



January 25, 2002

Ms. Kimberley Mickelson
Olson & Olson
33 Clay Street, Suite 3485
Houston, Texas 77002

OR2002-0368

Dear Ms. Mickelson:

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# 158000.

The City of Seabrook (the "city"), which you represent, received a request for information pertaining to a lawsuit involving the city. You assert that the four documents you have submitted to this office for review are excepted from disclosure under section 552.107 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted information.

We must initially address certain procedural matters. Subsections 552.301(a) and (b) of the Government Code provide:

(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 [Act's] exceptions . . . 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.

¹We assume that the city has released any other information responsive to the request, and this decision therefore does not address any such information.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

You represent that the city received the request on October 22, 2001. Accordingly, the deadline under subsections 552.301(a) and (b) was November 5, 2001. You did not request a decision from this office until correspondence dated, and first received by this office, on November 19, 2001. Consequently, you failed to request a decision within the ten business day period mandated by subsections 552.301(a) and (b) of the Government Code.

In addition, pursuant to subsection 552.301(e), a governmental body is required to submit to this office no later than fifteen business days after 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. You did not, however, submit to this office a copy of the written request for information.

Section 552.302 of the Government Code provides that if a governmental body fails to comply with section 552.301, the requested information "is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information." *See also 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 Gov't Code § 552.302); Open Records Decision No. 319 (1982). Your sole argument is that a compelling reason exists to withhold the information under section 552.107 "because of the attorney-client privilege and work product exceptions." Section 552.107(1) of the Government Code excepts information coming within the attorney-client privilege. Open Records Decision No. 574 (1990). We note that the attorney work product privilege is properly asserted under either section 552.103 or section 552.111 of the Government Code for pending litigation, and only under section 552.111 if the litigation has concluded. *See* Open Records Decision No. 647 (1996).

However, in Open Records Decision No. 630 (1994), this office concluded that the mere fact that information is within the attorney-client privilege does not alone demonstrate a compelling reason to withhold the information that is sufficient to overcome the section 552.302 presumption of openness. *See* Open Records Decision No. 630 at 7 (1994). Similarly, the attorney work product privilege, under section 552.103 or section 552.111, is

a discretionary exception to disclosure that a governmental body may choose not to assert.² As such, the applicability of the attorney work product privilege also does not alone demonstrate a compelling reason sufficient to overcome the section 552.302 presumption of openness. This office has long held that a compelling reason under section 552.302 is demonstrated only where the information is confidential by law — such that a governmental body is prohibited from releasing it — or where third party interests are at stake. *See, e.g.*, Open Records Decision No. 150 (1977). We conclude that none of the information may be withheld under section 552.107(1), or under the attorney work product privilege aspect of section 552.103 or 552.111. Accordingly, except as otherwise may be applicable below, the city must release the submitted documents pursuant to section 552.302.

The 77th Legislature in Senate Bill 694 added section 552.137 to the Act, an exception pertaining to e-mail addresses. Effective May 26, 2001, the provision states:

Sec. 552.137. CONFIDENTIALITY OF CERTAIN E-MAIL ADDRESSES.

(a) 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 this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Act of May 14, 2001, 77th Leg., R.S., S.B. 694, § 1 (to be codified at Gov't Code § 552.137).³ We have marked an e-mail address contained in two of the documents at issue. Absent the affirmative consent of the holder of the e-mail address, the city must withhold this information as confidential, pursuant to section 552.137 of the Government Code. *See* Gov't Code § 552.352 (prohibiting the distribution of confidential information).

²Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions 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).

³House Bill 2589 also contained a provision making e-mail addresses confidential, and took effect on September 1, 2001. *See* Act of May 22, 2001, 77th Leg., R.S., H.B. 2589, § 5 (to be codified at Gov't Code § 552.136). The language of section 552.136, as added by House Bill 2589, is identical to the above-quoted language of section 552.137.

In summary, except for the marked e-mail address, which the city may be required to redact from two of the documents as provided above, the submitted documents must be released in their entirety pursuant to section 552.302 of the Government Code.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Garbarino". The signature is fluid and cursive, with a long horizontal stroke at the end.

Michael Garbarino
Assistant Attorney General
Open Records Division

MG/seg

Ref: ID# 158000

Enc. Submitted documents

c: Mr. Ted McCollum
4600 Flamingo Drive
Seabrook, Texas 77586
(w/o enclosures)