



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 7, 2012

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

OR2012-06677

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# 452747 (GC No. 19304).

The City of Houston (the "city") received a request for e-mails sent or received by the Office of the Mayor containing any of four specified phrases during a specified time period. You state some information will be released to the requestor. You assert some of the requested information is subject to two prior rulings from this office. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code. We have considered the claimed exception and reviewed the submitted information.

Portions of the requested information were the subject of prior requests for information, in response to which this office issued Open Records Letter Nos. 2012-03951 (2012) and 2012-04396 (2012). In Open Records Letter No. 2012-03951, we held the city could generally withhold the responsive information under section 552.107 of the Government Code, except that to the extent the marked non-privileged e-mails existed separate and apart from the privileged e-mail strings in which they were submitted, such non-privileged e-mails must be released with the e-mail addresses of members of the public redacted under section 552.137 of the Government Code. In Open Records Letter No. 2012-04396, we ruled that to the extent the information at issue was subject to Open Records Letter No. 2012-03951, it must be withheld or released in accordance with that ruling. To the

extent the information at issue was not subject to Open Records Letter No. 2012-03951, we ruled the city may withhold the information it marked under section 552.107 of the Government Code, and must withhold the information we marked under (1) section 552.101 of the Government Code in conjunction with common-law privacy, (2) section 552.117(a)(1) of the Government Code, if the employee whose information was at issue timely elected under section 552.024 of the Government Code to keep her personal information confidential and if a governmental body does not pay for the cellular service, and (3) section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consented to disclosure. We then ruled the remaining information at issue in Open Records Letter No. 2012-04396 must be released to the requestor. We have no indication that the law, facts, or circumstances on which the prior rulings were based have changed. Accordingly, to the extent the information responsive to the instant request for information is identical to the information previously ruled upon by this office, the city must continue to rely on Open Records Letter Nos. 2012-03951 and 2012-04396 as previous determinations and withhold or release the previously ruled upon information in accordance with them. *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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). Because you state the submitted information was not subject to our previous rulings, we will address your argument against its release.

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 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 submitted information consists of communications between individuals you have identified as city attorneys, city officials, and city employees. You state the communications were made for the purpose of facilitating the rendition of 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 submitted information. Accordingly, the city may withhold the submitted information under section 552.107 of the Government Code.

In summary, to the extent any of the requested information is identical to the information previously ruled upon by this office, the city must continue to rely on Open Records Letter Nos. 2012-03951 and 2012-04396 as previous determinations and withhold or release the previously ruled upon information in accordance with them. The city may withhold the submitted information under section 552.107 of the Government Code.

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,



Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/som

Ref: ID# 452747

Enc. Submitted documents

c: Requestor
(w/o enclosures)