



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 14, 2011

Ms. Sharae N. Bassett
Assistant City Attorney
City of Beaumont
P.O. Box 3827
Beaumont, Texas 77704-3827

OR2011-08428

Dear Ms. Bassett:

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# 420441.

The City of Beaumont (the "city") received a request to review e-mails of a named city attorney from the attorney's city-operated computer during a specified time period. You state the city will provide some of the requested information to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.103, 552.105, 552.106, 552.107, 552.111, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we understand you to argue that the information in Exhibit 3 was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2011-07488 (2011). *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 the same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, we

¹This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

note the information you submitted as Exhibit 3 is dated after March 9, 2011—the date the city received the previous request for information—and, thus, was not previously ruled upon. Accordingly, we will consider your argument against disclosure of Exhibit 3.

Next, we note the city failed to comply with section 552.301 of the Government Code in requesting this decision. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information that it wishes to withhold. Pursuant to section 552.301(b), 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 a written request for information. Gov't Code § 552.301(b). Section 552.308 states:

(a) When this subchapter requires a request, notice, or other document to be submitted or otherwise given to a person within a specified period, the requirement is met in a timely fashion if the document is sent to the person by first class United States mail or common or contract carrier properly addressed with postage or handling charges prepaid and:

- (1) it bears a post office cancellation mark or a receipt mark of a common or contract carrier indicating a time within that period; or
- (2) the person required to submit or otherwise give the document furnishes satisfactory proof that it was deposited in the mail or common or contract carrier within that period.

Id. § 552.308(a). You state the city received the request for information on March 22, 2011. Thus, we find the city's ten-business-day deadline was April 5, 2011. *See id.* § 552.301(b). We received the city's request for a ruling and the information you seek to withhold on April 8, 2011. The envelope in which you submitted the request for a ruling does not contain a postmark date. Further, the city has not furnished satisfactory proof the request for a ruling was deposited in the mail within the ten-business-day deadline. Thus, we are unable to determine the city mailed its request for a ruling within the ten-business-day deadline. *See id.* § 552.308(a) (prescribing standards for timeliness of action by United States or common or contract carrier). Consequently, we find the city failed to comply with the procedural requirements mandated by section 552.301.

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 information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *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. 630 (1994). A compelling reason generally exists when 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 sections 552.103, 552.105, 552.106, 552.107, and 552.111 of the Government Code, these sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 439, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 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) (untimely request for decision resulted in waiver of discretionary exceptions), 564 (1990) (statutory predecessor to section 552.105 subject to waiver). Thus, in failing to comply with section 552.301, the city has waived its arguments under sections 552.103, 552.105, 552.106, 552.107, and 552.111, and may not withhold the information at issue on these bases. However, you also raise section 552.137 of the Government Code for portions of the information in Exhibit 14. Section 552.137 constitutes a compelling reason to withhold information. Additionally, we note portions of the information at issue are subject to sections 552.101 and 552.117 of the Government Code, which also constitute compelling reasons against disclosure.² Accordingly, we will consider the applicability of sections 552.101, 552.117, and 552.137 to the information at issue.

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. Section 552.101 encompasses the common-law right of privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Whether information is subject to a legitimate public interest and therefore not protected by common-law privacy must be determined on a case-by-case basis. *See* Open Records Decision No. 373 (1983). Upon review, we find that the information we have marked in Exhibit 12 is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Section 552.117 of the Government Code excepts from disclosure the 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 that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 of the Government Code not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular piece of 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, a governmental body must withhold information under section 552.117 on behalf of current or former officials or employees only if these individuals made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the officials or employees whose information is at issue timely elected to keep their personal information confidential pursuant to section 552.024, the city must withhold the cellular telephone numbers we marked in Exhibits 5, 6, and 13, and the home address we marked in exhibit 12, under section 552.117(a)(1). However, the city must withhold the cellular telephone numbers we have marked only if the officials or employees pay for the cellular telephone service with personal funds. The city may not withhold this information under section 552.117 for those officials or employees who did not make a timely election to keep the information confidential.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, or an e-mail address maintained by a governmental entity for one of its officials or employees. The e-mail addresses at issue are not any of the types specifically excluded by section 552.137(c). Accordingly, the city must withhold the e-mail address you have marked in Exhibit 14 and must generally withhold the e-mail addresses we have marked in Exhibits 5 through 13 and Exhibit 15 under section 552.137 of the Government Code unless the owners of the addresses have affirmatively consented to their release under section 552.137(b). However, we note some of the e-mail addresses we have marked are associated with public universities. If these individuals are employees of the universities, then their e-mail addresses are not excepted under section 552.137 and must be released. If these individuals are students of the universities, then their e-mail addresses are excepted from disclosure under section 552.137 and must be withheld, unless the individuals at issue consent to their disclosure.³

³We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

In summary: (1) the city must withhold the information we have marked in Exhibit 12 under section 552.101 of the Government Code in conjunction with common-law privacy; (2) to the extent the officials or employees whose information is at issue timely-elected confidentiality under section 552.024 and pay for the cellular service with personal funds, the city must withhold the information we have marked in Exhibits 5, 6, 12, and 13 under section 552.117(a)(1) of the Government Code; and (3) the city must withhold the e-mail address you have marked in Exhibit 14 and the e-mail addresses we have marked in Exhibits 5 through 13 and Exhibit 15 under section 552.137 of the Government Code unless the owners of the addresses have consented to their release. However, if the marked public university e-mail addresses belong to employees of the universities, then the e-mail addresses are not excepted under section 552.137 and must be released. The city must release the remaining information at issue.

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,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/em

Ref: ID# 420441

Enc. Submitted documents

c: Requestor
(w/o enclosures)