



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 9, 2008

Mr. C. Patrick Phillips
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street, 3rd Floor
Fort Worth, Texas 76102

OR2008-07836

Dear Mr. Phillips:

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# 312033.

The City of Fort Worth (the "city") received a request for information related to Heritage Plaza that includes city council minutes from 2006, a staff study from 2006, and the city's copy of an assessment. You state that you have provided the requestor with some of the requested information. You further state that you have no information responsive to the second category of the request. We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities. Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3. You state that you also have no information responsive to the third category of the request. In the alternative, you claim that the submitted information is not subject to the Act. You also assert that it is excepted from disclosure under section 552.111 of the Government Code. You further claim that the submitted information may implicate the proprietary interests of a third party. Pursuant to section 552.305 of the Government Code you notified Streams & Valleys, Inc. ("Streams & Valleys") of the request for information and of its right to submit arguments explaining why the requested information should not be released. *See Gov't Code § 552.305(d)*; *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have considered your arguments and reviewed the submitted information. We have also received and considered comments from the requestor's attorney. *See Gov't Code § 552.304* (interested party may submit written comments concerning availability of requested information).

Initially, we address your assertion that the submitted information is not responsive to the third category of the request. The third category seeks a copy of Carter & Burgess, Inc.'s ("Carter & Burgess") assessment of the condition of Heritage Park from the summer of 2007. We note that a governmental body must make a good-faith effort to relate a request for information to responsive information that is within the governmental body's possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). You state that Streams & Valleys funded this assessment and Carter & Burgess, Inc. conducted the assessment. You state that the submitted information does "not constitute Carter Burgess's 'assessment' of the Plaza and [is] instead merely a presentation highlighting certain issues raised during the assessment itself." We have reviewed the submitted information and conclude that it is responsive to the request. We will therefore address your arguments against disclosure.

Next, the city asserts that the submitted information is not subject to the Act. The Act is applicable to "public information." *See* Gov't Code § 552.021. Section 552.002 of the Act provides that "public information" consists of "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." *Id.* § 552.002(a). Thus, virtually all information that is in a governmental body's physical possession constitutes public information that is subject to the Act. *Id.* § 552.002(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). Information that is collected, assembled, or maintained by a third party may be subject to disclosure under the Act if it is maintained for a governmental body, the governmental body owns or has a right of access to the information, and the information pertains to the transaction of official business. *See* Open Records Decision No. 462 (1987). Upon review, we find that the submitted information pertains to the official business of the city. We also find that the city has a right of access to the submitted information. *See* Gov't Code § 552.002(a)(2); *see also* *Baytown Sun v. City of Mont Belvieu*, 145 S.W.3d 268, 271 (Tex.App-Houston [14th Dist.] 2004, no pet.) (governmental body that was entitled to inspect books and records of contracting party had right of access to its payroll account records). We therefore conclude that the submitted information is subject to the Act and must be released, unless it falls within the scope of an exception to disclosure. *See* Gov't Code §§ 552.002(a), .021.

Next, we address the requestor's contention that the city was untimely in requesting this ruling. You state that the city received the request for information on February 22, 2008. On March 7, 2008, you sent the requestor an itemized statement of estimated charges, and informed the requestor that the city required a deposit in the amount of fifty percent of the estimated cost of processing the request. Section 552.263(a) provides in relevant part that a governmental body "may require a deposit or bond for payment of anticipated costs . . . if [the governmental body] has provided the requestor with the required *written itemized statement* detailing the estimated charge for providing the copy and if the charge" is estimated to exceed \$100, if the governmental body has more than 15 full-time employees or \$50, if the governmental body has fewer than 16 full-time employees. Gov't Code § 552.263(a) (emphasis added). Pursuant to section 552.263 of the Government Code, a

request for a copy of public information is considered to have been received by a governmental body on the date the governmental body receives the deposit or bond for payment of anticipated costs. *See Gov't Code § 552.263(e)*. We note, however, that a governmental body may require a deposit or bond only if it has provided the requestor with the required written itemized statement. The requirements of the written itemized statement referred to in section 552.263 are found in section 552.2165 of the Government Code.

