



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 5, 2009

Mr. Warren Ernst
Chief of General Counsel Division
City of Dallas
1500 Marilla, Room 7DN
Dallas, Texas 75201

OR2009-10866

Dear Mr. Ernst:

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# 351048.

The City of Dallas (the "city") received twenty-three requests for e-mails, phone messages, notes, and a list of complaints relating to specific addresses from January 1, 2006 to May 1, 2009. You state the city is releasing some of the responsive information. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note that a portion of the submitted information, which we have marked, is not responsive as it does not fall within the dates specified by the requestor. The city need not release non-responsive information in response to this request, and this ruling will not address that information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W. 2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed).

Next, you acknowledge, and we agree, that the city failed to meet the deadlines prescribed by section 552.301 in requesting a decision from our office. *See Gov't Code* § 552.301.

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See Open Records Decision Nos. 499 (1988), 497 (1988)*. This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

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 unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *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 section 552.302); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982).

In this instance, the city's claim under 552.107 of the Government Code does not provide a compelling reason for non-disclosure under section 552.302. *See* Open Records Decision Nos. 676 at 12 (2002) (attorney-client privilege under Gov't Code § 552.107 or Tex. R. Evid. 503 constitutes compelling reason for non-disclosure under Gov't Code § 552.302 only if release of information would harm third party); *see also* 677 at 10 (2002) (attorney work product privilege under Tex. R. Civ. P. 192.5 does not provide compelling reason for non-disclosure if claim does not implicate third party rights). We note that you also raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure.² Although the applicability of section 552.101 can provide a compelling reason for non-disclosure, that exception does not encompass discovery privileges. *See* ORD 676 at 1-3. Therefore, the city may not withhold the information at issue under section 552.101 on the basis of rule 503 or rule 192.5. With regards to rule 1.05 of the Texas Disciplinary Rules of Professional Conduct, which you also raise, we note that rule 1.05 concerns the confidentiality of client information. *See* Tex. Disciplinary R. Prof'l Conduct Rule 1.05(a)(1). This office has concluded that in the open records context, an attorney's duty of confidentiality is limited to attorney-client privileged material. *See* Open Records Decision No. 574 at 2-5 (1990) (discussing Rule 1.05(a)(1) in the context of predecessor provision of section 552.107(1)). Thus, given its limitation in the open records context, the applicability of rule 1.05 also cannot overcome the presumption of openness of section 552.302.

You also claim the informer's privilege in conjunction with section 552.101 of the Government Code for portions of the submitted information. However, because the purpose of the informer's privilege is to protect the flow of information to a governmental body, rather than to protect a third person, the informer's privilege, unlike other claims under section 552.101 of the Government Code, can be waived, and thus does not constitute a compelling reason to overcome the presumption of openness under section 552.302. *See* Open Records Decision No. 549 at 6 (1990). In addition, you raise rule 508 of the Texas Rules of Evidence for this information. However, this office has determined that discovery

²Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101.

privileges, such as the informer's privilege under rule 508, do not provide a compelling reason to overcome the presumption of openness under section 552.302 of the Government Code. *See, e.g.*, Open Records Decision No. 676 at 11 (2002) (assertion of rule 503 does not demonstrate "compelling reason" under section 552.302 to prohibit governmental body's release of information). Consequently, we determine the city may not withhold the information at issue under either the common law informer's privilege or rule 508 of the Texas Rules of Evidence. However, as section 552.137 of the Government Code can provide a compelling reason to overcome the presumption of openness, we will consider your argument under this section.

You have marked e-mail addresses as confidential pursuant to section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See Gov't Code* § 552.137(a)-(c). The addresses you have marked, and the address we have marked, are not a type specifically excluded by section 552.137. Accordingly, the city must withhold the marked e-mail addresses under section 552.137, unless the owners of the addresses have affirmatively consented to their release. *See id.* § 552.137(b). As you raise no other exceptions to disclosure, 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.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 at (512) 475-2497.

Sincerely,



Pamela Wissemann
Assistant Attorney General
Open Records Division

PFW/dls

Ref: ID# 351048

Enc. Submitted documents

c: Requestor
(w/o enclosures)