



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 20, 2012

Ms. Susan Fillion
Assistant County Attorney
Harris County Attorney's Office
1019 Congress, 15th Floor
Houston, Texas 77002

OR2012-09465

Dear Ms. Fillion:

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# 456600 (12PIA0038).

The Harris County Attorney's Office (the "county attorney's office") received a request for the personnel evaluations or job performance reports of and e-mails sent or received by a named individual since January 1, 2010. You state you have released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you state a portion of the requested information was the subject of a previous request for a ruling by the county attorney's office. In response to that request, this office issued Open Records Letter No. 2012-08569(2012). You do not indicate there has been any change in the law, facts, and circumstances on which the prior ruling was based. We therefore conclude the county attorney's office must rely on Open Records Letter No. 2012-08569 as a previous determination and withhold or release any previously ruled upon information in accordance with the prior ruling. *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 same information as was addressed in prior attorney general ruling, ruling is

addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we must address the county attorney's office's procedural obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving an open records request: (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(1)(A)-(D). In this instance, you state the county attorney's office received the request for information on March 29, 2012. You inform us the county attorney's office was closed on April 6, 2012. Accordingly, the county attorney's office's fifteen-business-day deadline was April 20, 2012. A copy of the envelope in which the county attorney's office originally submitted a copy of the requested information bears a postmark of April 20, 2012. The submitted information reflects, however, that the original submission was returned to the county attorney's office for insufficient postage and the county attorney's office again mailed the requested information to this office in an envelope bearing a postmark of April 25, 2012. Section 552.308 of the Government Code provides when a submission within a specified time period is required under the Act, the time requirement is met if the submission is sent by first class mail "with postage . . . prepaid" and the postmark date is within the required time period. *See id.* § 552.308. Because the county attorney's office did not submit all the information required by section 552.301(e) within the required time period, we find the county attorney's office failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists 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, 381-82 (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); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Sections 552.103, 552.107, and 552.111 of the Government Code are all discretionary in nature; they serve only to protect a governmental body's interests. As such, the county attorney's office's claims under these exceptions 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. 676 at 11-12 (2002) (claim of attorney-client privilege under section 552.107 does not provide compelling reason for purposes of section 552.302 if it does not implicate third-party rights), 663 at 5 (1999) (governmental body may waive section 552.111); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). In failing to comply with section 552.301, the county attorney's office has waived its claims under sections 552.103, 552.107 and 552.111 of the Government Code. Therefore, none of the information at issue may be withheld under these exceptions. We note some of the information at issue is subject to section 552.137 of the Government Code.¹ Therefore, because section 552.137 can provide a compelling reason to overcome this presumption, we will consider the applicability of this exception to the information at issue.

Section 552.137 of the Government Code provides that "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). Upon review, we find the e-mail addresses we have marked in the submitted e-mails are not of the type specifically excluded by section 552.137(c) of the Government Code. Accordingly, the county attorney's office must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners consent to disclosure.

In summary, the county attorney's office must rely on Open Records Letter No. 2012-08569 as a previous determination and withhold or release any previously ruled upon information in accordance with the prior ruling. The county attorney's office must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners consent to disclosure.² The county attorney's office 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.

¹The 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).

²Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including 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.

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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/som

Ref: ID# 456600

Enc. Submitted documents

cc: Requestor
(w/o enclosures)