



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

May 23, 2003

Mr. Brendan Hall
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P.O. Box 2725
Harlingen, Texas 78550

OR2003-3513

Dear Mr. Hall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 181587.

The City of Harlingen Waterworks System (the "system"), which you represent, received a request for information regarding purchases of equipment from Hydro-Con Systems from September, 1991, through January 31, 2003. You claim that the requested information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We have also considered comments submitted by counsel for the requestor. *See Gov't Code § 552.304* (providing that interested party may submit comments stating why information should or should not be released).

Initially, we must address the system's obligations under section 552.301 of the Government Code. Under section 552.301(e), a governmental body receiving an open records request for information that it wishes to withhold pursuant to one of the exceptions to public disclosure is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would

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.

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.

You state that the system received the present request for information on March 6, 2003. Thus, the system was required to submit the information required under section 552.301(e) no later than March 27, 2003. The envelope containing the representative sample of the information bears postage indicating it was mailed on March 28, 2003. We did receive a copy of the letter accompanying the sample documents by fax on March 27, but we note that your fax transmission of March 27 indicates on its face that it consists of only three pages and it does not include the representative sample of the requested documents. As you indicate, the sample documents that you submitted by mail on March 28 consist of over 100 pages. We find that your fax transmission of March 27 was not sufficient to satisfy the requirement under section 552.301(e) that the system submit a representative sample of the information requested within fifteen business days of receiving the request. *See Gov't Code § 552.301(e); see also Gov't Code § 552.308(a)* (fifteen-day requirement met if request bears post office cancellation mark indicating time within fifteen-day period).

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).

The presumption that information is public under section 552.302 can generally be overcome by a demonstration that the information is confidential by law or that third party interests are at stake. *See Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982)*. Section 552.103 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived by the governmental body. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also Open Records Decision No. 665 at 2 n.5 (2000)* (discretionary exceptions generally). Therefore, section 552.103 does not provide a compelling reason to overcome the presumption that the information is public. Furthermore, although you state that the requested records relate to purchases that have been referred to law enforcement agencies for investigation, you have not demonstrated that an investigating law enforcement agency has requested that the system withhold the records at issue from disclosure. Thus, we find you have not demonstrated a compelling reason to withhold the requested information under section 552.108. *See Open Records Decision No. 586 (1991)* (need of another governmental body to withhold information from disclosure

provides compelling reason under section 552.108). We therefore determine that the system has waived its claims under sections 552.103 and 552.108 of the Government Code.

We note, however, that the submitted information contains account number information that is excepted under section 552.136 of the Government Code. Section 552.136 can provide a compelling reason to withhold information from disclosure.² Section 552.136 provides in relevant part:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding 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.

The system must withhold the account number information that we have marked pursuant to section 552.136 of the Government Code.

The submitted information also includes an e-mail address of a member of the public. Section 552.137 of the Government Code protects third party interests 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.

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).

Unless the relevant individual has affirmatively consented to the release of the marked e-mail address, the system must withhold the e-mail address under section 552.137 of the Government Code.

In summary, the system must withhold the marked account information under section 552.136 of the Government Code. The system must withhold the marked e-mail address under section 552.137 of the Government Code. The remainder of the 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,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 181587

Enc: Submitted documents

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