ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 1, 2013

Ms. Donna L. Johnson
Counsel for the City of Freeport
Olson & Olson, L.L.P.
2727 Allen Parkway, Suite 600
Houston, Texas 77019-2133

OR2013-07143

Dear Ms. Johnson:

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# 486170 (Ref: COF13-005).

The City of Freeport (the "city"), which you represent, received a request for a named individual's employee evaluation. You claim Exhibit 3 is excepted from disclosure under section 552.111 of the Government Code. Additionally, you inform us the city has notified the named individual of his right to submit comments to this office as to why some of this information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exception you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See id.*

Initially, you claim the employee evaluation submitted as Exhibit 3 is not responsive to the present request. The present request seeks the named individual's employee evaluation. You assert the submitted employee evaluation is not responsive to this request because the evaluation was "not finalized, signed by the employee, nor placed into his official personnel file." We note however, that the request does not specify that the employee evaluation must be finalized, signed, or come from the employee's official personnel file. The city has submitted an employee evaluation of the named individual. Thus, we find the information

at issue is responsive to the present request, and we will address your arguments against its disclosure.

But first, we must address the requestor's assertion the city failed to meet its procedural obligations under the Act. Section 552.301 of the Government Code describes the obligations placed on a governmental body that receives a written request for information it wishes to withhold. *See id.* § 552.301. Pursuant to section 552.301(b), the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. *See id.* § 552.301(b). The requestor asserts the employee evaluation at issue was responsive to a prior request for information the requestor's client made to the city on February 5, 2013. The requestor thus argues the city violated section 552.301(b) by not seeking a decision concerning this information in response to the earlier request. We note the February 5, 2013, request also sought a copy of the named individual's employee evaluation. Upon review, we find the submitted employee evaluation was also responsive to the prior request. Accordingly, we conclude the city failed to comply with the procedural requirements of section 552.301(b) of the Government Code with respect to the employee evaluation submitted as Exhibit 3.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the information is public and must be released. Information presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *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). Normally, 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. *See* Open Records Decision No. 150 at 2 (1977). Although you raise section 552.111 of the Government Code the information at issue, this section is discretionary in nature. It serves only to protect a governmental body's interests, and may be waived; as such, it does not constitute a compelling reason to withhold information. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (governmental body may waive section 552.111), 470 at 6-7 (1987) (statutory predecessor to section 552.111 is discretionary exception). Therefore, the city may not withhold Exhibit 3 under section 552.111 of the Government Code. As no further exceptions to disclosure are raised for Exhibit 3, the city must release it.

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,

Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/bhf

Ref: ID# 486170

Enc. Submitted documents

c: Requestor
(w/o enclosures)