ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 9, 2010

Mr. David Hamilton
City Attorney
City of Reno
3830 Farm Road 195
Paris, Texas 75462-1621

OR2010-18461

Dear Mr. Hamilton:

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# 402538.

The City of Reno (the "city"), which you represent, received a request for all tape recorded telephone calls made during a named individual's employment with the city. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.109 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information is not responsive to the present request because it pertains to recorded telephone calls made after the named individual was terminated from her employment with the city. This ruling does not address the public availability of non-responsive information, and the city is not required to release non-responsive information in response to this request.

Next, you state the responsive recordings were the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2008-11600 (2008). With regard to the previous request, the city failed to submit the responsive recordings to this office within the deadline prescribed by section 552.301(e) of the Government Code; thus, we concluded the city waived its claims under sections 552.103 and 552.108 of the Government Code. However, because the Office of the Attorney General

(the "OAG") stated release of the requested information would interfere with its pending investigation, we concluded the city may withhold the information at issue under section 552.108(a)(1) on behalf of the OAG. *See* Gov't Code § 552.108(a)(1); *see also* Open Records Decision No. 586 at 3 (1991) (determining the need of another governmental body to withhold law enforcement information under section 552.108 can provide a compelling reason to overcome the presumption of openness). However, you inform us the OAG no longer asserts a law enforcement interest in the information at issue. Therefore, the circumstances on which Open Records Letter No. 2008-11600 was based have changed, and the city may not rely on that ruling as a previous determination. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). Although you now raise sections 552.103 and 552.108 as exceptions to the disclosure of the identical information in the present request, these exceptions are discretionary and may be waived. As such, sections 552.103 and 552.108 do not make information confidential. *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. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions in general). Therefore, because the city waived its claims under sections 552.103 and 552.108 in Open Records Letter No. 2008-11600 with respect to the responsive recordings, we conclude they may not now be withheld pursuant to those exceptions. *See* Gov't Code § 552.302. However, you also raise sections 552.101 and 552.109 of the Government Code. Because these exceptions govern information confidential by law, we will address their applicability to the responsive recordings.

Next, we note because you now make the same arguments as previously made in Open Records Letter No. 2008-11600, we understand you to claim the responsive recordings are not subject to the Act.[1] The Act is applicable to "public information." *See id.* § 552.021. "Public information" is defined as

> 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

[1]Although you seek to incorporate all arguments at issue in Open Records Letter No. 2008-11600, we do not address your arguments pertaining to the requestor seeking information under the Freedom of Information Act (the "FOIA") or acting as an elected official as this requestor is not currently an elected official and did not make his request under the FOIA.

> (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Id. § 552.002(a). Information is generally subject to the Act when it is held by a governmental body, and it relates to the official business of a governmental body or is used by a public official or employee in the performance of official duties. *See* Open Records Decision No. 635 (1995). Virtually all information that is in a governmental body's physical possession constitutes public information. Gov't Code § 552.002(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). In this instance, you do not present any arguments the responsive recordings are not public information. Further, we determine the information at issue is collected or maintained in connection with the transaction of official business of the city, and thus, is public information as defined by section 552.002. Gov't Code § 552.002(a). Therefore, the responsive recordings are subject to the Act and may only be withheld if they are excepted from disclosure under the Act.

We now turn to your argument under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses information protected by other statutes. You claim the responsive recordings are excepted under section 16.02 of the Penal Code, which is encompassed by section 552.101. Section 16.02 provides in relevant part:

> (b) A person commits an offense if the person:
>
> > (1) intentionally intercepts, endeavors to intercept, or procures another person to intercept or endeavor to intercept a wire, oral, or electronic communication;
> >
> > (2) intentionally discloses or endeavors to disclose to another person the contents of a wire, oral, or electronic communication if the person knows or has reason to know the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection[.]

Penal Code § 16.02(b)(1), (2). You state the city and you, as attorney for the city, "have reason to know . . . that the data requested is an interception under . . . section 16.02[.]" Based on your representation, we find the city must withhold the responsive recordings under section 552.101 in conjunction with section 16.02.[2]

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[2]As our ruling is dispositive, we need not address your remaining arguments.

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,

Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 402538

Enc. Submitted documents

c: Requestor
(w/o enclosures)