



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 7, 2013

Ms. Elaine Nicholson  
Assistant City Attorney  
City of Austin  
P.O. Box 1088  
Austin, Texas 78767-8828

OR2013-17391

Dear Ms. Nicholson:

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# 502828.

The City of Austin (the "city") received a request for communications, including e-mails, pertaining to the requestor from five named city employees during a specified date range. You state the city has released some responsive information. You claim some of 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 representative sample of information.<sup>1</sup>

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<sup>1</sup>We 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 those submitted to this office.

Initially, we note you have marked some of the submitted information as not responsive to the instant request. This ruling does not address the public availability of information not responsive to the request, and the city is not required to release such information in response to this request.

You state some of the requested information was the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2011-02855 (2011) and 2007-15974 (2007).<sup>2</sup> You state there has not been any change in the law, facts, or circumstances on which the prior rulings were based. Accordingly, for the requested information that is identical to the information previously requested and ruled upon by this office, we conclude the city may rely on Open Records Letter Nos. 2011-02855 and 2007-15974 as previous determinations and withhold the identical information in accordance with those 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). To the extent the requested information is not encompassed by the prior rulings, we will consider the exception you claim.

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. 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 “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

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<sup>2</sup>In Open Records Letter No. 2007-15974, we determined the city (1) may withhold some of the information at issue pursuant to section 552.107 of the Government Code; (2) must withhold the e-mail address we marked under section 552.137 of the Government Code, unless the owner affirmatively consented to its release; and (3) must release the remaining information. In Open Records Letter No. 2011-02855, we concluded except for the e-mail we marked for release, the city may generally withhold the submitted information under section 552.107. However, to the extent the remaining non-privileged e-mails exist separate and apart from the submitted e-mail strings, they may not be withheld under section 552.107. In that case, the city must withhold the marked e-mail addresses under section 552.137, unless the owners consent to their disclosure. The remaining information must be released. Because the information to be released included the requestor’s e-mail address, we noted that if the city receives another request for this information from a requestor without a right of access, it may 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 (2009).

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). 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 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 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 information you have marked consists of communications between individuals you have identified as city attorneys and city staff. You state the communications were made for the purpose of facilitating the rendition of professional legal services, and were intended to be, and have remained, confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the city may withhold the information you have marked under section 552.107(1) of the Government Code.

In summary, the city may rely on Open Records Letter Nos. 2011-02855 and 2007-15974 as previous determinations and withhold the requested information that is identical to the information previously requested and ruled upon in accordance with those rulings. The city may withhold the information you have marked under section 552.107 of the Government Code. 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 [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,

A handwritten signature in black ink, appearing to read 'Cindy Nettles', written in a cursive style.

Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/dls

Ref: ID# 502828

Enc. Submitted documents

c: Requestor  
(w/o enclosures)