OPEN RECORDS DECISION NO. 673
(ORQ-55)

March 19, 2001

RE: Which attorney general decisions are "previous determinations" and which are not? When can a court decision function as a previous determination? When does a previous determination expire or become invalid? To which documents does a previous determination apply? To which governmental bodies does a previous determination apply? What is the result if a governmental body does not seek an attorney general ruling because it believes that it has a previous determination, but; in fact, the governmental body does not have a previous determination?

AUTHORITY

Section 552.011 of the Government Code states that "the attorney general shall maintain uniformity in the application, operation, and interpretation" of the Public Information Act (the "Act"). Pursuant to this legislative mandate, section 552.011 grants the attorney general the authority to "prepare, distribute, and publish any materials, including detailed and comprehensive written decisions and opinions, that relate to or are based on" the Act. Gov't Code § 552.011. Under that authority, we consider what constitutes a "previous determination" as that term is used in section 552.301(a) of the Government Code and related issues.

BACKGROUND

Section 552.301 of the Government Code states in pertinent part:

> (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.*

Gov't Code § 552.301(a) (emphasis added). The above language first sets forth a general requirement that a governmental body ask this office whether requested information is excepted from required disclosure whenever a governmental body seeks to withhold information responsive to a request. The language then sets forth a single exception to this general requirement: where there exists a "previous determination," a governmental body is not required to ask this office for a decision and may instead withhold the information in accordance with the previous determination. Thus, a governmental body must be able to

identify what constitutes a previous determination in order to ascertain whether the Act requires the governmental body to request a decision from this office.

The term "previous determination" is not defined in the Act. In addressing particular open records disputes, some court decisions have opined that a particular attorney general decision constituted a previous determination in regard to the request at issue in the case.[1] However, we are aware of no court decision that sets forth any criteria for determining what constitutes a previous determination, nor are we aware of any court decision that defines the term. In addition, no published decision of any court or of this office has held or suggested that a governmental body has the authority to determine, on its own, whether a decision of this office constitutes a previous determination. To the contrary, in a case deciding whether this office was required to issue a particular decision under the Act, the Texas Supreme Court declared that the Act "does not require a previous determination on the specific piece of information [at issue in a given request]; it allows the Attorney General to explicitly refuse to render a decision *if he decides that a previous determination has been made* regarding the category of information to which the request belongs." *Houston Chronicle Publ'g Co. v. Mattox*, 767 S.W.2d 695, 698 (Tex. 1989) (emphasis added). The court further directed the attorney general to perform his duties under the Act, by either rendering a decision or determining that a prior decision constitutes a previous determination as to the information at issue. Thus, the Texas Supreme Court has expressly acknowledged this office's authority to decide what constitutes a previous determination under section 552.301(a) of the Act.

Open records decisions of this office have used the term "previous determination" or "previously determined" in various and inconsistent ways.[2] Our varied use of these terms

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[1]*See, e.g., Hart v. Gossum*, 995 S.W.2d 958 (Tex. App. - Fort Worth 1999, no pet.) (concluding that Open Records Decision No. 574 (1990) constituted a previous determination that attorney communications of legal advice and opinion are excepted from disclosure); *Rainbow Group, Ltd. v. Texas Employment Comm'n*, 897 S.W.2d 946, 950 (Tex. App.-Austin 1995, writ denied) (concluding that Open Records Decision No. 599 (1992), Open Records Letter Ruling No. 92-201 (1992), and Open Records Letter Ruling No. 92-097 (1992) comprised previous determinations that information from employer reports held by the Texas Employment Commission was confidential under predecessor provision to section 301.081 of the Labor Code).

