ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 11, 2013

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

OR2013-17795

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# 501965 (Houston GC No. 20688).

The City of Houston (the "city") received a request for information related to complaints filed with the Office of the Inspector General (the "OIG") during a specified time period. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.117, 552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[1] We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, you inform us the submitted information in Exhibits 2, 3, and 4 was the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2013-06946 (2013), 2013-05132 (2013), and 2013-03624 (2013). You state the law, facts, and circumstances on which the prior rulings were based have not changed. Accordingly, the city must continue to rely on Open Records Letter Nos. 2013-06946, 2013-05132, and 2013-03624 as previous determinations and withhold the information at

[1]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 that submitted to this office.

issue 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).

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 that 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). 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. 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 that 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, 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 claim the information in Exhibits 5 and 6 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 you have generally demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the city may generally withhold Exhibits 5 and 6 under section 552.107(1) of the Government Code.[2] However, we note the information at issue includes e-mail correspondence received from or sent to non-privileged parties. If some of the e-mails received from or sent to non-privileged parties are removed from the otherwise privileged e-mail strings and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails, which we have marked in Exhibit 5, are maintained by the city separate and apart from the otherwise privileged e-mail strings in which they appear, then the city may not withhold the non-privileged e-mails under section 552.107(1) of the Government Code. Furthermore, portions of Exhibits 5 and 6 consist of complaints made to the OIG by individuals whom you have not identified as privileged parties or information shared with individuals whom you have not identified as privileged parties. Accordingly, you have failed to demonstrate how the information at issue falls within the attorney-client privilege. Therefore, we conclude you have failed to establish how this information, which we have marked for release, constitutes a communication between or among privileged parties for the purposes of section 552.107(1) of the Government Code, and the city may not withhold the information at issue on that 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." Gov't Code § 552.101. Section 552.101 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 (1988), 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. 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 portions of the remaining information in Exhibits 5 and 6 identify individuals who reported alleged multiple violations, including Mayor's Executive Order Numbers 1-39 (Revised) and 1-50, section 18-3 of the city's Code of Ordinances, and sections 31.03

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

and 22.03 of the Texas Penal Code to the OIG. You state violations of these ordinances and statutes are punishable by civil and criminal penalties. It does not appear the subjects of the complaints know the identities of the informers. Based on your representations and our review, we conclude that the city may withhold some of the information at issue, which we have marked, under section 552.101 of the Government Code in conjunction with the common-law informer's privilege.[3] However, we find the remaining information either does not identify or tend to identify the complainants, or does not pertain to a complaint alleging a violation of criminal or civil law. Accordingly, no portion of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with the informer's privilege.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. Common-law privacy protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. 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-law privacy. Upon review, we find you have failed to demonstrate how any of the remaining information is highly intimate or embarrassing information regarding an identified individual. Furthermore, we find none of the remaining information pertains to an investigation of sexual harassment. Accordingly, none of the remaining information may be withheld under section 552.101 of the Government Code on the basis of common-law privacy.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Upon review, however, we find none of the remaining information consists of the home address, telephone number, emergency contact information,

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

social security number, or family member information of a current or former employee of the city that is held in an employment context. Accordingly, none of the remaining information may be withheld on this basis.

Some of the remaining information at issue may be subject to section 552.1175 of the Government Code.[4] Section 552.1175 protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family member information of certain individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential. *See* Act of May 26, 2013, 83rd Leg., R.S., H.B. 1632, § 3 (to be codified as an amendment to Gov't Code § 552.1175(b)). Section 552.1175 applies, in part, to "peace officers as defined by Article 2.12, Code of Criminal Procedure." Gov't Code § 552.1175(a)(1). We note some of the remaining information contains personal information of an individual identified as a police officer with the city's police department. We have marked information pertaining to the individual at issue not held in an employment capacity that may be subject to section 552.1175. Accordingly, if the individual whose information we have marked is currently a licensed peace officer and elects to restrict access to the information pertaining to him in accordance with section 552.1175(b), the city must withhold the marked information under section 552.1175 of the Government Code. If the individual is not currently licensed or does not elect to restrict access to the information pertaining to him in accordance with section 552.1175(b), the city may not withhold the information at issue under section 552.1175 of the Government Code.

Section 552.137 of the Government Code 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). *Id.* § 552.137(a)-(c). The e-mail addresses we have marked are not of the types specifically excluded by section 552.137(c). Accordingly, the city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code unless the owners of the addresses affirmatively consent to their release.

In summary, the city must continue to rely on Open Records Letter Nos. 2013-06946, 2013-05132, and 2013-03624 as previous determinations and withhold the information at issue in Exhibits 2, 3, and 4 in accordance with those rulings. With the exception of the information we have marked for release, the city may withhold the information in Exhibits 5 and 6 under section 552.107(1) of the Government Code; however, if the marked non-privileged e-mails in Exhibit 5 are maintained by the city separate and apart from the otherwise privileged e-mail strings in which they appear, then the city may not withhold the marked non-privileged e-mails under section 552.107(1) of the Government Code. The city

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

may withhold the information we have marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. If the individual whose information we have marked is currently a licensed peace officer and elects to restrict access to the information pertaining to him in accordance with section 552.1175(b) of the Government Code, the city must withhold the information we have marked under section 552.1175 of the Government Code. Unless the owners consent to release, the city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code. The city must release the remaining 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, 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,

Cynthia G. Tynan

Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/akg

Ref: ID# 501965

Enc. Submitted documents

c: Requestor
(w/o enclosures)