



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 23, 2009

Mr. Todd M. Hurd  
Todd Hurd & Associates  
2306-A Avenue Q  
Lubbock, Texas 79411

OR2009-00918

Dear Mr. Hurd:

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# 332996.

The City of Abernathy (the "city"), which you represent, received a request to review checks and bills paid by the city to three specified entities. You state that you do not have information responsive to the third entity.<sup>1</sup> You also state that you will release some of the requested information. You claim that portions of the submitted information are excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code, and privileged under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure.<sup>2</sup> We have considered your arguments and reviewed the submitted information.

Initially, we must address the city's procedural obligations under the Act. Pursuant to section 552.301(b) of the Government Code, a governmental body must ask for a decision

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<sup>1</sup>The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *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), 563 at 8 (1990), 555 at 1-2 (1990).

<sup>2</sup>Although you raise section 552.101 of the Government Code as an exception to the disclosure of the requested information, you have provided no arguments regarding the applicability of this section. Thus, we assume that you no longer urge this section. *See Gov't Code* §§ 552.301(b), (e), .302.

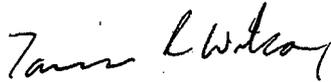
from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. You state the city received the request for information on October 14, 2008. However, you did not ask our office for a decision until November 6, 2008. You inform us that a cost estimate and bond request was sent to the requestor, and that you were waiting for the requestor to provide the cost funds up front. Gov't Code § 552.263. However, as we explained in our letter to the city, ML-332050-08, the city erred in sending a cost estimate and requesting a bond from the requestor. Thus, the city was required to seek a decision from our office by October 28, 2008. The city failed to comply with the procedural requirements mandated by section 552.301.

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 id.* § 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). Generally, a governmental body may demonstrate a compelling reason to withhold information by a showing that the information is made confidential by another source of law or affects third party interests. *See* Open Records Decision No. 630 (1994). Although you raise sections 552.103, 552.107, and 552.111 of the Government Code, Texas Rule of Evidence 503, and Texas Rule of Civil Procedure 192.5, these exceptions and rules are discretionary in nature. They serve only to protect a governmental body's interests and may be waived; as such, they do not constitute compelling reasons to withhold information for purposes of section 552.302. *See 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); Open Records Decision Nos. 677 at 10 (2002) (attorney work-product privilege under rule 192.5 is not compelling reason to withhold information under section 552.302), 676 at 12 (2002) (claim of attorney-client privilege under section 552.107 or rule 503 does not provide compelling reason to withhold information under section 552.302 if it does not implicate third-party rights), 663 at 5 (1999) (governmental body may waive sections 552.103 and 552.107), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions in general). In failing to comply with section 552.301, the city has waived its claims under sections 552.103, 552.107, and 552.111 of the Government Code, Texas Rule of Evidence 503, and Texas Rule of Civil Procedure 192.5, and may not withhold any of the submitted information based upon these exceptions and rules. As you raise no further exceptions, the submitted documents must be released to the requestor.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Tamara Wilcox  
Assistant Attorney General  
Open Records Division

TW/eeg

Ref: ID# 332996

Enc. Submitted documents

c: Requestor  
(w/o enclosures)