



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 22, 2019

Ms. Tiffany N. Evans
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2019-05143

Dear 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# 751760 (GC No. 25640).

The City of Houston (the "city") received a request for all e-mails containing two specified phrases during a specified time period. The city states it will make a portion of the responsive information available to the requestor. The city claims some of the submitted information is excepted from disclosure under section 552.107 of the Government Code.¹ Additionally, the city states release of the remaining information may implicate the proprietary interests of ICF Incorporated, LLC ("ICF"). Accordingly, the city states, and provides documentation showing, it notified ICF of the request for information and of its right to submit arguments to this office. *See* Gov't Code § 552.305(d); *see also* Open

¹We note, and the city acknowledges, the city did not comply with the requirements of section 552.301 of the Government Code in requesting a ruling from this office. *See* Gov't Code § 552.301(e). However, section 552.107 of the Government Code and third party interests can provide compelling reasons to overcome the presumption of openness caused by a failure to comply with section 552.301. *See id.* §§ 552.007, .302, .352. Accordingly, we will consider the submitted arguments against disclosure of the submitted information.

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 received comments from ICF. We have considered the submitted arguments and reviewed the submitted representative sample of information.² We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released).

Initially, the requestor contends the city has publicly disclosed some of the information responsive to the instant request. The Act does not permit the selective disclosure of information. *See id.* §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). If information has been voluntarily released to any member of the public, then that exact same information may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). However, section 552.007 does not prohibit an agency from withholding similar types of information that are not the exact information that has been previously released. The requestor does not argue the city has previously released the exact same information the city now seeks to withhold. Accordingly, we will consider the submitted arguments against disclosure of the submitted information.

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. *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 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

²We 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.

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.* 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).

The city informs us the information in Exhibit 2 was communicated between attorneys of the city and attorney representatives and employees of the city in their capacities as clients. The city explains these communications were created in furtherance of the rendition of professional legal services to the city. The city states the information at issue was not intended for release to third parties, and the confidentiality of the information at issue has been maintained. Based upon these representations and our review, we find the city demonstrated the applicability of the attorney-client privilege to the communications at issue. Accordingly, the city may generally withhold the information in Exhibit 2 under section 552.107(1) of the Government Code. However, we note one of these otherwise privileged e-mail strings includes an e-mail sent from a non-privileged party. Furthermore, if this e-mail is removed from the otherwise privileged e-mail string and stands alone, it is responsive to the instant request. Therefore, if the city maintains the non-privileged e-mail, which we marked, separate and apart from the otherwise privileged e-mail string in which it appears, then this non-privileged e-mail is not excepted under section 552.107(1) of the Government Code, and the city may not withhold it on that basis. In that case, the city must release the non-privileged e-mail to the requestor.

ICF asserts portions of Exhibit 3 are excepted from public disclosure under section 552.104 of the Government Code. Section 552.104(a) excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). A private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). 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.” *Id.* at 841. ICF states it has competitors. In addition, ICF explains release of the information it indicated would give its competitors an advantage. After review of the information at issue and consideration of the arguments, we find ICF has established the release of the information at issue, which we marked, would give an advantage to a

competitor or bidder. Accordingly, we conclude the city may withhold the information we marked under section 552.104(a) of the Government Code.³

In summary, the city may withhold the information in Exhibit 2 under section 552.107(1) of the Government Code; however, the city must release the non-privileged e-mail we marked if the city maintains it separate and apart from the otherwise privileged communications. The city may withhold the information we marked under section 552.104(a) 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,



James M. Graham
Assistant Attorney General
Open Records Division

JMG/gw

Ref: ID# 751760

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: Third Party
(w/o enclosures)

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