



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 3, 2013

Ms. Danielle R. Folsom
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77002-0368

OR2013-20930

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# 507404 (GC No. 20830).

The City of Houston (the "city") received a request for any correspondence generated as a result of the requestor's open records requests. 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 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).

You state a portion of the responsive information was the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2013-09745 (2013) and 2013-01585 (2013). In Open Records Letter No. 2013-09745, we determined the city (1) must release the information responsive to the February 20, 2013, request, (2) must continue to rely on Open Records Letter Nos. 2010-17492 (2010) and 2013-01585 as

¹We 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.

previous determinations, and (3) may withhold the remaining information under section 552.107 of the Government Code. In Open Records Letter No. 2013-01585, we determined the city (1) must rely on Open Records Letter No. 2010-17492 as a previous determination, to the extent the marked information is identical to the information previously ruled upon, (2) may withhold the remaining information that is not responsive to the requestor's May 5, 2011, request under Texas Rule of Evidence 503, and (3) must release the remaining information. We have no indication there has been any change in the law, facts, or circumstances on which the prior rulings were based. Accordingly, for the requested information that is identical to the information previously requested and ruled upon by this office, we conclude the city must rely on Open Records Letter Nos. 2013-09745 and 2013-01585 as previous determinations and withhold or release the identical information 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). However, we will consider your arguments against the disclosure of the information not previously submitted to and ruled upon by this office.

Section 552.107(1) of the Government Code protects information coming 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. 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 the remaining information consists of confidential communications made in furtherance of professional legal services rendered to the city. You state these communications were exchanged between city attorneys and city employees. You state these communications were intended to be confidential and confidentiality has been maintained. Based on these representations, and our review, we agree section 552.107 is applicable to the information at issue, and the city may generally withhold this information under section 552.107(1) of the Government Code. We note, however, these privileged e-mail strings include e-mails received from or sent to a non-privileged party. Furthermore, if the e-mails received from or sent to the non-privileged party are removed from the 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, 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 these non-privileged e-mails under section 552.107(1) of the Government Code.

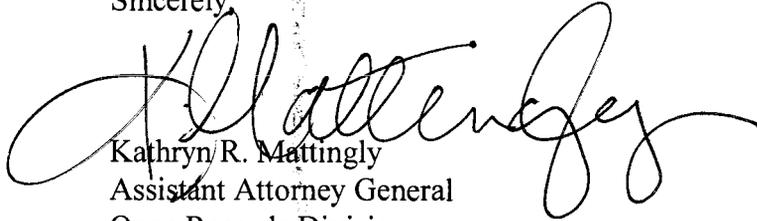
In summary, for the requested information that is identical to the information previously requested and ruled upon by this office, the city may rely on Open Records Letter Nos. 2013-09745 and 2013-01585 as previous determinations and withhold or release the identical information in accordance with those rulings. The city may withhold the remaining information under section 552.107(1) of the Government Code; however, if the marked non-privileged e-mails are maintained by the city separate and apart from the otherwise privileged e-mail strings in which they appear, then they must be released.²

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.

²We note that in the event information is released, the requestor has a right of access to his own e-mail address. *See* Gov't Code § 552.137(b). However, if the city receives another request for the same information from a different requestor, we note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including an e-mail address of a member of the public, under section 552.137 of the Government Code, without the necessity of requesting an attorney general opinion.

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,

A handwritten signature in black ink, appearing to read 'K. Mattingly', written in a cursive style.

Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/som

Ref: ID# 507404

Enc. Submitted documents

c: Requestor
(w/o enclosures)