



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 14, 2016

Mr. Jeffrey W. Giles
Assistant City Attorney
Legal Department
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2016-27669

Dear Mr. Giles:

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# 637644 (GC Nos. 23754 and 23786).

The City of Houston (the "city") received two requests from the same requestor for 1) ten categories of information related to the city's proposed high speed rail project, and 2) communications and documents related to the request detailed in item one. You state you have released some information. You claim the submitted information is excepted from disclosure under sections 552.104, 552.107, and 552.111 of the Government Code. You also state release of some of the submitted information may implicate the proprietary interests of Kimley-Horn and Associates, Inc. Accordingly, you state, and provide documentation showing, you notified this third party of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have

considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note some of the information submitted in response to the second request for information is not responsive because it was created after the second request for information was received. This ruling does not address the public availability of any information that is not responsive to the request, and the city need not release the non-responsive information, which we have marked, in response to this portion of the request.

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). You state the information at issue pertains to a competitive bidding process. We understand the contract at issue has not been executed and negotiations are ongoing. The city believes in the event a contract is not awarded in relation to the current bidding process, the release of the information would negatively impact the prices future bidders offer. The city additionally states disclosure of the information at issue “would present a clear threat of harm to the [c]ity’s ability to obtain the lowest price possible in the current or any future related bidding process.” After review of the information at issue and consideration of the arguments, we find the city has established the release of the information at issue would give advantage to a competitor or bidder. Thus, the city may withhold Exhibit 2-GC 23754 under section 552.104(a) of the Government Code.²

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. *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 “to facilitate 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*

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 that those records contain substantially different types of information than that submitted to this office.

²As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

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)(A), (B), (C), (D), (E). 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. Finally, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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 information submitted as Exhibit 2-GC 23786 consists of communications involving city officials and attorneys for the city. You assert the communications were made for the purpose of facilitating the rendition of professional legal services to the city and these communications have remained confidential. Based on your representations and our review, we find most of the information at issue in Exhibit 2-GC-23876 consists of privileged attorney-client communications the city may withhold under section 552.107(1) of the Government Code. However, upon review, we find the remaining information, which we have marked for release, consists of a communication with an individual you have not demonstrated is a privileged party. Therefore, we conclude you have failed to establish the applicability of the attorney-client privilege to the remaining information, and it may not be withheld under section 552.107(1).

In summary, the city may withhold Exhibit 2-GC 23754 under section 552.104(a) of the Government Code. With the exception of the information we have marked for release, the city may withhold Exhibit 2-GC 23786 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.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 that reads "Erin Groff". The signature is written in a cursive, flowing style.

Erin Groff
Assistant Attorney General
Open Records Division

EMG/som

Ref: ID# 637644

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)