[2]The term "previous determination" has sometimes been employed to indicate the absence of a prior decision with regard to a particular exception. *See, e.g.*, Open Records Decision No. 537 at 1 (1990). The term has also been employed to refer to prior decisions of this office that concluded particular information is *not* excepted from required disclosure. *See, e.g.*, Open Records Decision Nos. 206 at 1 (1978), 197 at 2 (1978). Similarly, the term "previously determined" has sometimes been employed to refer to categories of information that this office, or a court, has declared *not* excepted from required disclosure. *See, e.g.*, Open Records Decision Nos. 633 at 2 (1995), 562 at 9 (1990). The term "previously determined" has also been employed to refer to categories of information that a prior decision held to be excepted from disclosure. *See, e.g.*, Open Records Decision No. 550 at 3 (1990). In addition, the term "previously determined" has been employed to indicate that a prior decision from this office held that a particular governmental body may claim a particular exception. *See, e.g.*, Open Records Decision No. 211 at 3 (1978).

has contributed to confusion and divergent views over the meaning of the term "previous determination" as it is used in section 552.301(a). Indeed, the comments submitted to this office in connection with this decision confirm that there exist among various governmental bodies and interested parties, each relying on different authority or even interpreting the same authority in different ways, conflicting and varied viewpoints of what constitutes a previous determination under section 552.301(a). Thus, under the existing authority which employs the term "previous determination," including prior decisions from this office, a governmental body acting in good faith may conclude that it is not required to seek a decision from this office, although this office may disagree with the governmental body that a particular decision functions as a previous determination. Because section 552.011 requires that this office "maintain uniformity in the application, operation, and interpretation" of the Act, and because the Texas Supreme Court has expressly acknowledged this office's authority to decide what constitutes a previous determination, this office is compelled to provide clear guidance to governmental bodies as to the meaning of the term "previous determination" as it is used in section 552.301(a).

DISCUSSION

At the outset, we note that, because a "previous determination" under section 552.301(a) is not defined in the Act, the meaning of the term must be derived by reading it in the context of the Act as a whole. *Jones v. Fowler*, 969 S.W.2d 429, 432 (Tex.1998); *Taylor v. Fireman's & Policemen's Civil Service Comm'n*, 616 S.W.2d 187, 190 (Tex. 1981). Mindful of the Act's purpose and the legislative mandate that the provisions of the Act be construed liberally in favor of granting a request for information,[3] the legislature has adopted, in subchapter G of the Act, detailed provisions pertaining exclusively to the *procedural* process a governmental body must follow if it seeks to withhold information from the public. *See* Gov't Code §§ 552.301, .302, .303, .305, .306. These *procedural* requirements are separate from the *substantive* provisions in the Act that lay out the particular exceptions a governmental body may assert.[4] To validly invoke an exception to disclosure a governmental body must comply with both the substance and the procedure, which means both identifying an exception that arguably applies (substance) and also seeking a ruling from the attorney general regarding whether that exception actually applies (procedure).

The general rule that a governmental body must ask for an attorney general decision is reinforced by specific provisions in subchapters G and H. These provisions establish the consequences of a governmental body's failure to seek a decision from the attorney general as provided by section 552.301 and generally limit the exceptions a governmental body may

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[3]*See* Gov't Code § 552.001.

[4]The Act's exceptions to required disclosure, sections 552.101 through 552.132 of the Government Code, are found in subchapter C of the Act.

raise in a suit filed under the Act to only those exceptions that were "properly raised" before the attorney general in the procedural rulings process.[5] *See* Gov't Code §§ 552.302, .326. Indeed, the importance of the rulings process is specifically reinforced by the legislature's express authorization for this office to file suit against a governmental body that refuses to request a ruling from this office. *See* Gov't Code § 552.321. Thus, other provisions of the Act contemplate that the section 552.301(a) requirement that a governmental body seek a decision from this office is a legislative mandate that generally applies anytime a governmental body wishes to withhold requested information from the public. The structure of the statute makes clear that a "previous determination" in section 552.301(a) is an exception to the provision's general rule that a governmental body must obtain an attorney general ruling.

Some of the comments submitted to this office argue in favor of a broad reading of the term "previous determination" in section 552.301(a), thus creating a broad exception to the above-referenced general mandate. The essential assertion is that the term encompasses any decision from this office or of a court that concludes, based on a given standard of interpretation, that a category of information is excepted from disclosure under a particular exception in the Act. Under this reading, if a governmental body holds information that appears to be encompassed within a description of information discussed in an open records or court decision, and if the decision concludes the information discussed is excepted from disclosure, the decision would constitute a previous determination and the governmental body could therefore decide to withhold its information without seeking a decision from this office.

