



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 12, 2014

Mr. Jerry E. Drake, Jr.
First Assistant City Attorney
City Attorney's Office
City of Denton
215 East McKinney
Denton, Texas 76201

OR2014-22569

Dear Mr. Drake:

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# 546856.

The City of Denton (the "city") received a request for all records related to a specified variance from two specified moratorium ordinances. You state you have made the majority of the requested information available to the requestor. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted information.

Initially, we must address the city's obligations under section 552.301 of the Government Code, which prescribes the procedures 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 the exceptions that apply within ten business days of receiving the written request. *See*

¹Although you also raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2(2002), 575 at 2 (1990). Furthermore, we note the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107 of the Government Code. ORD 676 at 1-2.

Gov't Code § 552.301(b). You state, and the submitted documentation reflects, the city received the request for information on September 22, 2014. This office received the city's request for a ruling on October 8, 2014. You do not inform us the city was closed for any business days between September 22, 2014 and October 8, 2014. Accordingly, you were required to request a decision from this office by October 6, 2014. We note the envelope in which the city's request for a ruling was submitted does not bear a discernible post office cancellation mark. *See id.* § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Further, you have not provided this office with satisfactory proof the city requested a ruling from this office within the ten business day deadline. *See id.* § 552.308(a)(2). Consequently, we determine the city failed to comply with the procedural requirements mandated by 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. Information that is 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). Generally, a governmental body may demonstrate a compelling reason to withhold information by showing that the information is made confidential by another source of law or affects third party interests. *See* ORD 630. Although you claim the requested information is excepted from disclosure under section 552.107(1) of the Government Code, this section is a discretionary exception that protects a governmental body's interests and may be waived. *See* Open Records Decision Nos. 676 at 12 (claim of attorney-client privilege under section 552.107 or rule 503 does not provide compelling reason to withhold information under section 552.302 if it does not implicate third-party rights), 665 at 2 n.5 (2000) (discretionary exceptions in general). Thus, in failing to comply with section 552.301, the city has waived its claims under section 552.107(1). Therefore, the city may not withhold any portion of the submitted information under section 552.107 of the Government Code. However, because sections 552.117 and 552.137 can provide compelling reasons to withhold information, we will address the applicability of these exceptions to the submitted information.²

Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't

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).

Code § 552.117(a)(1). Section 552.117 is applicable to cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the city may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, to the extent the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the city must withhold the cellular telephone numbers we have marked under section 552.117(a)(1) of the Government Code, so long as the cellular telephone service is not paid for by a governmental body. Conversely, to the extent the individuals at issue did not timely request confidentiality under section 552.024, or a governmental body pays for the cellular telephone service, the city may not withhold the marked information under section 552.117(a)(1).

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 e-mail address at issue is not of the types excluded by subsection (c). Accordingly, the city must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the e-mail address has affirmatively consented to its release.

In summary, to the extent the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the city must withhold the cellular telephone numbers we have marked under section 552.117(a)(1) of the Government Code, so long as the cellular telephone service is not paid for by a governmental body. The city must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the e-mail address has affirmatively consented to its 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read 'JBW', is written over a horizontal line. The signature is stylized and somewhat cursive.

Joseph Behnke
Assistant Attorney General
Open Records Division

JB/som

Ref: ID# 546856

Enc. Submitted documents

c: Requestor
(w/o enclosures)