



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

May 6, 2003

Ms. Eugenia A. Cano
City Attorney
City of Alvin
216 West Sealy
Alvin, Texas 77511

OR2003-3051

Dear Ms. Cano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 180566.

The City of Alvin (the "city") received a request for any and all records in reference to an alleged mercury violation at 1298 E. House Street in Alvin, Texas. You claim that the requested information may be excepted from disclosure under section 552.101 of the Government Code in conjunction with chapter 161 of the Health and Safety Code, or in the alternative, that it may be expressly public under section 361.182 of the Health and Safety Code. We have considered your claims and reviewed the submitted information.

We note that the requestor also asks for documents through the date of the request and "supplemented if new material becomes available after today's date." Chapter 552 of the Government Code does not require a governmental body to make available information that did not exist at the time the request was received. Open Records Decision No. 362 (1983); *see* Open Records Decision No. 452 (1986) (document not within chapter 552's purview if it does not exist when governmental body receives a request for it). Furthermore, the Public Information Act does not require a governmental body to inform a requestor if the requested information comes into existence after the request is made. Open Records Decision No. 452 at 8. Consequently, a governmental body is not required to comply with a request to supply information "if it becomes available in the future." Attorney General Opinion JM-48 at 2 (1983); Open Records Decision Nos. 476 at 1, 465 at 1 (1987). Thus, the city need not comply with the requestor's request that it provide him with new material that becomes available after the date of the request.

Next, we address the city's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. You state, and provide documentation showing, that the city

received the present request for information on February 11, 2003. The city did not request a decision from this office until March 4, 2003. Consequently, the city failed to request a decision within the ten-business-day period mandated by section 552.301(a) of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See Gov't Code § 552.302; 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). As section 552.101 of the Government Code can provide a compelling reason to overcome the presumption of openness, we will address your arguments under that exception. *See Open Records Decision No. 150 (1977)* (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests).

You ask whether the submitted materials are expressly public under section 361.182 of the Health and Safety Code. That section provides in relevant part:

- (a) The executive director [of the Texas Commission on Environmental Quality ("TCEQ")¹] may conduct investigations of facilities that are listed on the state registry, or that the executive director has reason to believe should be included on the state registry, in accordance with Sections 361.032, 361.033, and 361.037.
- (b) If there is a reasonable basis to believe there may be a release or threatened release of a hazardous substance at a facility, the executive director may submit requests for information and requests for the production of documents to any person who has or may have information or documents relevant to:
 - (1) the identification, nature, or quantity of materials that have been generated, treated, stored, or disposed of at a facility or transported to a facility;
 - (2) the identification of soils, groundwater, or surface water at a facility that have been or may be affected by an actual or threatened release of a hazardous substance;

¹TCEQ was formerly referred to as the Texas Natural Resources Conservation Commission ("TNRCC").

- (3) the nature or extent of a release or threatened release of a hazardous substance at or from a facility; or
- (4) the ability of a person to pay for or to perform a remedial action.
- (c) formation or documents requested under Subsection (b) or this subsection are public records, except that the commission shall consider the copied records as confidential if a showing satisfactory to the commission is made by the owner of the records that the records would divulge trade secrets if made public
- (d) The commission shall adopt rules regarding the provision of notice and an opportunity for a hearing before the commission on whether the requested information or documents should be produced.

Health & Safety Code § 361.182(a), (b), (c), (d). Additionally, subchapter K of the TCEQ Rules, "Hazardous Substance Facilities Assessment and Remediation," "supplement and therefore should be read in conjunction with the provisions of the Texas Health and Safety Code, Chapter 361, Subchapter F." 30 T.A.C. § 335.341(a). The rules set out the procedure for "identifying, proposing, listing, and delisting facilities on the State Registry." *Id.* This subchapter further provides as follows:

- (a) The executive director [of TCEQ] may submit requests for information and requests for production of documents as authorized by the [Health and Safety Code], § 361.182 to any person who has information or documents which in the executive director's opinion are necessary for the adequate investigation or remediation of a facility listed on the Registry [or] that the executive director has reason to believe should be listed on the State Registry. . . .
- (b) formation or documents provided to the executive director in accordance with this section are subject to the Public Information Act and its exceptions.

