



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 7, 2010

Mr. Warren M. S. Ernst
Chief of the General Counsel Division
City of Dallas
1500 Marilla, Room 7DN
Dallas, Texas 75201

OR2010-08285

Dear M:

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# 381812.

The City of Dallas (the "city") received a request for all information related to Camco International, Inc.; Camco Group and/or Camco DCE, Inc.; Dallas Clean Energy, LLC and/or Clean Energy Fuels Corporation as it pertains to the purchase, operation, revenue, receipts, royalty payments or any other matter concerning the operation of the McCommas Landfill and the collection, treatment, and ultimate sale of methane gas or other constituents of the landfill gas from the McCommas Landfill from December 15, 2009 to the date of the request. The city states some of the requested information will be released. The city claims, however, the remaining information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the claimed exceptions and reviewed the submitted representative sample of information.¹

Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to

¹We assume 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 those records contain substantially different types of information than that submitted to this office.

section 552.301(b) of the Government Code, the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. Gov't Code § 552.301(b). Pursuant to section 552.301(e) of the Government Code, the governmental body is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e). Although the city received the request for information on February 19, 2010, it did not request a ruling or comply with the requirements of section 552.301(e) until March 30, 2010. Thus, we find the city failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption the information is public and must be released, unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *Id.* § 552.302; *see Jackson v. Tex. Dep't of Pub. Safety*, 243 S.W.3d 754 (Tex. App.—Corpus Christi 2007, pet. denied); *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *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 Gov't Code § 552.302); Open Records Decision Nos. 630 (1994), 319 (1982). Although the city acknowledges its procedural violations, it asserts the submitted documents are confidential under section 552.101 in conjunction with the attorney-client privilege found in rule 503 of the Texas Rules of Evidence. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. If information is confidential under section 552.101, a governmental body is prohibited from releasing the information; improper disclosure results in criminal penalties under the Act. *See id.* § 552.352 (providing criminal penalties for misuse or distribution of confidential information). Because a client may waive the attorney-client privilege, it is discretionary and no criminal penalties attach if the client voluntarily releases the information. Accordingly, rule 503 does not make information confidential for purposes of section 552.101 and the privilege may not be asserted under that exception. *See* Open Records Decision No. 676 at 1-3 (2002) (discussing proper exception for attorney-client privilege).

The city also asserts section 552.107(1) which protects information that comes within the attorney-client privilege. *See* Gov't Code § 552.107(1). Because section 552.107(1) only protects a governmental body's interests, it is discretionary and is waived by a governmental body's failure to comply with the Act's procedural requirements. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver

of discretionary exceptions). Accordingly, the exception is not a compelling reason under section 552.302. ORD 676 at 11-12; *City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.—Amarillo 2007), *rev'd on other grounds*, 304 S.W.3d 380 (Tex. 2010).

The city asserts its attorney-client privilege cannot be waived by the actions of its attorneys in failing to timely request a ruling, but only by its own actions as the client. This office does not dispute the privilege belongs to the city as the client. See TEX. R. EVID. 503; see also ORD No. 676 at 2 (expressly stating privilege rests with client governmental body). However, the responsibility of complying with the Act as well as the consequences of failing to comply with the statute rest with the city. Gov't Code §§ 552.301, .302. The request for information was sent to the city, the client and the governmental body under the Act.

