KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 21, 2015

Ms. Nneka E. Kanu
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2015-17472

Dear Ms. Kanu:

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# 576724 (GC# 22400).

The City of Houston (the "city") received a request for four categories of information: (1) all communications between the city and a specified contractor related to the contractor's nonperformance of a specified contract, (2) any documents pertaining to the city's use or hiring of three named alternative contractors, (3) all requests or demands to the specified contractor related to the nonperformance, and (4) all documents establishing the city's determination of a metric in a settlement agreement with the specified contractor. You state the city will release some information. 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]

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. 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.

[1]We 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.

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)(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. *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 assert the submitted information consists of communications between city attorneys and city employees in their capacities as clients. You further state the communications were made for the purpose of facilitating the rendition of professional legal services to the city and the confidentiality of the communications has been maintained. Upon review, we find some of the e-mail strings at issue were communicated with individuals whom you have not identified as privileged. Thus, the city may not withhold this information, which we have marked for release, under section 552.107(1) of the Government Code. However, based on your representations and our review, we find the city has demonstrated the applicability of the attorney-client privilege to the remaining information. Thus, with the exception of the non-privileged e-mail strings we have marked for release in their entireties, the city may generally withhold the remaining information under section 552.107(1) of the Government Code. We note, however, some of the privileged e-mail strings include e-mails and an attachment received from or sent to a non-privileged party. Furthermore, if the non-privileged e-mails and attachment received from or sent to the non-privileged party are removed from the privileged e-mail strings and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails and attachment, 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 and attachment under section 552.107(1) of the Government Code.

To the extent the non-privileged attachment is maintained separate and apart by the city, we note it contains information subject to section 552.136 of the Government Code.[2] Section 552.136 states "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. This office has determined an insurance policy number is an access device for the purposes of section 552.136. Accordingly, we find the city must withhold the insurance policy number we have marked under section 552.136 of the Government Code.

In summary, except for the e-mail strings we have marked for release, the city may generally withhold the submitted information under section 552.107(a)(1) of the Government Code. However, if the non-privileged e-mails and attachment we have marked are maintained by the city separate and apart from otherwise privileged e-mail strings in which they appear, then the city may not withhold these non-privileged e-mails and attachment under section 552.107(1) of the Government Code. In that instance, the city must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code. The remaining submitted information must be released.

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,

Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/dls

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[2]The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Ref: ID# 576724

Enc. Submitted documents

c: Requestor
(w/o enclosures)