ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 28, 2012

Mr. Ronald F. Plackemeier
City Attorney
City of Texas City
P.O. Box 2608
Texas City, Texas 77592-2608

OR2012-15514

Dear Mr. Plackemeier:

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# 466527.

The City of Texas City (the "city") received a request for all e-mails from a specified time period between six named individuals that contain specified terms.[1] You state the city has made some information available to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant request because it does not consist of the e-mails requested. The city need not release non-responsive information in response to this request, and this ruling will not address that information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't

[1]We note the city sought and received clarification of the request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *see also City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

Code § 552.101. This section encompasses information made confidential by other statutes, such as section 143.089 of the Local Government Code. You state the city is a civil service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files for fire fighters in a civil service city: a civil service file the civil service director is required to maintain and an internal file the fire department may maintain for its own use. Local Gov't Code § 143.089(a), (g). The fire fighter's civil service file must contain certain specified items, including commendations, periodic evaluations by the fire fighter's supervisor, and documents relating to any misconduct in which the fire department took disciplinary action against the officer under chapter 143 of the Local Government Code. *Id.* § 143.089(a)(1)-(2). Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *Id.* §§ 143.051-.055; *see* Attorney General Opinion JC-0257 (written reprimand is not disciplinary action for purposes of chapter 143 of the Local Government Code).

In cases in which a fire department investigates a fire fighter's misconduct and takes disciplinary action against a fire fighter, it is required by section 143.089(a)(2) to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the fire fighter's civil service file maintained under section 143.089(a). *See Abbott v. City of Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, no pet.). All investigatory materials in a case resulting in disciplinary action are "from the employing department" when they are held by or in possession of the department because of its investigation into a fire fighter's misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* Such records are subject to release under the Act. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). However, information maintained in a fire department's internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. Tex. Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You state some of the responsive information, which you have marked, is contained in the city fire department's personnel files maintained under section 143.089(g). However, we note some of the information at issue consists of e-mails specifically requested by the requestor that may be maintained by the city independently of any officer's personnel file. The city may not engraft the confidentiality afforded to records under section 143.089(g) to records that exist independently of the internal files. Thus, to the extent the information at issue is maintained solely in the fire fighters' personnel files, it is confidential under section 143.089(g) of the Local Government Code and must be withheld under section 552.101 of the Government Code. However, to the extent the information at issue is maintained outside the fire fighters' departmental files, it is not confidential under section 143.089 of the Local Government Code and may not be withheld under section 552.101 of the Government Code on that basis.

Section 552.107(1) of the Government Code protects information that comes 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. *See* 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. *See* 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. *See 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 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. *See* 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. *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 e-mails you have marked consist of attorney-client communications that were made between privileged parties for the purpose of rendering professional legal services to the city. We understand these communications were intended to be and remain 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 generally withhold the information at issue under section 552.107(1) of the Government Code. We note, however, these privileged e-mail strings include e-mails from non-privileged parties that are separately responsive to the instant request. Consequently, if these e-mails, which we have marked, exist separate and apart from the privileged e-mail strings in which they are included, the city may not withhold them under section 552.107(1) of the Government Code. If these e-mails do not exist separate and apart from the privileged e-mail strings in which they are included, the city may withhold them as privileged attorney-client communications under section 552.107(1) of the Government Code.

In summary, to the extent the responsive information you have marked is maintained solely in the fire fighters' personnel files, it is confidential under section 143.089(g) of the Local Government Code and must be withheld under section 552.101 of the Government Code. The city may generally withhold the responsive information you have marked under section 552.107(1) of the Government Code. However, if the non-privileged e-mails we have marked exist separate and apart from the privileged e-mail strings in which they are included, the city may not withhold them under section 552.107(1) of the Government Code. In this instance, the city must release the non-privileged e-mails, as well as any 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.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,

Sean Nottingham
Assistant Attorney General
Open Records Division

SN/bhf

Ref: ID# 466527

Enc. Submitted documents

c: Requestor
(w/o enclosures)