Section 552.2615 requires a governmental body to provide a requestor with an estimate of charges when a request to inspect a paper record will result in the imposition of a charge that will exceed forty dollars. *See id.* § 552.2615. Under section 552.2615, a governmental body is required to inform the requestor of the duties imposed on him by this section and provide the requestor the information needed to respond. *Id.* Section 552.2615 of the Government Code provides in part:

(a) [T]he governmental body must inform the requestor of the responsibilities imposed on the requestor by this section and of the rights granted by this entire section and give the requestor the information needed to respond, including:

(1) that the requestor must provide the governmental body with a mailing, facsimile transmission, or electronic mail address to receive the itemized statement and that it is the requestor's choice which type of address to provide;

(2) that the request is considered automatically withdrawn if the requestor does not respond in writing to the itemized statement and any updated itemized statement in the time and manner required by this section; and

(3) that the requestor may respond to the statement by delivering the written response to the governmental body by mail, in person, by facsimile transmission if the governmental body is capable of receiving documents transmitted in that manner, or by electronic mail if the governmental body has an electronic mail address.

(b) A request . . . is considered to have been withdrawn by the requestor if the requestor does not respond in writing to the itemized statement by informing the governmental body within 10 days after the date the statement is sent to the requestor that

(1) the requestor will accept the estimated charge;

(2) the requestor is modifying the request in response to the itemized statement; or

(3) the requestor has sent to the attorney general a complaint alleging that the requestor has been overcharged for being provided with a copy of public information.

Gov't Code § 552.2615(a), (b). We have examined the cost estimate the city provided to the requestor, and note that in this instance the city did not inform the requestor of her rights and responsibilities under sections 552.2615(a) and (b). We therefore find that the city failed to meet the requirements of section 552.2615 in providing the required written itemized statement. Because the required written itemized statement was defective, the city may not require a deposit or bond of the requestor and the city's deadlines were not tolled under section 552.263. Furthermore, the provision of an itemized estimate of charges to a requestor under section 552.2615 does not excuse a governmental body from complying with its deadlines under section 552.301. *See id.* § 552.2615(g) (deadlines imposed by section 552.2615 do not affect application of time deadline imposed on governmental body under subchapter G of the Government Code).

Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information that it wishes to withhold. Pursuant to section 552.301(b), the governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(b). Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples if the information is voluminous. *See id.* § 552.301(e)(1)(A)-(D). You state that the city received the original request for information on February 22, 2008. However, you did not request a ruling from this office until April 1, 2008. Furthermore, you did not submit the requested information or arguments stating why your claimed exception would apply until April 8, 2008. Consequently, we find that the city failed to comply with the procedural requirements of section 552.301 in requesting this decision from our office.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *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 section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Although you claim

an exception to disclosure under section 552.111 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). Thus, your claim under section 552.111 does not provide a compelling reason for non-disclosure, and the city may not withhold the submitted information under this exception. However, because third party interests can provide a compelling reason to withhold information, we will address whether the submitted information is excepted under the Act.

We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, Streams & Valleys has not submitted to this office any reasons explaining why its information should not be released. Therefore, Streams & Valleys has not provided us with any basis to conclude that it has a protected proprietary interest in the information at issue. *See, e.g., id.* § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the city may not withhold the submitted information on the basis of any proprietary interest Streams & Valleys may have in the information.

You state that the submitted information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are protected by copyright. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of materials protected by copyright, the person must do so unassisted by the governmental body. In making 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 submitted information must be released to the requestor, but any information protected by copyright may only be released in accordance with 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 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,



Chris Schulz
Assistant Attorney General
Open Records Division

CS/mcf

Ref: ID# 312033

Enc. Submitted documents

c: Ms. Lisa Lowry
Chairman
Historic Fort Worth, Inc.
1110 Penn Street
Fort Worth, Texas 76102
(w/o enclosures)