



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 11, 2019

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

OR2019-09840

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# 758882 (25610-A).

The City of Houston (the "city") received a request for all e-mails from a named employee or a specified department pertaining to a named individual during a specified time period.¹ The city states it will release some information to the requestor. The city claims some of the remaining requested information is excepted from disclosure under section 552.107 of the Government Code. You also state release some of the remaining requested information may implicate the proprietary interests of a third party.² Accordingly, you state, and provide documentation showing, you notified ICF Incorporated, L.L.C. ("ICF") of the request for

¹You inform us a requestor was required to make a deposit for payment of anticipated costs for the request under section 552.263 of the Government Code, which the city received on January 18, 2019. *See* Gov't Code § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date that governmental body receives deposit or bond).

²We note, and you acknowledge, the city did not comply with the procedural requirements of section 552.301 of the Government Code with respect to this information. *See* Gov't Code § 552.301(e). Nonetheless, third-party interests can provide a compelling reason to overcome the presumption of openness caused by failure to comply with section 552.301. *See id.* §§ 552.007, .302; Open Records Decision No. 150 at 2 (1977). Thus, we will consider whether the information at issue is excepted from disclosure under the Act on that ground.

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 received comments from ICF. We have considered the submitted arguments and reviewed the submitted representative sample of information.³

Initially, we note some of the requested information may have been the subject of previous requests for a ruling, as a result of which this office issued Open Records Letter Nos. 2019-04313 (2019) and 2019-05143 (2019). In Open Records Letter No. 2019-04313 we concluded: (1) the city may withhold certain information under sections 552.107(1) and 552.111 of the Government Code; (2) the city must withhold certain cellular telephone numbers under section 552.117(a)(1) of the Government Code if a governmental body does not pay for the cellular telephone service and the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code; (3) to the extent the e-mail addresses in the remaining information at issue are not excluded by section 552.137(c), the city must withhold such e-mail addresses under section 552.137 of the Government Code, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release; and (4) the city must release the remaining information. In Open Records Letter No. 2019-05143 we concluded: (1) the city may withhold certain information under section 552.107(1) of the Government Code, however, the city must release the non-privileged e-mail at issue if the city maintains it separate and apart from the otherwise privileged communications; (2) the city may withhold certain information under section 552.104(a) of the Government Code; and (3) the city must release the remaining information. We have no indication the law, facts, or circumstances on which the prior rulings were based have changed. Thus, to the extent the requested information is identical to the information previously requested and ruled upon, the city must continue to rely on Open Records Letter Nos. 2019-04313 and 2019-05143 as previous determinations and withhold or release the identical information at 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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the information at issue is not encompassed by the previous rulings, we will address the applicability of the Act to the information at issue.

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). A

³We 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.

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 indicated, would give an advantage to a competitor or bidder. Accordingly, we conclude the city may withhold the information we indicated under section 552.104(a) of the Government Code.

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 “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 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.* 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. *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).

The city states Exhibit 3 consists of communications involving city attorneys, city employees, outside legal counsel for the city, and consultants hired by the city that were made in furtherance of the rendition of professional legal services to the city. The city states these communications were intended to be, and have remained, confidential. Based on the city's representations and our review, we find the city has demonstrated the applicability of the attorney-client privilege to Exhibit 3. Accordingly, the city may generally withhold Exhibit 3 under section 552.107(1) of the Government Code. However, we note one of these privileged e-mail strings includes an e-mail sent to or received from non-privileged parties. Furthermore, if this e-mail is removed from the e-mail string and stands alone, it is responsive to the request for information. Therefore, to the extent 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, the city may not withhold the non-privileged e-mail under section 552.107(1) of the Government Code.

We note some of the information in the non-privileged e-mail is subject to section 552.137 of the Government Code.⁴ Section 552.137 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). *See* Gov't Code § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, the general e-mail address of a business, an Internet website address, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address that a governmental entity maintains for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). The city must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless the individual to whom the e-mail address belongs affirmatively consents to its release. *See id.* § 552.137(b).

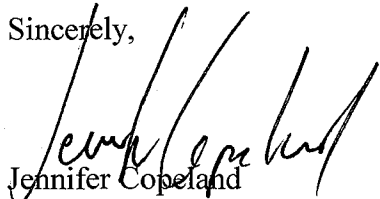
In summary, to the extent the requested information is identical to the information previously requested and ruled upon, the city must continue to rely on Open Records Letter Nos. 2019-04313 and 2019-05143 as previous determinations and withhold or release the identical information at issue in accordance with those rulings. The city may withhold the information we indicated under section 552.104 of the Government Code. The city may withhold Exhibit 3 under section 552.107(1) of the Government Code; however, if the non-privileged e-mail we marked is maintained by the city separate and apart from the otherwise privileged e-mail string in which it appears, then the city may not withhold the non-privileged e-mail under section 552.107(1) of the Government Code. The remaining information must be released.

⁴The 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).

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,



Jennifer Copeland
Assistant Attorney General
Open Records Division

JC/gw

Ref: ID# 758882

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: Third Party
(w/o enclosures)