



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 20, 2006

Ms. Ada Owens
Interim City Secretary
City of Aransas Pass
P.O. Box 2000
Aransas Pass, Texas 78335-2000

OR2006-07874

Dear Ms. Owens:

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# 254587.

The City of Aransas Pass (the "city") received a request for information relating to three named entities. You state that the city will release some of the requested information. You claim that other responsive information is excepted from disclosure under section 552.131 of the Government Code. You also indicate that some of the requested information may be the subject of a previous open records letter ruling. We have considered your arguments and have reviewed the information you submitted. We also have considered the comments that we received from the requestor.¹

We first note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information.² In this instance, some of the submitted information does not appear to have been in existence when the city

¹See Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

²See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

received the present request for information. To the extent that the submitted information did not exist when the city received this request, it is not responsive to the request. This decision does not address the public availability of any information that is not responsive to the present request, and the city need not release any such information.

You indicate that some of the submitted information may be the subject of Open Records Letter No. 2006-04215 (2006). In that ruling, we concluded that the city could withhold some of the information at issue under section 552.131(b) of the Government Code, to the extent that the requestor had not already had access to that information. We ruled that the remaining information must be released. To the extent that the submitted information was the subject of Open Records Letter No. 2006-04215, the city must release or withhold any such information in accordance with the previous ruling, provided that there has been no change in the law, facts, and circumstances on which the previous ruling is based. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under Gov't Code § 552.301(a)).

Next, we address the city's obligations under section 552.301 of the Government Code. Section 552.301 prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(d) provides that a governmental body that requests an attorney general decision must provide to the requestor, not later than the 10th business day after the date of its receipt of the written request for information:

- (1) a written statement that the governmental body wishes to withhold the requested information and has asked for an attorney general decision about whether the information is within an exception to public disclosure; *and*
- (2) a copy of the governmental body's written communication to the attorney general asking for the decision or, if the governmental body's written communication to the attorney general discloses the requested information, a redacted copy of that written communication.

Gov't Code § 552.301(d) (emphasis added). If a governmental body fails to comply with section 552.301 in requesting a decision, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

The requestor has informed this office that he did not receive a copy of the city's request for this decision, as required by section 552.301(d)(2). Pursuant to section 552.303 of the Government Code, we sent you a letter, asking whether the city provided the requestor with a copy of the letter dated May 12, 2006, in which you requested this decision. *See id.* § 552.303(c). As of the date of this decision, we have received no response to our letter.

See id. § 552.303(d). Furthermore, there is no indication in your May 12 letter that a copy was provided to the requestor. Thus, we conclude that the city failed to comply with section 552.301(d) of the Government Code in requesting this decision. Any submitted information that may not be withheld on the basis of Open Records Letter No. 2006-04215 is therefore presumed to be public under section 552.302.

This statutory presumption can generally be overcome when the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Although the city claims an exception to disclosure under section 552.131(b) of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). As such, the city's claim under section 552.131(b) is not a compelling reason for non-disclosure under section 552.302. Therefore, the city may not withhold any of the submitted information under section 552.131(b) of the Government Code.

We note that section 552.117 of the Government Code may be applicable to some of the submitted information.³ Section 552.117(a)(2) excepts from public disclosure the home address, home telephone number, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 or 552.1175. Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. We have marked a cellular telephone number that must be withheld under section 552.117(a)(2) if it is the cell phone number of a peace officer. *See* Open Records Decision No. 670 at 6 (2001).

If the cell phone number is not that of a peace officer, it may nevertheless be excepted from disclosure under section 552.117(a)(1). Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024

³Unlike other exceptions to disclosure, this office will raise section 552.117 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

that the information be kept confidential. Thus, the marked cell phone number must be withheld under section 552.117(a)(1) if it is the personal cell phone number of a current or former city official or employee who timely requested confidentiality for his telephone number under section 552.024. We note that a cell phone number that is provided to a civilian employee of the city at public expense may not be withheld from disclosure under section 552.117(a)(1). *See* Open Records Decision No. 506 at 5-7 (1988) (statutory predecessor not applicable to cellular mobile phone numbers provided and paid for by governmental body and intended for official use).

We also note that section 552.137 of the Government Code is applicable to some of the submitted information.⁴ Section 552.137 provides in part:

(a) Except as otherwise provided by this section, 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.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

⁴Section 552.137 is also a mandatory exception and may not be waived. Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001).

Gov't Code § 552.137. Section 552.137 excepts from public disclosure certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with a governmental body, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. Likewise, section 552.137(c) is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked e-mail addresses that the city must withhold under section 552.137 of the Government Code, unless the e-mail address is subject to section 552.137(c) or the owner of the e-mail address has affirmatively consented to its public disclosure.

In summary: (1) to the extent that the submitted information was the subject of Open Records Letter No. 2006-04215, the city must release or withhold any such information in accordance with the previous ruling, provided that there has been no change in the law, facts, and circumstances on which the previous ruling is based; (2) the marked cell telephone number must be withheld from disclosure under section 552.117(a)(2) of the Government Code if it is the cell phone number of a peace officer; (3) if it does not relate to a peace officer, the cell phone number must be withheld under section 552.117(a)(1) of the Government Code if it is the personal cell phone number of a current or former city official or employee who timely requested confidentiality for his telephone number under section 552.024; and (4) the marked e-mail addresses must be withheld under section 552.137 of the Government Code, unless the e-mail address is subject to section 552.137(c) or the owner of the e-mail address has consented to its disclosure. The rest of the submitted information must be released.

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, upon receiving this ruling, the governmental body

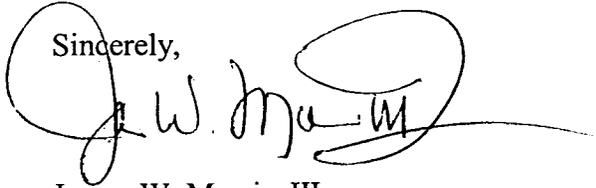
will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to 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 Dep't of Pub. 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 Office of the Attorney General 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 "J.W. Morris, III", with a large, stylized flourish extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 254587

Enc: Submitted documents

c: Mr. Tom Hargrave
122 Sea View Drive
Aransas Pass, Texas 78336
(w/o enclosures)