



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 23, 2011

Mr. Sam Shobassy
Assistant City Attorney
City of Port Arthur
P.O. Box 1089
Port Arthur, Texas 77641-1089

OR2011-07184

Dear Mr. Shobassy:

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# 421469.

The City of Port Arthur (the "city") received a request for an "[a]ffidavit [sic] that was filed against [the requestor]." You claim the requested information is excepted from disclosure under sections 552.103, 552.108, and 552.151 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You indicate the submitted "Statement of Facts" consists of the requested affidavit. We note you have submitted additional documents to us for review that do not appear to be responsive to the request for information. This ruling does not address the public availability of any information that is not responsive to the request, and the city is not required to release this information, which we have marked, in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed).

We must next address the city's obligations under section 552.301 of the Government Code, which 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(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. You state the city's Legal Department received the request for information on March 30, 2011.

However, the copy of the request for information you have submitted is stamped as having been received by the city on March 29, 2011. Thus, the city's ten-business-day deadline to request a ruling from this officer was April 12, 2011. Your request for a ruling from this office is postmarked April 13, 2011. *See* Gov't Code § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail). Accordingly, the city failed to comply with the procedural requirements mandated by section 552.301(b).

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 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Sections 552.103 and 552.108 are discretionary exceptions to disclosure that protect a governmental body's interests; thus, the city's claim under sections 552.103 and 552.108 are not compelling reasons to overcome the presumption of openness. *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. 665 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 177 (1977) (statutory predecessor to section 552.108 subject to waiver); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). *But see* Open Records Decision No. 586 at 2-3 (1991) (claim of another governmental body under statutory predecessor to section 552.108 can provide compelling reason for non-disclosure). Therefore, the city may not withhold any of the submitted information under section 552.103 or 552.108. However, sections 552.102, 552.117, and 552.151 of the Government Code can provide compelling reasons to overcome this presumption.¹ Therefore, we will consider whether these sections require you to withhold the submitted information.

Section 552.151 of the Government Code provides the following:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 if, under the specific circumstances

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987); *see, e.g.*, Open Records Decision No. 470 at 2 (1987) (because release of confidential information could impair rights of third parties and because improper release constitutes a misdemeanor, attorney general will raise predecessor statute of section 552.101 on behalf of governmental bodies).

pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Gov't Code § 552.151.² You assert release of the submitted Statement of Facts is excepted from disclosure under section 552.151 because "the affiant states he/she is afraid of retaliation." However, we find you have failed to demonstrate that release of the information at issue would subject a city employee or officer to a substantial threat of physical harm. *See id.* Thus, the city may not withhold the Statement of Fact under section 552.151.

Section 552.102(a) of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Having carefully reviewed the information at issue, we have marked the information that must be withheld under section 552.102(a) of the Government Code.

We note section 552.117 of the Government Code may be applicable to some of the remaining information. Section 552.117(a)(1) excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. Therefore, the city may only withhold information under section 552.117(a)(1) on behalf of current or former employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Such information may not be withheld for individuals who did not make a timely election. We have marked information that must be withheld if section 552.117 applies.

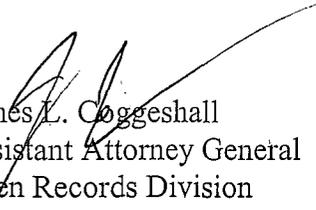
To conclude, the city must withhold the information we have marked under section 552.102 of the Government Code. The city must also withhold the information we have marked under section 552.117(a)(1) of the Government Code if the employee at issue made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. The city must release the remaining responsive information.

²We note that there are currently two sections of the Act numbered section 552.151. The first, which is raised here, is an exception under the Act pertaining to the personal safety of public employees and officers. *See Act of June 3, 2009, 81st Leg., R.S., ch. 283, § 4, 2009 Tex. Gen. Laws 742, 743*. The second pertains to biological agents and toxins identified or listed as select agents under federal law. *See Act of June 3, 2009, 81st Leg., R.S., ch. 1377, § 5, 2009 Tex. Gen. Laws 4325, 4325-26*.

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/eb

Ref: ID# 421369

Enc. Submitted documents

c: Requestor
(w/o enclosures)