



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 15, 2013

Ms. Danielle Folsom
Assistant City Attorney
Legal Department
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2013-14281

Dear Ms. Folsom:

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# 496398 (GC No. 20522).

The City of Houston (the "city") received a request for twenty-six categories of information pertaining to a specified contract. You state some of the requested information will be made available to the requestor. You claim 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.¹

We begin by noting that some of the submitted information, which we have marked, is not responsive to the instant request for information because it was created after the date the city received the request. This ruling does not address the public availability of any information that is not responsive to the request, and the city need not release that information in response to this request.

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

¹We 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.

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 responsive information consists of e-mails sent to, from, and among individuals you have identified as city attorneys, other legal staff, and city employees in their capacity as clients. You state the communications at issue were made in furtherance of 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 most of the responsive information. Accordingly, the city may generally withhold most of the responsive information under section 552.107(1) of the Government Code. However, we note some of the information at issue consists of communications with outside parties that you have not identified. This information, which we have marked for release, may not be withheld under section 552.107(1) of the Government Code. Further, we note some of the otherwise privileged e-mail strings include e-mails to and from non-privileged parties that are separately responsive to the instant request. Consequently, to the extent these e-mails, which we have marked, exist separate and apart from the privileged e-mail strings in which they were 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 were included, the city may withhold them as privileged attorney-client communications under section 552.107(1) of the Government Code.

We note portions of the remaining information may be subject to section 552.117 of the Government Code.² Section 552.117 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 timely request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Section 552.117 is also applicable to cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body must withhold information under section 552.117 on behalf of current or former officials or employees only if these individuals made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the individual whose information is at issue timely elected to keep his personal information confidential pursuant to section 552.024 and the cellular service is not paid for by a governmental body, the city must withhold the cellular telephone number we have marked under section 552.117(a)(1) of the Government Code. The city may not withhold this information under section 552.117 if the individual did not make a timely election to keep the information confidential or if the cellular telephone service is paid for by a governmental body.

We note the remaining information and non-privileged e-mails contain information subject to section 552.137 of the Government Code. Section 552.137 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). *See* Gov't Code § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, or an e-mail address maintained by a governmental entity for one of its officials or employees. *See id.* § 552.137(c). The city must withhold the personal e-mail addresses we have marked in the remaining information, as well as in the non-privileged e-mails to the extent they exist separate and apart from their otherwise privileged e-mail strings, under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.³

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

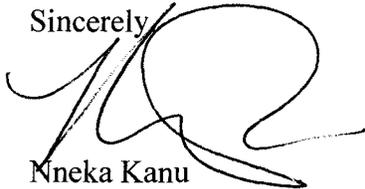
³We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

In summary, except for the e-mails we have marked for release, the city may generally withhold the submitted information under section 552.107(1) of the Government Code. However, if the non-privileged e-mails, which we have marked, exist separate and apart from the privileged e-mail strings in which they were included, the city may not withhold them under section 552.107(1). The city must withhold the cellular telephone number we have marked under section 552.117(a)(1) of the Government Code if the individual whose information is at issue timely elected to keep his personal information confidential pursuant to section 552.024 and the cellular service is not paid for by a governmental body. The city must withhold the personal e-mail addresses we have marked in the remaining information, as well as in the non-privileged e-mails to the extent they exist separate and apart from their otherwise privileged e-mail strings, under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. 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.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,



Nneka Kanu
Assistant Attorney General
Open Records Division

NK/bhf

Ref: ID# 496398

Enc. Submitted documents

c: Requestor
(w/o enclosures)