



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 30, 2017

Ms. Nneka E. Kanu
Ms. Tiffany N. Evans
Assistant City Attorneys
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2017-06605

Dear Ms. Kanu and Ms. Evans:

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# 651531 (GC Nos. 24030, 24065).

The City of Houston (the "city") received two requests from the same requestor for eight categories of information pertaining to communications among specified entities and named individuals during specified time periods, specified contracts, and expenditures made by the city. You state the city does not have information responsive to portions of the first request.¹ Additionally, you state the city will release some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.103, 552.104,

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative samples of information.²

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant requests for information because it was created outside the time period specified in the request. This ruling does not address the public availability of any information that is not responsive to the requests, and the city is not required to release such information in response to these requests.

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 you marked pertains to a competitive bidding situation. In addition, you state the information pertains to an ongoing bidding process for which a final contract has not yet been awarded, and release of the information would harm the city’s ability to obtain the lowest price possible by giving bidders a competitive advantage. After review of the information at issue and consideration of your arguments, we find the city has established the release of the responsive information you marked would give advantage to a competitor or bidder. Thus, we conclude the city may withhold the responsive information you marked under section 552.104(a) of the Government Code.³

Section 552.107(1) 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. *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. 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

²We 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.

³As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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. 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. Lastly, 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 remaining information consists of communications between city attorneys and employees that were made for the purpose of providing legal services to the city. Further, you state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the remaining information consists of privileged attorney-client communications. Therefore, the city may withhold the remaining information under section 552.107(1) of the Government Code.⁴

In summary, this ruling does not address the public availability of any information that is not responsive to the requests, and the city is not required to release such information in response to these requests. The city may withhold the responsive information you marked under section 552.104(a) of the Government Code. The city may withhold the remaining information under section 552.107(1) 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.

⁴As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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,



Kieran Hillis
Assistant Attorney General
Open Records Division

KH/sb

Ref: ID# 651531

Enc. Submitted documents

c: Requestor
(w/o enclosures)