We do not believe such a broad reading of the term "previous determination" is tenable. There is a significant difference between announcing a general standard in an open records decision as to the applicability of an exception in the Act to the particular records before this office in that decision, and applying that standard to other documents or records that are responsive to a given request. For example, in Open Records Decision No. 435 (1986), we addressed the issue of whether three memoranda held by a school district could be withheld under the predecessor provision to section 552.111 of the Government Code without the necessity of seeking a decision from this office. We stated that "although prior decisions have discussed the *standard* to be applied in section [552.111] cases . . . the applicability of this standard to the content of these three memoranda has never been resolved." Open Records Decision No. 435 at 2 (1986) (emphasis in original). We further stated:

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[5]By way of illustration, even if litigation involving the governmental body is pending, section 552.326 of the Government Code prohibits a governmental body from raising, among other exceptions, section 552.103 of the Government Code in a suit filed against the governmental body under the Act if the governmental body did not properly raise section 552.103 in connection with its request for a decision from this office. *See* Gov't Code §§ 552.103, .326.

> To allow a governmental body conclusively to determine how standards developed for open records decisions apply to particular documents would enable it to function in two inconsistent legal roles - those of advocate and judge. In its role as advocate, the entity could assert the applicability of a standard; then, in its role as judge, the entity could decide the validity of its claim. Its conclusion, moreover, would not be subject to review by this office, because unless a governmental body seeks our decision we will very likely never hear of the matter. This is so even though the Act clearly contemplates that the attorney general shall independently and objectively review determinations by governmental bodies that particular exceptions apply to requested information.
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> In fact, this situation has occurred several times. We have received many letters from the public seeking our assistance in obtaining information denied them by governmental bodies on the basis of standards discussed in prior decisions. After obtaining the relevant details, we have often discovered that the governmental body incorrectly applied these standards. Had the requestor never brought the matter to our attention, we would never have been able to perform the independent-review function contemplated by the [Act]. The requestor's only recourse would have been to seek a writ of mandamus under section [552.321 of the Act].

Id.; see also Open Records Decision No. 511 at 3 (1988). As a practical matter, an average member of the general public who requests information from a governmental body does not have the resources to file suit every time a governmental body unilaterally withholds information without seeking a ruling from this office. Moreover, a governmental body does not have the discretion to unilaterally decide whether it can withhold information that is subject to the Act. *City of Lubbock v. Cornyn*, 993 S.W.2d 461, 465 (Tex. App. - Austin 1999, no pet.). Such a broad reading of the term "previous determination" under section 552.301(a) would subvert the primary purpose of the Act, *i.e.*, to make information available to the public, and would be contrary to the legislative mandate that the Act's provisions be liberally construed by this office in a way that favors granting a request for information. Gov't Code § 552.001.

Had the legislature intended the "previous determination" exception in section 552.301(a) to be read broadly, the practical effect would be that this office, charged with interpreting the Act, would now be called upon to issue open records decisions only on novel issues or questions of first impression. The practical effect of such a broad reading of the term "previous determination," thus, would virtually rescind section 552.301(a)'s express general requirement that a decision be sought from this office. Only in the rarest of circumstances, *e.g.* a question of first impression, would a governmental body then be required to do so. We find no indication that the legislature intended the Act's procedural rulings process to operate

in this manner. Indeed, the language of section 552.301(a) and the structure of the Act strongly suggest that seeking a decision from this office is not anomalous, but is instead a general procedural requirement in the ordinary operation of the Act.

This is not to say, however, that the general standards announced in open records decisions and court cases do not serve an important and useful purpose in the Act's rulings process. This office's numerous open records decisions that interpret and adopt standards for particular exceptions under the Act provide guidance to a governmental body, and allow it to make its own informed initial determination as to whether particular information that is responsive to a request may be excepted from required disclosure. However, these decisions do not substitute for the detailed rulings procedures that the legislature has adopted in the Act. For all of the above reasons, we hold that the term "previous determination" under section 552.301(a) of the Act must be construed narrowly. Because this office has used the term in various and inconsistent ways, we next set forth the specific criteria that must be met in order for a previous determination under section 552.301(a) to exist.

