



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 6, 2010

Ms. Lauren Kalisek  
Lloyd, Gosselink, Rochelle & Townsend, P.C.  
For the Bosque River Coalition  
816 Congress Avenue, Suite 1900  
Austin, Texas 78701

OR2010-18214

Dear Ms. Kalisek:

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# 406414.

The Bosque River Coalition (the "coalition"), which you represent, received a request for 26 categories of information pertaining to the coalition, the City of Waco (the "city"), and dairies in the North Bosque River Watershed. You inform us the coalition has no responsive information for categories twenty-two and twenty-three. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code and Texas Rule of Evidence 503. We note the requestor has submitted arguments regarding why the information should be released. *See* Gov't Code § 552.304 (permitting member of public to submit to attorney general reasons why requested information should or should not be released). We have considered the exceptions you claim and the arguments of the requestor, and have reviewed the submitted representative sample of information.<sup>1</sup>

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<sup>1</sup>We assume the "representative sample" of information 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 those submitted to this office.

Initially, we must address the coalition's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(b) of the Government Code, a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. Gov't Code § 552.301(b). Further, pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records 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). You state the request was sent to the coalition's post office box and was postmarked on September 22, 2010. You further state the coalition was not aware of the instant request until October 27, 2010 because the coalition does not frequently check its post office box. Thus, the coalition contends it did not receive the request until October 27, 2010. We disagree. Just stating when the coalition became aware of the request does not establish when the coalition received the request. Rather, the coalition's receipt date would be closer to the request's postmark date. Because the coalition submitted its request for a decision from this office on November 10, 2010, more than a month after the request for information was postmarked, the coalition failed to comply with section 552.301.<sup>2</sup>

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; *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); Open Records Decision No. 319 (1982). The presumption that information is public under section 552.302 can be overcome by demonstrating the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982).

Although you raise sections 552.103, 552.107, and 552.111 of the Government Code and Texas Rule of Evidence 503, these exceptions and this rule 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.

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<sup>2</sup>Although the coalition informs this office the requestor failed to comply with section 552.2615 of the Government Code, we note section 552.2615(g) states the requirements of section 552.2615 do not affect the application of the time deadlines that section 552.301 of the Government Code imposes on the governmental body. *See* Gov't Code § 552.2615 (providing procedural requirements governmental body and requestor must follow when estimate of charges is sent).

*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 Decision No. 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 section 552.111); *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 coalition has waived its claims under sections 552.103, 552.107, and 552.111 of the Government Code and Texas Rule of Evidence 503. Therefore, none of the submitted information may be withheld under these exceptions and this rule. You also raise section 552.101 of the Government Code, and we note some of the submitted information is subject to sections 552.136 and 552.137 of the Government Code.<sup>3</sup> Because sections 552.101, 552.136, and 552.137 can provide compelling reasons to withhold information, we will consider the applicability of these exceptions to the submitted information.

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. This section encompasses information that is made confidential by statute. You claim exhibits OO through RR are confidential under section 154.073 of the Civil Practice and Remedies Code. Section 154.073 provides in relevant part:

(a) Except as provided by Subsections (c), (d), (e), and (f)<sup>4</sup> a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

(b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

Civ. Prac. & Rem. Code § 154.073(a), (b). Further, in Open Records Decision No. 658 (1998), this office found communications made during the formal settlement process are

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<sup>3</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>4</sup>Subsections 154.073(c), (e), and (f) are inapplicable in this instance.

intended to be confidential. Open Records Decision No. 658 at 4; *see also* Gov't Code § 2009.054(c). The documents in exhibits OO through RR are records made during the course of an alternative dispute resolution proceeding. Thus, the coalition must withhold exhibits OO through RR under section 552.101 of the Government Code in conjunction with section 154.073 of the Civil Practice and Remedies Code.

We note section 552.136 of the Government Code states “[n]otwithstanding any other provision of this chapter, 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.” Gov't Code § 552.136(b). Section 552.136(a) defines “access device” as “a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument.” *Id.* § 552.136(a). Upon review, we conclude the coalition must withhold the bank account and bank routing numbers we have marked in exhibit P under section 552.136.

We also note exhibits O, P, and U through W contain e-mail addresses. Section 552.137 provides that “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). We have marked e-mail addresses that are not of the types specifically excluded by section 552.137(c) of the Government Code. Accordingly, the coalition must withhold the e-mail addresses we have marked in exhibits O, P and U through W under section 552.137 of the Government Code, unless the owners consent to disclosure.

In summary, the coalition must withhold exhibits OO through RR under section 552.101 of the Government Code in conjunction with section 154.073 of the Civil Practice and Remedies Code. The coalition must withhold the bank account and bank routing numbers we have marked in exhibit P under section 552.136. The coalition must withhold the e-mail addresses we have marked in exhibits O, P, and U through W under section 552.137 of the Government Code, unless the owners consent to disclosure.<sup>5</sup> The remaining information at issue must be released.

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<sup>5</sup>We note Open Records Decision No. 684 (2009) authorizes withholding bank account and bank routing numbers under section 552.136 of the Government Code and e-mail addresses of members of the public under section 552.137 of the Government Code without the necessity of requesting an attorney general decision.

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, toll free at (888) 672-6787.

Sincerely,



Sean Nottingham  
Assistant Attorney General  
Open Records Division

SN/eeg

Ref: ID# 402974

Enc. Submitted documents

c: Requestor  
(w/o enclosures)