



February 8, 2000

Open Records Decision No. 665

Re: Upon receipt of a request for public information, when may or must a governmental body ask for a decision from the Attorney General? Does the Public Information Act allow a governmental body to ask for an attorney general decision when the governmental body has determined that the requested information is not subject to one of the Act's exceptions? (ORQ-46)

Dear Ladies and Gentlemen:

Section 552.011 of the Government Code grants the Attorney General the authority to issue opinions for the purpose of maintaining uniformity in the application, operation, and interpretation of the Public Information Act. Under that authority, we consider whether a governmental body, determined to be such for purposes of the Public Information Act, may request an open records decision when the governmental body has identified the requested information and reasonably believes it to be public information under the Act that is not subject to any exception to required disclosure. We conclude that a governmental body may not seek an attorney general decision when the governmental body has identified the requested information and reasonably believes that it is not subject to one of the Act's exceptions to required public disclosure.¹

¹We note that requiring a governmental body to "reasonably believe" that information is subject to an exception does not require the governmental body to be absolutely certain of the applicability of an exception, but rather requires a good faith belief that valid legal arguments may support the claimed exception.

Absent authority under the Public Information Act, a governmental body may not request a decision from the Attorney General as to whether information is required to be publicly disclosed.^{2, 3} Section 552.301(a) provides that authority:⁴

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure *and* that it considers to be within one of the exceptions under Subchapter C must ask for a decision from the attorney general about whether the information is within that exception *if* there has not been a previous determination about whether the information falls within one of the exceptions. [Emphasis added]

The governmental body's authority under section 552.301 to request an attorney general decision exists only when three conditions are met: (1) the governmental body wishes to withhold the information;⁵ (2) the governmental body considers the information to fall

²Subchapter C, chapter 402 of the Government Code authorizes certain listed officials and entities to request a written opinion concerning the official duties of the requesting person or on a question of public interest, including an advisory opinion interpreting the Public Information Act. Gov't Code § 402.042. The Public Information Act, chapter 552 of the Government Code, governs questions governmental bodies pose to the Attorney General regarding pending requests for information received by the governmental body.

³Generally, an administrative agency is a creation of the legislature and possesses only those powers expressly delegated to it and those necessarily implied. *State v. Jackson*, 376 S.W.2d 341, 344 (Tex. 1964); *Sexton v. Mount Olivet Cemetery Ass'n*, 720 S.W.2d 129, 137 (Tex. App.—Austin 1986, writ ref'd n.r.e.). See also *Stauffer v. City of San Antonio*, 344 S.W.2d 158 (Tex. 1961) and *Texas Parks & Wildlife Dep't v. Callaway*, 971 S.W.2d 145, 148 (Tex. App.—Austin 1998, no pet.).

⁴The Act authorizes a governmental body to temporarily withhold information for the purpose of requesting an attorney general decision under section 552.301. Section 552.305 authorizes the temporary withholding of information when release of the information implicates the privacy or property interests of third parties. Section 552.307 authorizes the temporary withholding of information in order for a governmental body to request an attorney general decision if the requestor has a special right of access to the information but the governmental body believes that the information is subject to an exception other than one intended to protect the requestor. A governmental body may not otherwise withhold information unless it has received a previous determination permitting the withholding of the precise information at issue.

⁵A governmental body is not required to request a decision from the Attorney General if the only exceptions applicable to the information at issue are discretionary exceptions, and the governmental body wishes to waive the application of those exceptions and release the requested information. Gov't Code § 552.007(a). Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. See, e.g., Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)); 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding); 549 at 6 (1990) (governmental body may waive informer's privilege); 522 at 4 (1989) (discretionary exceptions in general). See also Gov't Code § 552.007(a); *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475, 476 (Tex. App.—Dallas 1999, no pet.)

