ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 19, 2011

Ms. Tiffany N. Evans
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2011-18641

Dear Ms. Evans:

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# 439937 (GC No. 18996).

The City of Houston (the "city") received a request for information related to complaints filed with the Office of the Inspector General (the "OIG"). You state you will release some of the requested information. You claim that the requested information is excepted from disclosure under sections 552.101, 552.107, 552.108, 552.117, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[1]

Initially, we note Exhibit 3a consists of an investigation completed by the OIG and is therefore subject to section 552.022(a)(1) of the Government Code. Section 552.022(a) provides in relevant part the following:

> Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public

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

> information and not excepted from required disclosure unless made confidential under [the Act] or other law:
>
> > (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). Although you assert this information is excepted from disclosure under section 552.107, this section is discretionary and does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 6 (2002) (section 552.107 is not other law for purposes of section 552.022); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the city may not withhold the information subject to section 552.022 under section 552.107. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" that makes information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503. We note sections 552.101 and 552.117 of the Government Code make information confidential under the Act for purposes of section 552.022. Therefore, we will also consider the applicability of these exceptions to the information subject to section 552.022. In addition, because information subject to section 552.022(a)(1) may be excepted under section 552.108 of the Government Code, we will also address your argument under this exception.

Rule 503 of the Texas Rules of Evidence enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
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> > (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
> >
> > (B) between the lawyer and the lawyer's representative;
> >
> > (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
> >
> > (D) between representatives of the client or between the client and a representative of the client; or

> (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if 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). 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* ORD 676 at 6-7.

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state, and provide documentation showing, that pursuant to City of Houston Executive Order 1-39 (Revised), the OIG is a division of the Office of the City Attorney and acts under that office's supervision. You also state Exhibit 3a consists of communications to and from employees of the OIG in their capacity as attorney representatives and various city employees in their capacity as clients and client representatives made in furtherance of the rendition of professional legal services to the city. You have identified the parties concerned. You state that these communications were not intended for release to third parties and that the confidentiality of the communications has been maintained. Based on your representations and our review, we conclude the city may withhold Exhibit 3a under rule 503 of the Texas Rules of Evidence.[2]

Next, we consider your argument under section 552.107 of the Government Code for the information not subject to section 552.022. Section 552.107(1) protects information coming within the attorney-client privilege. The elements of the privilege under section 552.107 are the same as those discussed for Rule 503. *See* ORD 676. 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

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[2]As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You also state the information in Exhibits 2, 2a, 3, and 4 consists of communications to and from employees of the OIG in their capacity as attorney representatives and various city employees in their capacity as clients and client representatives made in furtherance of the rendition of professional legal services to the city. You state that these communications were not intended for release to third parties and that the confidentiality of the communications has been maintained. Based on your representations and our review, we find Exhibits 2, 2a, and 4 are protected by the attorney-client privilege and may be withheld under section 552.107(1) of the Government Code.[3] However, we note Exhibit 3 consists of multiple complaints made to the OIG. Accordingly, you have failed to demonstrate how the information in Exhibit 3 falls within the attorney-client privilege. Accordingly, Exhibit 3 may not be withheld under section 552.107(1) of the Government Code.

Section 552.108(a)(2) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]" Gov't Code § 552.108(a)(2). Section 552.108(a)(2) is applicable only if the information at issue relates to a concluded criminal case that did not result in a conviction or deferred adjudication. A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A). You generally assert portions of Exhibit 3 concern criminal investigations that did not result in convictions or deferred adjudication. However, because you have failed to specify what portions of the information in Exhibit 3 are excepted from disclosure under section 552.108(a)(2), this office is unable to determine whether these sections apply to any of the information at issue. Consequently, we find the city has failed to demonstrate the applicability of section 552.108(a)(2) and none of the information in Exhibit 3 may be withheld on this basis.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the identities of victims of alleged sexual harassment were held to be protected by common-

[3]As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

law privacy. A portion of Exhibit 3 pertains to a sexual harassment investigation and contains the identity of the alleged sexual harassment victim. Accordingly, we conclude the city must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy and the holding in *Ellen*. The remaining information in Exhibit 3 does not constitute highly intimate or embarrassing information of no legitimate public interest. Thus, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy under *Ellen*.[4]

Section 552.101 of the Government Code also encompasses information protected by the common-law informer's privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer's privilege protects the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. *See* Open Records Decision Nos. 515 at 3 (1998), 208 at 1–2 (1978). The privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." *See* Open Records Decision No. 279 at 2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4–5 (1988). The privilege excepts the informer's statement only to the extent necessary to protect the informer's identity. *See* Open Records Decision No. 549 at 5 (1990).

You state the remaining information at issue identifies individuals who reported alleged multiple violations, including Mayor's Executive Order Numbers 1-20, 1-50, and section 31.03 of the Texas Penal Code to the OIG. You state violations of these ordinances are punishable by civil and criminal penalties. It does not appear the subject of the complaints knows the identity of the informers. Based on your representations and our review, we conclude that the city may withhold the information we have marked in Exhibit 3 under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. However, we find no portion of the remaining information at issue identifies or tends to identify the complainants. Accordingly, no portion of the remaining information at issue may be withheld under section 552.101 of the Government Code in conjunction with the informer's privilege.

In summary, the city may withhold Exhibit 3a under rule 503 of the Texas Rules of Evidence. The city may withhold Exhibits 2, 2a, and 4 under section 552.107(1) of the Government Code. The city must withhold the information we have marked in Exhibit 3

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[4]As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

under section 552.101 of the Government Code in conjunction with common-law privacy under *Ellen*. The city may withhold the information we have marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. The remaining information must be released.

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.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,

Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID# 439937

Enc. Submitted documents

c: Requestor
(w/o enclosures)