ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 29, 2012

Mr. Jason D. King
Counsel for the City of Lakeway
Akers & Boulware-Wells, LLP
6618 Sitio Del Rio Boulevard, Suite 102
Austin, Texas 78730

OR2012-08205

Dear Mr. King:

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# 455452.

The City of Lakeway (the "city"), which you represent, received four requests from the same requestor for (1) all correspondence and communications between a named individual and the city during a specified time period and (2) all correspondence and communications of three named city officials during a specified time period. You claim that the requested information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[1] We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we must 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

[1]We assume the "representative sample" of information submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than those submitted to this office.

the exceptions that apply within ten business days of receiving the written request. *See* Gov't Code § 552.301(b). You state the city received the requests on March 15, 2012. Thus, the ten-day-deadline was March 29, 2012. However, the city's request for a ruling, arguments explaining the claimed exceptions, and submitted responsive information received by this office were hand delivered on March 30, 2012. You state, and provide documentation showing, that initially the city timely mailed the documents specified by section 552.301, but inadvertently sent them to an incorrect address. Section 552.308 of the Government Code provides in pertinent part:

> (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 if the document is sent to the person by first class United States mail *properly addressed* with postage prepaid and:
>
> > (1) it bears a post office cancellation mark 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 within that period.

Id. § 552.308(a) (emphasis added). Because the city's initial submission was improperly addressed, it was not received by this office by the mandated ten business day deadline and, thus, it did not meet the elements of timeliness established by section 552.308. Therefore, we conclude that the city failed to comply with 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 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. *See* Open Records Decision No. 150 (1977). Sections 552.103 and 552.107 of the Government Code are discretionary in nature: they serve only to protect a governmental body's interests. *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 No. 676 at 12 (2002) (attorney-client privilege under section 552.107 or Texas Rule of Evidence 503 constitutes compelling reason to withhold information under section 552.302 only if information's release would harm third party); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Thus, the claims of the city under sections 552.103 and 552.107 are not compelling reasons to overcome the presumption of openness. Therefore, the city may not withhold any of the submitted information under either of these sections. However, because section 552.137 of the Government Code can

provide a compelling reason to overcome this presumption, we will address the applicability of this section.[2]

Section 552.137 of the Government Code 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). The city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their release. 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,

Sean Opperman
Assistant Attorney General
Open Records Division

SO/bhf

Ref: ID# 455452

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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[2]The 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).