



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 6, 2008

Ms. Yvette Aguilar  
Mr. Ronald J. Bounds  
Assistant City Attorneys  
City of Corpus Christi  
P.O. Box 9277  
Corpus Christi, Texas 78469-9277

OR2008-06142

Dear Ms. Aguilar and Mr. Bounds:

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# 309262.

The City of Corpus Christi (the "city") received a request for records of "permits and inspection reports during and since the conversion of the Wilson [Building] to a detention [c]enter" and "temporary employee costs used to flush dead end mains." You inform us that some of the requested information has been released. You state that other responsive information is the subject of a previous open records letter ruling. You have submitted information that the city seeks to withhold under sections 552.103 and 552.136 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

You state that some of the requested information was the subject of a previous request, as a result of which this office issued Open Records Letter No. 2008-01781 (2008). You also state that there has been no change in the law, facts, and circumstances on which the previous ruling is based. We therefore conclude that the city may continue to rely on Open Records Letter No. 2008-01781 with regard to the requested information that is the subject of that decision. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under Gov't Code § 552.301(a)).

We next note that the city failed to submit some of the information at issue to this office within the fifteen-business-day deadline prescribed by section 552.301 of the Government Code.<sup>1</sup> See Gov't Code § 552.301(e)(1)(D) (governmental body must submit information at issue or representative samples within fifteen business days after date of receipt of request for information). The information that was not timely submitted is therefore presumed to be public and must be released unless there is a compelling reason for non-disclosure. See *id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App. – Austin 1990, no writ); Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Although you seek to withhold the information in question under section 552.103 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. See Gov't Code § 552.007; *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 Gov't Code § 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Thus, the city's claim under section 552.103 is not a compelling reason for non-disclosure. Therefore, the information that was not timely submitted may not be withheld under section 552.103 and must be released.

We also note that some of the submitted information falls within the scope of section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). Section 552.022(a)(3) provides for required public disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body," unless the information is expressly confidential under other law. *Id.* § 552.022(a)(3). We have marked the information that is subject to section 552.022. You do not claim that the marked information is excepted from disclosure under section 552.108. Although you seek to withhold the marked information under section 552.103, that section is not other law that makes information confidential for the purposes of section 552.022. Therefore, the city may not withhold any of the marked information that is subject to section 552.022 under section 552.103.

You also claim, however, that some of the marked information is excepted from disclosure under section 552.136 of the Government Code. Section 552.136, which is other law that makes information confidential for the purposes of section 552.022, provides as follows:

- (a) "[A]ccess device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification

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<sup>1</sup>You inform us that the city received the instant request for information on February 18, 2008; therefore, the city's deadline under section 552.301(e) was March 11. The document in question was submitted to this office on March 14.

number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another 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 [the Act], 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.

*Id.* § 552.136(a)-(b). A governmental body must explain, unless it is clear from the face of the document, how the information that it seeks to withhold constitutes an access device number for the purposes of section 552.136. *See id.* § 552.301(e)(1)(A), Open Records Decision Nos. 542 (1990) (concluding that Act places on governmental body burden of establishing which exceptions apply to requested information and why), 532 (1989), 515 (1988), 252 (1980). Historically, this office has allowed governmental bodies to withhold certain types of access device numbers, such as bank account numbers, credit card numbers, and insurance policy numbers, under section 552.136 because it is obvious how these types of numbers can be used alone or in conjunction with another device to obtain money, goods, or services, or to initiate transfers of funds. *See Gov't Code* § 552.136(a)-(b). You seek to withhold the account number that you have marked in the submitted invoices under section 552.136. In this instance, however, you have merely recited the key terms of section 552.136(a)(2) in your argument for withholding the marked information and have not explained how the marked account number, whether used alone or in conjunction with another device, may be used to initiate a transfer of funds. Thus, we find that you have failed to explain how the account number that you have marked constitutes an "access device number" for the purposes of section 552.136. Therefore, the city may not withhold the information that you have marked under section 552.136 of the Government Code.

With regard to the remaining information at issue, we address your claim under section 552.103. This exception provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App. – Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

You contend that the remaining information is related to a pending lawsuit to which the city is a party. You inform us, and have provided documentation demonstrating, that the lawsuit was filed against the city in the District Court for the 117<sup>th</sup> Judicial District, Nueces County, prior to the city's receipt of this request for information. You state that the remaining information is related to the pending lawsuit because the plaintiff is alleging a violation of the Whistleblower Act. You also state that the remaining information is related to the alleged violations of law that the plaintiff reported. Based on your representations, the submitted documentation, and our review of the information at issue, we find that the city was a party to pending litigation when it received this request for information and that the information at issue is related to the pending litigation for the purposes of section 552.103. We therefore conclude that the city may withhold the remaining information under section 552.103 of the Government Code.

In reaching this conclusion, we assume that the opposing parties in the litigation have not seen or had access to the remaining information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that is related to litigation through discovery procedures. *See Open Records Decision No. 551 at 4-5 (1990).* If the opposing parties have seen or had access to information that is related to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See Open Records Decision Nos. 349 (1982), 320 (1982).* We note that the applicability of section 552.103 ends once the related litigation concludes. *See Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).*

In summary: (1) the city may continue to rely on Open Records Letter No. 2008-01781 with regard to the requested information that is the subject of that decision; (2) the city must

release the information that it did not timely submit in requesting this decision; (3) the city also must release the marked information that is subject to section 552.022 of the Government Code; and (4) the city may withhold the rest of the submitted information under section 552.103 of the Government Code.

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).

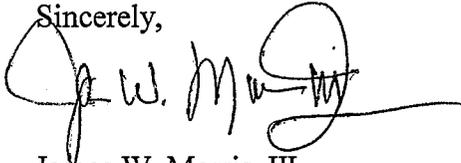
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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 fluid and cursive, with a long horizontal stroke extending to the right.

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

JWM/jh

Ref: ID# 309262

Enc: Submitted documents

c: Mr. John Kelley  
We the People News  
P.O. Box 537  
Corpus Christi, Texas 78403  
(w/o enclosures)