestor's response to a cost estimate letter.² You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code.³ We have considered the exception you claim and reviewed the submitted representative samples of information.⁴

Initially, you indicate the city will redact information from the records to be released under section 552.102 of the Government Code. We note a governmental body may not withhold information from the public without asking this office for a decision under section 552.301 of the Government Code unless a provision of the Act or a previous determination specifically authorizes the governmental body to do so. *See* Gov't Code § 552.301(a); *see also, e.g., id.* §§ 552.024(c), .147; Open Records Decision No. 673 (2001) (previous determinations). We are unaware of any statutory or other authority that would permit the city to withhold information under section 552.102 without asking this office for a decision. Therefore, the city may not redact any information from the records to be released on the basis of section 552.102 of the Government Code without asking this office for a ruling under section 552.301 of the Government Code.

Next, you inform us the information submitted as Attachment 3 was the subject of two previous requests for information, in response to which this office issued Open Records Letter Nos. 2010-04287 (2010) and 2012-01516 (2012). In Open Records Letter No. 2010-04287, we ruled the city may withhold the information at issue under

²Section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsections 552.130(a)(1) without the necessity of seeking a decision from the attorney general. *See* Gov't Code §552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). Section 552.136(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See id.* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e). Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. *See id.* 552.147(b). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

³Although you also raise Texas Rule of Evidence 503, we note the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107 of the Government Code. *See* Open Records Decision Nos. 677 (2002), 676 (2002).

⁴We assume 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 those records contain substantially different types of information than that submitted to this office.

section 552.107(1) of the Government Code. In Open Records Letter No. 2012-01516, we ruled the city may rely on Open Records Letter No. 2010-04287 as a previous determination and withhold Attachment 3 in accordance it; and, with the exception of the information the city marked for release, the city may withhold Attachment 2 under section 552.107(1) and must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless the owners affirmatively consented to their public disclosure. We are unaware of any change in the relevant law, facts, and circumstances on which the previous rulings were based. Accordingly, the city must rely on Open Records Letter Nos. 2010-04287 and 2012-01516 as previous determinations and withhold or release the information submitted as Attachment 3 in accordance with these rulings. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

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. ORD 676 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. *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 to only 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 to only a confidential communication, *id.*, meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of 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 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) (privilege extends to entire communication, including facts contained therein).

You inform us the information submitted as Attachment 2 consists of communications between city attorneys, the city's outside counsel, and city staff that were made for the purpose of facilitating the rendition of professional legal services to the city. You also inform us these communications were intended to be, and have remained, confidential. Based on your representations and our review, we conclude the information at issue generally constitutes privileged attorney-client communications the city may withhold under section 552.107(1) of the Government Code. We note, however, some of this information was sent to or received from a non-privileged party. Furthermore, if the information sent to or received from the non-privileged party is removed from the otherwise privileged communications, it is responsive to the present request for information. Therefore, to the extent to the non-privileged communications, which we have marked, exist separate and apart from the otherwise privileged communications, they may not be withheld under section 552.107(1).

We note some of the non-privileged communications contain information that may be subject to section 552.117(a)(1) of the Government Code.⁵ This section excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). 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)*. Information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee 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 official or employee who did not timely request confidentiality under section 552.024. Thus, to the extent the former city employee at issue timely requested confidentiality for his information under section 552.024 of the Government Code, the city

⁵The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)*.

must withhold the information we have marked in the non-privileged communications under section 552.117(a)(1) of the Government Code.

We also note the non-privileged communications contain e-mail addresses subject to section 552.137 of the Government Code. This section 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). We note the requestor has a right of access to his own e-mail address pursuant to section 552.137(b) of the Government Code. *See id.* § 552.137(b). Upon review, we have marked e-mail addresses that are not specifically excluded by section 552.137(c). *See id.* § 552.137(c). As such, the e-mail addresses we have marked in the non-privileged communications must be withheld under section 552.137 of the Government Code, unless their owners affirmatively consent to their release. *See id.* § 552.137(b).

In summary, the city must rely on Open Records Letter Nos. 2010-04287 and 2012-01516 as previous determinations and withhold or release the information submitted as Attachment 3 in accordance with these rulings. The city may generally withhold Attachment 2 under section 552.107(1) of the Government Code; however, to the extent the non-privileged communications we have marked exist separate and apart from the otherwise privileged communications, they may not be withheld under section 552.107(1) of the Government Code. The city must withhold the information we have marked in the non-privileged communications under section 552.117(a)(1) of the Government Code to the extent the former city employee at issue timely requested confidentiality for his information under section 552.024 of the Government Code. The city must withhold the e-mail addresses we have marked in the non-privileged communications under section 552.137 of the Government Code, unless their owners affirmatively consent to their release. The city must release the remaining information.⁶

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

⁶We note the information being released includes the requestor’s e-mail address. As noted above, the requestor has a right of access to this information under section 552.137(b) of the Government Code. *See Gov’t Code* § 552.137(b). If the city receives another request for the information at issue from a requestor without such a right of access, as previously noted, it is authorized to withhold the requestor’s e-mail address under section 552.137, without the necessity of requesting an attorney general decision, pursuant to Open Records Decision No. 684.

responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/bhf

Ref: ID# 477574

Enc. Submitted documents

c: Requestor
(w/o enclosures)