



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 27, 2011

Mr. Michael S. Brennan
For City of Alamo Heights
2015 North East Loop 410
San Antonio, Texas 78217

OR2011-10818

Dear Mr. Brennan:

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# 425120.

The City of Alamo Heights (the "city"), which you represent, received a request for copies of all e-mails and other correspondence received or sent by members of the Facilities Committee. You claim the submitted information is excepted from disclosure under section 552.106 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments to this office stating why the information at issue should or should not be released).

Initially, we note much of the submitted information is not responsive to the request. The city received the request at issue on May 6, 2011.² Any e-mails or correspondence created

¹Although you also claim the submitted information is excepted from disclosure by sections 552.022(a)(1) and 552.022(a)(5), we note these are not exceptions to disclosure. Rather, section 552.022 is a provision in the Act that lists certain categories of information that are not excepted from disclosure unless they are expressly confidential under other law. *See* Gov't Code § 552.022(a)(1) (completed report, audit, evaluation or investigation), .022(a)(5) (working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes, on completion of estimate).

²You provide documentation showing the request was received by e-mail on May 6, 2011. However, you state the employee to whom the request was sent did not actually receive the request until May 9, 2011. We note, however, the deadlines under the Act pertain to the date the governmental body receives a request and are not tolled due to employee absence. *See* Gov't Code § 552.301(a), (b), (d), (e)(1)(c).

after the date the request was received are not responsive to the request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1–2 (1990), 452 at 3 (1986), 362 at 2 (1983). This ruling does not address the public availability of the non-responsive information, which we have marked, and the city is not required to release information that is not responsive to the request.

Next, we must address the city's responsibilities 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(b) of the Government Code, a governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See Gov't Code* § 552.301(b). The city received the request for information on May 6, 2011. Thus, the city was required to request a decision from this office and state the exceptions that apply by May 20, 2011. The city did not raise section 552.106 until May 24, 2011. Because the city failed to raise this exception within the required ten-business-day deadline, we find the city failed to comply with the requirements of section 552.301 of the Government Code.

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. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information sufficient to overcome the presumption of openness. *See Gov't Code* § 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) (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 exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Section 552.106 of the Government Code is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See Gov't Code* § 552.007; Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). In failing to comply with the requirements of section 552.301, the city has waived its claim under section 552.106. Accordingly, the city may not withhold any of the responsive information under section 552.106 of the Government Code. However, we note some of the information is subject to sections 552.101 and 552.137 of the Government Code, which are mandatory exceptions, so we will consider their applicability to the information at issue.³

³The 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 552.101 of the Government Code exempts 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 doctrine of common-law 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. This office has found that some kinds of medical information or information indicating disabilities or specific illnesses are protected 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). Upon review, we find the information we have marked is highly intimate and embarrassing and of no legitimate concern to the public. Accordingly, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.137 provides, “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). Gov’t Code § 552.137(a)–(c). Subsection (c) provides an e-mail address is not confidential if it is:

- (1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor’s agent;
- (2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor’s agent;
- (3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract;
- (4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public; or
- (5) provided to a governmental body for the purpose of providing public comment on or receiving notices related to an application for a license as defined by Section 2001.003(2) of this code, or receiving orders or decisions from a governmental body.

Gov’t Code § 552.137(c)(1)–(5). We note section 552.137(a) is not applicable to institutional e-mail addresses or e-mail addresses a governmental body provides for use by its officials or employees. Therefore, pursuant to section 552.137 of the Government Code,

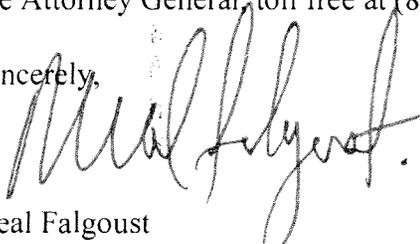
the city must withhold the e-mail addresses of members of the public within the submitted documents, unless the owner of an e-mail address has consented to its release or it is a type excluded by subsection (c).⁴

In summary, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The city must withhold the e-mail addresses of members of the public within the submitted documents, unless the owner of an e-mail address has consented to its release or it is a type excluded by subsection (c). The remaining information must be released.

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,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/tf

Ref: ID# 425120

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴We note this office has issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including the 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.