

The ruling you have requested has been amended as a result of litigation and has been attached to this document.



January 31, 2001

Mr. Art Pertile, III
City Attorney
City of Waco
P.O. Box 2570
Waco, Texas 76702-2570

OR2001-0365

Dear Mr. Pertile:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 143779.

The City of Waco (the "city") received a request for

any and all documents which relate to the proposed TMDLs for the Bosque River, dairy industry, and taste and odor problems of Lake Waco including, but not limited to: 1) water quality and other tests; 2) reports; 3) studies; 4) both electronic and written memoranda and correspondence; and 5) any and all City Council minutes from 1995 to date.

You inform us that you will release some of the information responsive to the request, but claim that the remaining requested information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

¹We assume that the "representative samples" of records submitted to this office are 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.

Initially, we note that pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. The city received the written request for information on November 2, 2000. You did not, however, submit the written request to this office until November 30, 2000, more than fifteen business days after the city's receipt of the request.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to timely submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). You have not shown such a compelling interest to overcome the presumption that the information at issue is public.² Accordingly, you must release the requested information. We caution that the distribution of confidential information constitutes a criminal offense. Gov't Code § 552.352.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

²Sections 552.103 and 552.107 of the Government Code, which you raise, are permissive exceptions which are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 473 (1987) (city's failure to meet 10-day deadline waived protections of section 552.103 and 552.111). Permissive exceptions therefore do not constitute compelling reasons to overcome the presumption of openness.

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

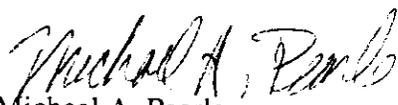
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,


Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/seg

Ref: ID# 143779

Encl. Submitted documents

cc: Ms. Susan E. Potts
Potts & Reilly, L.L.P.
401 West 15th Street, Suite 850
Austin, Texas 78701-1665
(w/o enclosures)

CAUSE NO. GV100264

CITY OF WACO, TEXAS,
Plaintiff,

V.

ATTORNEY GENERAL OF THE
STATE OF TEXAS,
Defendant.

§
§
§
§
§
§
§

IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

98TH JUDICIAL DISTRICT

District Court
Travis County, Texas
SEP 14 2006
9:00 AM
M. Rodriguez-Mendoza, Clerk

AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for agreed final judgment. Plaintiff, City of Waco, Texas, and Defendant, Greg Abbott, Attorney General of Texas, appeared by and through their respective attorneys and announced to the court that all matters of fact and things in controversy between them had been fully and finally compromised and settled. This cause is an action under the Public Information Act (PIA), TEX. GOV'T CODE ANN. ch. 552. The parties represent to the Court that, in compliance with TEX. GOV'T CODE ANN. § 552.325(c), the requestor was sent reasonable notice of this setting and of the parties' agreement that the City of Waco may withhold the information at issue; that the requestor was also informed of her right to intervene in the suit to contest the withholding of this information; and that the requestor, Susan Potts, has not informed the parties of her intention to intervene. Neither has the requestor filed a motion to intervene or appeared today. After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. The information at issue submitted to the Office of the Attorney General on February

1, 2006 by Waco as Exhibits 2, and 5 - 14 is excepted from disclosure, as follows:

Exhibit 2 - Various documents related to reasonably anticipated litigation, and handwritten notes on certain documents, as marked by the Office of the Attorney General, is excepted from disclosure under TEX. GOV'T CODE ANN. § 552.103. The following documents shall be released with any handwritten notes on such documents redacted:

a. Letter from Thomas H. Walston, Administrative Law Judge, dated October 27, 2000, and the Proposal for Decision and Order included with Walston's letter.

b. Two Total Maximum Daily Loads for Phosphorus in the North Bosque River (Document for Public Review–Sept. 2000), prepared by Strategic Assessment Division, TNRCC.

Exhibit 5 - Communications from Jack Battle and/or Sara Burgin and Kinnan Goleman, attorneys representing Waco, is excepted from disclosure under TEX. GOV'T CODE ANN. § 552.107.

Exhibit 6 - Communications from Assistant City Manager Wiley Stem is excepted from disclosure under TEX. GOV'T CODE ANN. § 552.103.

Exhibit 7 - Communications from Cullen Smith, attorney representing Waco, is excepted from disclosure under TEX. GOV'T CODE ANN. § 552.107.

Exhibit 8 - Communications from James Miertschin, an expert hired by Waco as recommended by Mr. Battle, is excepted from disclosure under TEX. GOV'T CODE ANN. § 552.103.

Exhibit 9 - Communications from Waco Director of Utilities Ricky Garrett and/or Waco Water Quality Administrator Tom Conry is excepted from disclosure under TEX. GOV'T CODE ANN. § 552.103.

Exhibit 10 - Communications from Mayor Linda Ethridge is excepted from disclosure under TEX. GOV'T CODE ANN. § 552.103,

Exhibit 11 - Communications from City Attorney Art Pertile is excepted from disclosure under TEX. GOV'T CODE ANN. § 552.107.

Exhibit 12 - Communications from Glenda Dunn, Program Manager from Water Utility Services, is excepted from disclosure under TEX. GOV'T CODE ANN. § 552.103.

Exhibit 13 - Billing statements from Jack Battle's Law Firm, Brown, McCarroll, to the City of Waco, bates stamped pages 15-17, 19-20, 25-28, 33-38, 41-42, 44, and 47-49, of Waco's legal bills dated June 13, 2000, July 13, 2000, August 8, 2000, September 11, 2000, October 13, 2000, as marked by the Office of the Attorney General, is excepted from disclosure under TEX. GOV'T CODE ANN. § 552.107.

Exhibit 14 - Memoranda or notes documenting communications at various meetings between Cullen Smith, an attorney with the law firm of Naman, Howell, Smith and Lee, who represented Waco, the Mayor of Waco, and/or various management-level Waco staff or other Waco representatives involved in the Lake Waco Protection Strategy, is excepted from disclosure under TEX. GOV'T CODE ANN. § 552.103.

2. Waco may redact the descriptions, or parts thereof, in the fee bills and the handwritten notes as enumerated in ¶ 1 of this Agreed Final Judgment.

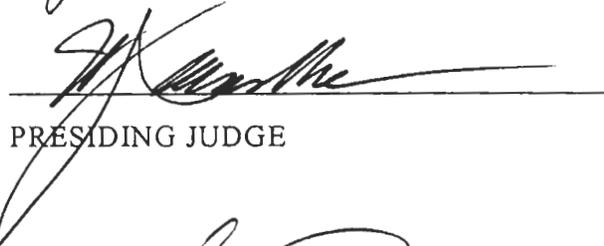
3. If it has not already done so, Waco shall release the legal bills and the two documents agreed to be released in Exhibit 2, with the information described in ¶¶ 1 and 2 of the Agreed Final Judgment redacted, and any other information responsive to Susan Potts' request, except for information excepted from disclosure by ¶¶ 1 and 2 of this Agreed Final Judgment, to the requestor promptly upon receipt by Waco of an agreed final judgment signed by the Court.

4. All costs of court are taxed against the parties incurring the same;

5. All relief not expressly granted is denied; and

6. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendant and is a final judgment.

SIGNED this the 14 day of September, 2006.



PRESIDING JUDGE

APPROVED:



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