



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 30, 2004

Ms. Janis Kennedy Hampton
Assistant City Attorney
City of Bryan
P.O. Box 1000
Bryan, Texas 77805

OR2004-7383

Dear Ms. Hampton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 208183.

The City of Bryan (the "city") received a request for "any and all correspondences and documents between the City of Bryan and St. Paul, Fidelity & Guaranty Insurance Underwriters, Bierhalter & Associates and Pate & Pate Enterprises." You state that the city is releasing to the requestor portions of the requested information. You claim that other portions of the requested information are excepted from disclosure under sections 552.101 and 552.111 of the Government Code and Texas Rules of Evidence 503 and 408. We have considered your claims and reviewed the submitted information, which you say is a representative sample of the requested information.¹

We first address the city's obligations to follow the Act's procedural requirements for seeking an open records decision from this office. Section 552.301 of the Government Code provides in relevant part as follows:

¹We 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.

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

Gov't Code § 552.301(a), (b). You state that the city received the request on June 2, 2004, and acknowledge that the city failed to submit this request to our office within the ten business days. We received your request for an open records ruling on June 28, 2004. The ten-day deadline for this request was June 16, 2004. Consequently, we find that you failed to request a decision within the ten business day period mandated by section 552.301(a) of the Government Code. Because the request for a decision was not timely submitted, the requested information is presumed to be public information. Gov't Code § 552.302.

In order to overcome the presumption that the requested information is public information, a governmental body must provide compelling reasons why the information should not be disclosed. *Id.*; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see* Open Records Decision No. 630 (1994). A compelling reason exists when the information is deemed confidential by law or the release of the information effects a third party's interest. *See* Open Records Decision No. 150 (1977).

However, section 552.111 is a discretionary exception and serves only to protect a governmental body's interest and may be waived. As such, the applicability of section 552.111 is not a compelling reason to withhold information. *See* Open Records Decision Nos. 677 (2002), 473 (1987); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Accordingly, we find that the city may not withhold the requested information based on section 552.111.

You also raise section 552.101 of the Government Code, an exception which, if applicable, can provide a compelling reason to overcome the presumption of openness. However, your arguments do not establish the applicability of this exception to the information at issue, as we will explain.

Section 552.101 excepts from required public disclosure information that is confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101; Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). You assert that this exception applies because you assert that the information is confidential under Texas Rules

of Evidence 503 and 408. However, for information to be encompassed by section 552.101, the provision of law argued must explicitly require confidentiality. A confidentiality requirement will not be inferred from a provision's structure. *See* Open Records Decision Nos. 658 at 4 (1998) (stating that statutory confidentiality provision must be express and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (stating that, as general rule, statutory confidentiality requires express language making information confidential), 465 at 4-5 (1987).

Further, we note that chapter 552 of the 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 at 2 (1996) (section 552.101 does not encompass discovery privileges), 575 at 2 (1990) (stating explicitly that discovery privileges are not covered under predecessor to section 552.101), 416 (1984) (finding that even if evidentiary rule specified that certain information may not be publicly released during trial, it would have no effect on disclosability under Act). Accordingly, because Rules 503 and 408 of the Texas Rules of Evidence do not explicitly provide that information is confidential, we find that the city may not withhold the information from the requestor under section 552.101 of the Government Code in conjunction with Rules 503 or 408.

You also argue that the Texas Supreme Court in *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001) held that governmental bodies do not need to seek an attorney general ruling when the requested information is confidential under other law and that documents that are subject to the Texas Rules of Evidence and the Texas Rules of Civil Procedure are confidential under other law under section 552.022 of the Government Code. The Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022" of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Section 552.022(a) enumerates categories of information that are public information and not excepted from required disclosure under chapter 552 of the Government Code unless they are "expressly confidential under other law." *See* Gov't Code § 552.022(a). However, the information at issue here is not subject to section 552.022. *See id.* Accordingly, we find that the city may not withhold the information under rule 503 or rule 408 of the Texas Rules of Evidence because the information at issue is not encompassed by section 552.022 of the Government Code.

In summary, the city has not established that the requested information is excepted from required public disclosure. Consequently, the city must release the requested information 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,

A handwritten signature in cursive script, appearing to read "Kay Hastings".

Kay Hastings
Assistant Attorney General
Open Records Division

KH/seg

Ref: ID# 208183

Enc: Submitted documents

c: Ms. Tammy D. Isbell
Dudley Construction, Ltd.
11370 State Highway 30
College Station, Texas 77845
(w/o enclosures)