



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 17, 2003

Ms. Margot Campbell
Counsel
Port of Houston Authority
P. O. Box 2562
Houston, Texas 77252-2562

OR2003-6520

Dear Ms. Campbell:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 187723.

The Port of Houston Authority (the "authority") received a request for information relating to the authority's purchase of property for a dredge material disposal facility. You state that the authority has made some responsive information available to the requestor. You claim, however, that the remaining requested information is excepted from disclosure pursuant to sections 552.022, 552.101, 552.103, and 552.104 of the Government Code.¹ We have considered the exceptions you claim and have reviewed the submitted information. We have also considered comments submitted by a representative of the requestor. *See Gov't Code* § 552.304 (providing that person may submit comments stating why information should or should not be released).

Initially, we must address the procedural requirements of section 552.301 of the Government Code. Section 552.301(e) provides that a governmental body that requests an attorney general decision under section 552.301(a) must, within a reasonable time, but not later than the fifteenth business day after the date of receiving the written request, submit to the attorney general, among other items, a copy of the written request for information. *See Gov't*

¹ Although the authority claims that some of the requested information is excepted from disclosure under section 552.022 of the Government Code, we note that section 552.022 does not constitute an exception to disclosure under the Public Information Act (the "Act"). Accordingly, we do not address whether any portion of the submitted information is excepted from disclosure under section 552.022 of the Government Code.

Code § 552.301(e). To date, the authority has not provided us with a copy of the written request for information. Therefore, we find that the authority failed to comply with the procedural requirements of section 552.301 in requesting this decision from us.

Because the authority failed to comply with the procedural requirements of section 552.301 in requesting this decision from us, the information at issue is now presumed public. *See* Gov't Code § 552.302; *see also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The authority must demonstrate a compelling interest in order to overcome the presumption that the information at issue is now public. *See id.* Normally, a compelling interest is demonstrated when some other source of law makes the requested information confidential or when third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Although the authority claims that the information at issue is excepted from disclosure pursuant to sections 552.103 and 552.104 of the Government Code, we note that these exceptions are discretionary exceptions to disclosure under the Act that do not constitute compelling interests sufficient to overcome the existing presumption that the information at issue is now public.² Accordingly, we conclude that the authority may not withhold any portion of the submitted information under sections 552.103 or 552.104 of the Government Code. However, since the authority also claims that the submitted information is excepted from disclosure pursuant to section 552.101 of the Government Code, we will address this particular claim.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by other law. *See* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). We note that for information to be encompassed by section 552.101, the provision argued by a governmental body must explicitly require confidentiality for the information. A confidentiality requirement will not be inferred from statutory or constitutional structure. *See, e.g.,* Open Records Decision No. 465 at 4-5 (1987). After reviewing the authority's arguments and the submitted information, we find that the authority has failed to adequately demonstrate that any portion of the information is expressly made confidential by law. Chapter 552 of the

² Discretionary exceptions 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)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 522 at 4 (1989) (discretionary exceptions in general), 473 (1987) (governmental body may waive statutory predecessor to section 552.111); *see also Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.--Dallas 1999, no pet.) (governmental body may waive section 552.103). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

Government Code differs in purpose from statutes and procedural rules providing for discovery in judicial proceedings. *See* Gov't Code §§ 552.005 (chapter 552 does not affect scope of civil discovery), .006 (chapter 552 does not authorize withholding public information or limit availability of public information to public except as expressly provided by chapter 552); *see also* Attorney General Opinion JM-1048 (1989); Open Records Decision No. 575 (1990) *overruled in part by* Open Records Decision No. 647 (1996) (section 552.101 does not encompass discovery privileges). Accordingly, we conclude that the authority may not withhold any portion of the submitted information under section 552.101 of the Government Code.

We note, however, that portions of the submitted information are copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making such copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the authority must release the entirety of the submitted information to the requestor in compliance with applicable copyright law.

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

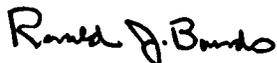
provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to 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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 187723

Enc. Submitted documents

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(w/o enclosures)