



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 7, 2008

Mr. Ron G. MacFarlane, Jr.
Dealey, Zimmerman, Clark, Malouf & MacFarlane, P.C.
3131 Turtle Creek Boulevard Suite 1201
Dallas, Texas 75219-5415

OR2008-03147

Dear Mr. MacFarlane:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 304175.

The City of Cedar Hill (the "city"), which you represent, received a request for information relating to transactions with the Audubon Society. You inform us that some of the requested information has been released. You claim that other responsive information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted. We also have considered the comments that we received from the requestor. *See Gov't Code* § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

We first note that some of the submitted information was created after the date of the city's receipt of this request for information. The Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App. – San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983). Thus, the information that did not exist when the city received this request is not responsive to the request. This decision does not address the public availability of the non-responsive information, which we have marked, and that information need not be released to the requestor.

We also note that the city seeks to withhold information that has been released to the requestor in response to the instant request. The Act does not permit selective disclosure of information. *See Gov't Code* §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). Information that has been voluntarily released to a member of the public may not subsequently be withheld from the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See Gov't Code*

§ 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988); *but see* Open Records Decision Nos. 579 (1990) (exchange of information among litigants in “informal” discovery is not “voluntary” release of information for purposes of statutory predecessor to Gov’t Code § 552.007), 454 at 2 (1986) (governmental body that disclosed information because it reasonably concluded that it had constitutional obligation to do so could still invoke statutory predecessor to Gov’t Code § 552.108). Section 552.107(1) of the Government Code, which you claim, is a discretionary exception to disclosure that protects a governmental body’s interests and may be waived. *See* Open Records Decision Nos. 676 at 11 (2002) (governmental body may waive attorney-client privilege under Gov’t Code § 552.107(1)), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). As such, section 552.107(1) does not prohibit the release of information or make information confidential under law. You also claim the attorney-client privilege under section 552.101 of the Government Code, which excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Although this exception can constitute a confidentiality provision for the purposes of section 552.007, section 552.101 does not encompass the attorney-client privilege. *See* ORD 676 at 1-3 (Gov’t Code § 552.101 does not encompass discovery privileges). Therefore, the information that the city has released to the requestor may not be withheld under section 552.107(1) or section 552.101.

Next, we address the city’s obligations under section 552.301 of the Government Code. This section prescribes procedures that must be followed in asking this office to decide whether requested information is excepted from public disclosure. *See* Gov’t Code § 552.301(a). Section 552.301(e) provides in part that a governmental body must submit to this office, not later than the fifteenth business day after the date of its receipt of the request, the specific information that the governmental body seeks to withhold or representative samples if the information is voluminous. *See id.* § 552.301(e)(1)(D). If a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App. – Austin 1990, no writ).

In this instance, the city’s fifteen-business-day deadline under section 552.301(e) was January 4, 2008. Although you originally submitted responsive information on December 27, 2007, the information at issue had been redacted from the documents such that this office was unable to review it. On January 10, 2008, you submitted some of the information at issue in unredacted form.¹ In failing to submit any of the information at issue in unredacted form until after its fifteen-business-day deadline, the city did not comply with section 552.301(e). The city also failed to comply with section 552.301(e) with respect to

¹We note that your markings in the documents submitted on January 10 indicate that you now seek to withhold certain information that was not redacted from the documents that you submitted on December 27. In your December 27 letter, however, you stated that the unredacted portions of the submitted documents were being released to the requestor. Accordingly, the information that has been released may not now be withheld. *See* the foregoing discussion of section 552.007 of the Government Code at pages 1 and 2 of this decision.

the information at issue that was originally redacted and has not subsequently been submitted to this office in unredacted form. Thus, all of the information at issue is presumed to be public under section 552.302. This statutory presumption can generally be overcome when the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Because section 552.107(1) is a discretionary exception that a governmental body may waive, the city's claim under section 552.107(1) does not provide a compelling reason for non-disclosure under section 552.302. *See* ORD 676 at 12 (harm to interests of governmental body that received request for information is not compelling reason for non-disclosure under Gov't Code § 552.107(1)). Likewise, because section 552.101 does not encompass the attorney-client privilege, the city's assertion of that exception does not provide a compelling reason for non-disclosure. *See id.* at 1-3. Therefore, the city may not withhold any of the information at issue under section 552.107(1) or section 552.101 of the Government Code. As you claim no other exception to disclosure, the city must release all of the information that is responsive to this request.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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).

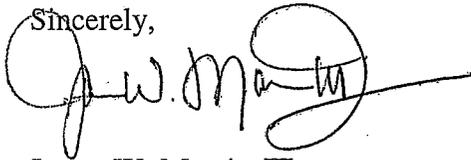
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 challenge 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 Office of the Attorney General 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,

A handwritten signature in black ink, appearing to read "J.W. Morris, III". The signature is stylized with a large, circular flourish at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/jb

Ref: ID# 304175

Enc: Submitted documents

c: Mr. M. Johnson
P.O. Box 3621
Cedar Hill, Texas 75106
(w/o enclosures)