



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

June 3, 2016

Mr. Jonathan Miles  
Open Records Attorney  
Texas Health and Human Services Commission  
Mail Code 1070  
P.O. Box 13247  
Austin, Texas 78711

OR2016-12608

Dear Mr. Miles:

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# 613845 (HHSC Ref. No. 10961).

The Texas Health and Human Services Commission (the "commission") received two requests from the same requestor for (1) e-mails between the requestor and a commission employee relating to a specified company or its predecessor, (2) information provided to the State Auditor's Office relating to a specified audit, and (3) three additional categories of e-mails.<sup>1</sup> You state the commission will redact information subject to section 552.117 of the Government Code pursuant to section 552.024(c) of the Government Code.<sup>2</sup> Further, you state pursuant to the previous determination in Open Records Decision No. 684 (2009), the commission will redact personal e-mail addresses subject to section 552.137 of the

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<sup>1</sup>As the commission did not submit a copy of the second request for information, we take this description from the commission's brief.

<sup>2</sup>Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2). If a governmental body redacts such information, it must notify the requestor in accordance with subsections 552.024(c-1) and (c-2). *See id.* § 552.024(c-1)-(c-2).

Government Code.<sup>3</sup> You indicate the commission released some information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>4</sup>

Initially, we must address the commission's obligations under the Act. Section 552.301 of the Government Code prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the claimed 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. Gov't Code § 552.301(e). The commission asserts it received the second request for information on March 23, 2016. The commission states it sought and received clarification of the information requested on March 30, 2016. *See id.* § 552.222(b) (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). As of the date of this letter, the commission has not submitted a copy of the second written request for information. Consequently, we find the commission failed to comply with the requirements of section 552.301 of the Government Code with regard to the second request.

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 information is public and 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) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when

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<sup>3</sup>Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including e-mail addresses of members of the public under section 552.137, without the necessity of requesting an attorney general decision.

<sup>4</sup>We assume 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.

information is confidential under other law. Open Records Decision No. 150 (1977). Although you assert the information at issue is excepted from disclosure under sections 552.107, 552.108, and 552.111 of the Government Code, these are discretionary exceptions to disclosure and may be waived. *See* Gov't Code § 552.007; Open Records Decision Nos. 676 at 6 (section 552.107(1) is not other law for purposes of section 552.022), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions, governmental body may waive section 552.111), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Therefore, in failing to comply with the requirements of section 552.301, the commission has waived its claims under sections 552.107, 552.108, and 552.111 for the second request, and may not withhold the information solely responsive to the second request on the basis of its own interests under sections 552.107, 552.108, or 552.111. However, the need of a governmental body other than the agency that is seeking an open records decision to withhold information under section 552.108 of the Government Code can provide a compelling reason to withhold information from disclosure. *See* Open Records Decision No. 586 at 3 (1991) (claim of another governmental body under statutory predecessor to section 552.108 can provide compelling reason for non-disclosure). Because the commission informs us, and provides documentation showing, the Travis County District Attorney's Office (the "district attorney's office") objects to the release of the information at issue, we will consider whether the commission may withhold the information at issue under section 552.108 on behalf of the district attorney's office. Further, as section 552.101 provides a compelling reason to overcome the presumption of openness under section 552.302, we will consider the commission's argument under this section for the information responsive to the second request. Furthermore, we will consider the commission's arguments for the information responsive to the first request, which was timely submitted to this office.

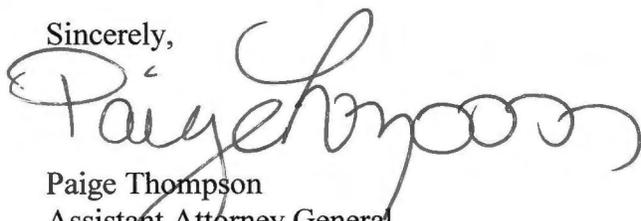
Section 552.108(a)(1) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by the proper custodian of information relating to a pending investigation or prosecution of criminal conduct. *See* Open Records Decision No. 474 at 4-5 (1987). Where a non-law enforcement agency has custody of information that would otherwise qualify for exception under section 552.108 as information relating to the pending case of a law enforcement agency, the custodian of the records may withhold the information if it provides this office with a demonstration the information relates to the pending case and a representation from the law enforcement agency that it wishes to have the information withheld.

The district attorney's office states the submitted information is related to a criminal investigation that is pending with the district attorney's office. The district attorney's office asserts release of the submitted information would interfere with the investigation. Based on the district attorney's office's representation, we conclude the commission may withhold the submitted information under section 552.108(a)(1) of the Government Code on behalf of the district attorney's office.<sup>5</sup> *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976).

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](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,



Paige Thompson  
Assistant Attorney General  
Open Records Division

PT/dls

Ref: ID# 613845

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>5</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of the submitted information.