Although this office does not have the exact number of requests for rulings submitted by the city for our review since the Act's inception in 1973, it should be noted that since January 1, 2010, the city has requested nearly 500 rulings. The submitted records also indicate the city had recently responded to another request by this requestor for presumably similar records. Thus, it cannot be said the city was unaware of its obligations under the Act. Further, based on the thousands of rulings this office has issued to the city, it cannot be said the city is unaware of this office's interpretations of the Act's provisions. In fact, between 1999 and 2008, this office issued 719 rulings to the city involving violations of section 552.301. And yet, when the city as the client entity received this open records request, it chose not to raise its claim under section 552.107(1) in a timely manner. In fact, the city is nearly a month late in submitting its request for a decision from this office. The city attributes its delinquency to the actions of some unidentified attorney. Even if the city's untimely request was caused by this unidentified attorney's negligence, the city fails to explain why it should not be held responsible for the actions of its employee. Governmental entities are responsible for the acts and omission of their employees if those employees are acting in the scope of their employment. See, e.g., Civ. Prac. & Rem. Code § 101.021. The attorney assigned to handle public information requests and any other employees responsible for responding were doing so on behalf of the city. See *Nat'l Med. Enters., Inc. v. Godbey*, 924 S.W.2d 123, 124 (Tex.1996) (holding corporation acts through its human agents). We cannot, as the city urges, read section 552.302 out of the Act. The privilege and the exception rest with the city and by failing to comply with the Act, the city waived its section 552.107 claim with respect to the submitted documents. *Simmons*, 166 S.W.3d at 350; Open Records Decision Nos. 676 (2002), 630 (1994).

The city argues, however, that neither the Act nor any other law stipulates that a governmental body waives its attorney-client privilege claim by failing to request a ruling in accordance with section 552.301. We disagree. Section 552.302 clearly states:

If a governmental body does not request an attorney general decision as provided by Section 552.301 and provide the requestor with the information required by Sections 552.301(d) and (e-1), the information requested in

writing is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information.

Gov't Code § 552.302. Thus, pursuant to section 552.302, a governmental body's failure to comply with section 552.301, results in the waiver of its discretionary claims. This office's long standing interpretation of section 552.302 and its consequences have been repeatedly affirmed by the courts. *See, e.g., Simmons*, 166 S.W.3d at 350; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (stating governmental body may waive Gov't Code § 552.103); *Hancock*, 797 S.W.2d at 381-82. In advancing its argument that sections 552.301 and 552.302 do not express a clear legislative intent that procedural violations result in a waiver of a governmental body's discretionary claims, the city fails to submit any arguments explaining what it believes the legislature's intent was when it enacted those provisions. Accordingly, we find the city's violation of section 552.301 resulted in a waiver of its claim under section 552.107.

Finally, the city asserts that in this instance, it has a compelling reason to withhold the submitted information that overcomes the presumption of openness. In several formal decisions, this office stated the presumption of openness can be overcome by a showing that the requested information is confidential by law or third party interests are implicated by the release. *See, e.g., Open Records Decision Nos.* 630 (1994), 552 (1990), 319 (1982), 77 (1975), 26 (1974). The courts have acknowledged and applied our interpretation. *Doe v. Tarrant County Dist. Attorney's Office*, 269 S.W.3d 147, 154-55 (Tex. App.—Fort Worth 2008, no pet.) (holding statutory and case law support attorney general's general rule); *Jackson*, 234 S.W.3d at 758; *City of Dallas*, 279 S.W.3d at 810-11; *Simmons*, 166 S.W.3d at 350; *Hancock*, 797 S.W.2d at 381.

The city, however, would have this office adopt a new compelling reason standard based on the substantial harm release of the requested information would cause the governmental body or public. Under the city's reasoning, if a governmental body could show this office the millions it would forfeit, the number of employees to be disciplined, or the number of reputations sullied by the release, this office would overlook the governmental body's procedural violations and allow the information to be withheld. The city fails to articulate when the "numbers" justify a compelling reason to withhold. In fact, the city offers no clear standard for this office to follow. In this instance, the city simply states release of the submitted information would prejudice its bargaining position in a multi-million dollar long term transaction. The city does not provide any evidence to support its claim. The open records process is not a court of law. This office is statutorily bound to issue a decision within forty-five business days. Gov't Code § 552.306. We do not have the statutory authority or the resources to cross-examine witnesses or seek independent expert testimony. This office is mandated to liberally construe the Act's provision for the purpose of promoting the state's policy of open government. *See generally id.* § 552.001. Accordingly, we find the city failed to articulate a compelling reason that overcomes the presumption of openness, and the requested information must be released in its entirety.

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, 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, toll free, at (888) 672-6787.

Sincerely,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/sdk

Ref: ID# 381812

Enc. Submitted documents

c: Requestor
(w/o enclosures)