Id. § 335.345. After reviewing section 361.182 of the Health and Safety Code, and subchapter K of the TCEQ Rules, we find that these sections apply only to TCEQ because they refer to information that has been provided to the director of TCEQ at the director's request, and furthermore, apply only to sites either listed on the State Registry, or which the director believes should be listed on the State Registry. The submitted information consists of the city's files. You do not inform us that the director of TCEQ requested these documents, or that the site in question would qualify under the TCEQ Rules as a site that

would be considered for inclusion on the State Registry. We therefore conclude that section 361.182 of the Health and Safety Code does not apply to the submitted documents, which are in the city's possession.

We therefore will address your argument that the submitted information is confidential under chapter 161 of the Health and Safety Code. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 161.0211 of the Health and Safety Code provides in part that the Texas Department of Health ("TDH") "shall conduct epidemiologic or toxicologic investigations of human illnesses or conditions and of environmental exposures that are harmful or believed to be harmful to the public health." Health & Safety Code § 161.0211(a). That section also provides that "any findings or determinations from such investigations that relate to environmental exposures believed to be harmful to the public shall be reported in writing to the Texas Natural Resources Conservation Commission and the two agencies shall coordinate corrective measures as appropriate." Health & Safety Code § 161.0211(b). Section 161.0213 provides that "reports, records, and information furnished to the commissioner [of public health] . . . or the Texas Natural Resource Conservation Commission that relate to an epidemiologic or toxicologic investigation of . . . environmental exposures that are harmful . . . to the public health are not public information under Chapter 552, Government Code . . ." Health & Safety Code § 161.0213. We find, however, that this section only applies to information related to an investigation in the possession of TDH, or to information transferred by TDH under the statute to TCEQ. In this case, the submitted materials relate to investigations conducted by either TCEQ or the Environmental Protection Agency ("EPA"), and were neither in the possession of TDH nor transferred by TDH to TCEQ under the statute. Rather, the city possesses and maintains the information at issue. As such, the submitted information is not covered by these code sections, and is therefore not confidential under section 552.101 of the Government Code in conjunction with chapter 161 of the Health and Safety Code.

We note, however, that certain information contained within the submitted materials is confidential and must be withheld from public disclosure.² Section 552.101 encompasses common-law privacy. For information to be protected from public disclosure by the common-law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685. This office has determined that some personal financial information is highly intimate or

²The 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).

embarrassing for the purpose of common-law privacy. Open Records Decision Nos. 545 (1990) (common-law privacy protects personal financial information not relating to the financial transaction between an individual and a governmental body, including deferred compensation information, mortgage payments, assets, bills, and credit history), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (common-law privacy protects assets and income source information). In this instance, we find that certain information related to an insurance policy contained in the submitted materials constitutes intimate information for the purpose of common-law privacy, and the public has no legitimate interest in this information. Accordingly, we have marked the personal financial information that the city must withhold under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.130 of the Government Code prohibits the release of information relating to a driver's license or motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130. Accordingly, the city must withhold the driver's license numbers, which we have marked, under section 552.130 of the Government Code.

The submitted materials also contain bank account numbers. Section 552.136 of the Government Code states that "[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. The city must, therefore, withhold the bank account numbers, which we have marked, under section 552.136.

Section 552.137 of the Government Code protects e-mail addresses obtained from members of the public and provides as follows:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The city must, therefore, withhold the e-mail addresses of members of the public under section 552.137. We have marked the e-mail addresses that must be withheld under section 552.137. We note that section 552.137 does not apply to a business' general e-mail address or to a government employee's work e-mail address.

Finally, we note that the submitted documents contain social security numbers that may be confidential under federal law. A social security number may be withheld in some

circumstances under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the responsive records are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Public Information Act on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the city pursuant to any provision of law enacted on or after October 1, 1990.

To summarize, we find that: (1) the city need not supplement its response to this request with any materials received after the date of the request; (2) we have marked certain personal financial information which is confidential under section 552.101 of the Government Code in conjunction with common-law privacy; (3) the submitted driver's license numbers, which we have marked, must be withheld under section 552.130 of the Government Code; (4) the bank account numbers, which we have marked, must be withheld under section 552.136 of the Government Code; (5) certain e-mail addresses, which we have marked, must be withheld under section 552.137 of the Government Code; and (6) prior to releasing any social security numbers, you should ensure that no such information was obtained or is maintained by the city pursuant to any provision of law enacted on or after October 1, 1990. The remaining submitted information must be released to the requestor.

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 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 Dep't of Pub. 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/lmt

Ref: ID# 180566

Enc. Submitted documents

c: Larry D. Smith, M.D.
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(w/o enclosures)