



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

August 31, 2010

Mr. William R. Crow, Jr.
Corporate Counsel
San Antonio Water System
P.O. Box 2449
San Antonio, Texas 78298-2449

OR2010-13230

Dear Mr. Crow:

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# 392264.

The San Antonio Water System ("SAWS") received a request for information related to two specified SAWS municipal solid waste unauthorized sites, including the personnel file of the requestor's client. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered your claimed exception.

We begin by addressing your claim that the present request has been withdrawn by the requestor. You inform us the requested information relates to pending litigation involving SAWS and the requestor's client. You state that, subsequent to its receipt of the public information request, SAWS received from the requestor a discovery request in the pending litigation. You assert that the discovery request seeks the same information at issue in the public information request. You argue that because legal authority already exists that governs the production of documents, the requestor's "submission of discovery in the pending lawsuit seeking the same substantive information as originally sought in the [public information] request . . . is tantamount to a written withdrawal of the request."

Although discovery in a contested case is conducted under the Texas Rules of Civil Procedure, there is nothing that prevents the requestor from also submitting a request for information under the Act. Because the Act and the procedures for discovery in litigation serve distinct purposes, information that is privileged from discovery is not necessarily protected from required public disclosure under the Act. *See* Gov't Code §§ 552.005 (the Act does not affect the scope of civil discovery), .0055 (subpoena duces tecum or request for discovery issued in compliance with statute or rule of civil or criminal procedure is not considered to be request for information under the Act). Because nothing prevents the requestor from submitting both a discovery request and a request for information under the Act, we determine that the request under the Act has not been withdrawn by the requestor's subsequent submittal of a discovery request for the same information. Consequently, we will consider your claimed exception to disclosure for the requested information.

Next, we must address your procedural obligations under the Act. Section 552.301 of the Government Code prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. 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 general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld and a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e). As of the date of this letter, you have not submitted to this office a copy or representative sample of the information requested. Consequently, we find SAWS 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 the 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; *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 section 552.302); *see also* Open Records Decision No. 630 (1994). The presumption that information is public under section 552.302 can be overcome by demonstrating that the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982).

Although you raise section 552.103 of the Government Code as an exception to disclosure for the requested information, section 552.103 is a discretionary exception to disclosure. Section 552.103 serves only to protect a governmental body's interests and may be waived; as such, it does not constitute a compelling reason to withhold information for purposes of section 552.302. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open

Records Decisions Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions). Accordingly, SAWS may not withhold the requested information pursuant to section 552.103 of the Government Code but must release it 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, 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 392264

No submitted documents

c: Requestor