within an exception to required disclosure; and (3) there has not been a previous determination about whether the information falls within one of the exceptions. *See Conely v. Peck*, 929 S.W.2d 630 at 632 (Tex. App.—Austin 1996, no writ) (requirement to request a decision applies only when governmental body receives a request for information it considers subject to an exception). Therefore, a governmental body’s authority to request a decision from the Attorney General under section 552.301 exists only after the governmental body makes an initial finding that it in good faith reasonably believes the requested information to be within an exception to disclosure. A governmental body “considers [information] to be within one of the exceptions” when it in good faith believes there exist valid legal arguments to support the claimed exception to required disclosure. Gov’t Code § 552.301(a). A request for a determination by the Attorney General is then appropriate, when accompanied as required by an identification of the exception claimed and arguments supporting the application of the exception, in addition to the other documentation required. Gov’t Code § 552.301(a), (b), (e). *See also* Gov’t Code § 552.326 (exceptions not properly raised to Attorney General are barred in court challenge unless based on requirement of federal law or involving property or privacy interests of another person). The Act does not authorize a governmental body to request an attorney general decision as to whether public information is required to be publicly disclosed under any other circumstances.⁶

In 1999, the Legislature clarified that a governmental body may not seek an attorney general decision except as authorized under section 552.301, by adding subsection (f) to that section. Subsection (f) provides that a governmental body “must release the requested information and is prohibited from asking for a decision from the attorney general” if there has been a prior determination from the Attorney General or a court that the identical information is required to be released. Gov’t Code § 552.301(f). Act of May 25, 1999, 76th Leg., R.S., ch. 1319, § 20, 1999 Tex. Gen. Laws 4500, 4509.

Therefore, the Act does not authorize a governmental body to seek an attorney general decision if the governmental body reasonably believes that requested information is not within an exception to required public disclosure. Generally, a governmental body will not reasonably believe that information is protected from required disclosure when, for example, the information falls within a category of information expressly public under section 552.022; the governmental body has intentionally and voluntarily released the precise public information at issue to another requestor who does not have a special right of access, *see*

(governmental body may waive litigation exception, section 552.103).

⁶As previously noted, the discussion in this decision assumes that the entity requesting an open records ruling is a governmental body subject to the Public Information Act and that the information requested is public information subject to the Act. *See* Gov’t Code §§ 552.002, 552.003; *Blankenship v. Brazos Higher Educ. Auth.*, 975 S.W.2d 353 (Tex. App.—Waco 1998, pet. denied) (suggesting that entity may include request for determination as to whether it is governmental body subject to Act as part of its section 552.301 request, without admitting that entity is governmental body subject to Act).

Gov't Code §§ 552.007(b), 552.223, 552.307; or the only argument the governmental body has to make is identical to an argument repeatedly made by the governmental body and consistently dismissed by the Attorney General, the information at issue is substantially the same type of information the Attorney General has consistently directed the governmental body to release, and there has been no change in facts or law suggesting that the Attorney General may begin to interpret the argument differently. *See also Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475, 476 (Tex. App.–Dallas 1999, no pet.) (governmental body may waive litigation exception by agreeing to produce documents and producing some; suggesting subsequent request for attorney general decision raising that exception inappropriate).

The conditions of section 552.301, including the governmental body's reasonable good faith belief that the requested information may be excepted from disclosure, must be met before a governmental body may seek the attorney general decision. If a governmental body does not have a reasonable, good faith belief that requested information is subject to one of the Act's exceptions to required public disclosure, the governmental body may not request a decision from the Attorney General. When a governmental body reasonably believes that requested information is not subject to any of the Act's exceptions, the governmental body must release the information "promptly" and "without delay." Gov't Code §§ 552.221(a), 552.228(a), 552.230(a); *see* Open Records Decision No. 664 (2000); *see also* Gov't Code §§ 552.001(a), 552.353 (offense to fail to provide access to public information as required by Act).

S U M M A R Y

A governmental body may not request an open records decision from the Attorney General if the governmental body reasonably believes that the requested information is not excepted from required disclosure. Instead, the governmental body must promptly produce the requested public information to the requestor.

Yours very truly,

A handwritten signature in black ink, appearing to read "John Cornyn", written over a horizontal dashed line.

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