



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 3, 2011

Ms. Allison Bastian
Assistant City Attorney
City of Brownsville
P.O. Box 911
Brownsville, Texas 78522

OR2011-11190

Dear Ms. Bastian:

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# 425849.

The City of Brownsville (the "city") received a request for cellular telephone records, calls, text messages, and e-mails from a named individual during a specified period of time. You state you have released the cellular telephone records for a portion of the requested time period, as well as a majority of the requested e-mails. You state the city does not possess cellular telephone records for the remaining requested time period or any text messages.¹ You claim that the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code, and privileged under Texas Rule of Evidence 503. We have considered your arguments and reviewed the submitted information.

Initially, we note some of the submitted e-mails may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2011-09904 (2011), and some other e-mails may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2011-09206 (2011). To the extent these e-mails were the subjects of our previous rulings, the city may withhold or release the information at issue in accordance with those

¹We note the Act does not require a governmental body to release information that did not exist when it received a request. See *Economic 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), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

rulings, provided there have been no changes in the law, facts, and circumstances on which the previous rulings were based. To the extent the submitted information is not the subject of the previous rulings, the city may not rely upon the previous rulings and we will consider your arguments against disclosure of this information. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination).

Next, you acknowledge and we agree that the city did not comply with its ten-business-day deadline under section 552.301 of the Government Code in requesting this decision. Gov't Code § 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 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, orig. proceeding); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, 2005, orig. proceeding). This statutory presumption can generally be overcome when 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 552.107 and 552.111 of the Government Code and Texas Rule of Evidence 503, these exceptions and this rule are discretionary in nature. They serve to protect only a governmental body's interests and may be waived. *See* Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 676 at 10-12 (2002) (attorney-client privilege under section 552.107 and Texas Rule of Evidence 503 subject to waiver), 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). Thus, in failing to comply with section 552.301, the city has waived its arguments under section 552.107, section 552.111, and Texas Rule of Evidence 503, and may not withhold the information at issue on these bases. However, we note portions of the information at issue are subject to section 552.137 of the Government Code, which provides a compelling reason that overcomes the presumption of openness.²

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 we have marked are not of the types specifically excluded by section 552.137(c). Accordingly, the

²The 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).

city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code unless the owners of the addresses have affirmatively consented to their release.³ We note that the submitted information also includes an e-mail address that may be a personal e-mail address of a member or employee of the Brownsville Economic Development Council. Because we are unable to discern whether this e-mail address is a personal e-mail address, we must rule conditionally. If the other e-mail address we have marked is a personal e-mail address, the city must withhold it under section 552.137. However, if the e-mail address at issue is maintained by a governmental entity for one of its officials or employees, it must be released.

In summary, the city may withhold or release any information that was the subject of prior rulings in accordance with those rulings, provided there have not been changes in the law, facts, and circumstances on which the previous rulings were based. The city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code unless the owners of the addresses have consented to their release. In addition, if the other e-mail address we have marked is a personal e-mail address, the city must withhold it under section 552.137. The city must release the remaining information.

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

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.

Ref: ID# 425849

Enc. Submitted documents

c: Requestor
(w/o enclosures)