PREVIOUS DETERMINATIONS

We believe there are only two instances in which a previous determination under section 552.301(a) exists. The first and by far the most common instance of a previous determination pertains to specific information that is again requested from a governmental body where this office has previously issued a decision that evaluates the public availability of the precise information or records at issue. This first instance of a previous determination does not apply to records that are substantially similar to records previously submitted to this office for review, nor does it apply to information that may fall within the same category as any given records on which this office has previously ruled. The first type of previous determination requires that all of the following criteria be met:

1. the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code;

2. the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general;

3. the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and

4. the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling.[6]

Absent all four of the above criteria, and unless the second type of previous determination applies, a governmental body must ask for a decision from this office, if it wishes to withhold from the public information that is requested under the Act.

The second type of previous determination requires that all of the following criteria be met:

1. the requested records or information at issue fall within a specific, clearly delineated category of information about which this office has previously rendered a decision;

2. the previous decision is applicable to the particular governmental body or type of governmental body from which the information is requested;[7]

3. the previous decision concludes that the specific, clearly delineated category of information is or is not excepted from disclosure under the Act;

4. the elements of law, fact, and circumstances are met to support the previous decision's conclusion that the requested records or information at issue is or is not excepted from required disclosure; and[8]

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[6]A governmental body must make an initial finding that it in good faith reasonably believes the requested information is excepted from disclosure. Open Records Decision No. 665 at 3 (2000). A governmental body should request a decision from this office if it is unclear to the governmental body whether there has been a change in the law, facts, or circumstances on which the prior decision was based.

[7]Previous determinations of the second type can apply to all governmental bodies if the decision so provides. *See, e.g.*, Open Records Decision No. 670 (2001) (concluding that all governmental bodies subject to the Act may withhold information that is subject to section 552.117(2) of the Government Code without the necessity of seeking a decision from this office). The second type of previous determination can also apply to all governmental bodies of a certain type. *See, e.g.*, Open Records Decision No. 634 (1995) (applying to any governmental body that meets the definition of an "educational agency or institution" as defined in the federal Family Educational Rights and Privacy Act, *see* 20 U.S.C. § 1232g(a)(3)). On the other hand, if the decision is addressed to a particular governmental body and does not explicitly provide that it also applies to other governmental bodies or to all governmental bodies of a certain type, then only the particular governmental body to which the decision is addressed may rely on the decision as a previous determination. *See, e.g.*, Open Records Decision No. 662 (1999) (constituting the second type of previous determination but only with respect to information held by the Texas Department of Health).

[8]Thus, in addition to the law remaining unchanged, the facts and circumstances must also have remained unchanged to the extent necessary for all of the requisite elements to be met. As with the first type of previous determination, a governmental body seeking to withhold requested information must make an initial finding that it in good faith reasonably believes the information is excepted from disclosure. With respect to

> 5. the previous decision explicitly provides that the governmental body or bodies to which the decision applies may withhold the information without the necessity of again seeking a decision from this office.

Absent all five of the above criteria, and unless the first type of previous determination applies, a governmental body must ask for a decision from this office if it wishes to withhold from the public information that is requested under the Act.

This office has issued a limited number of decisions that constitute the second type of previous determination. For example, in Open Records Decision No. 634, this office concluded:

> *[A]n educational agency or institution* may withhold from public disclosure information that is protected by [the Family Educational Rights and Privacy Act (FERPA)] and excepted from required public disclosure *by section 552.101* as 'information considered to be confidential by law,' *without the necessity of requesting an attorney general decision as to that exception.*

Open Records Decision No. 634 at 10 (1995) (emphasis added). This decision constitutes a previous determination for requested records or information if: the requested information falls within the specific, clearly delineated category of information that is protected by FERPA (criterion "1"), and the governmental body from which the information is requested is an educational agency or institution as that term is defined in FERPA[9](criterion "2"). This is because the decision concludes that the information is excepted from disclosure under section 552.101 of the Government Code (criterion "3"), the law, facts, and circumstances on which the conclusions of Open Records Decision No. 634 were based equally apply to the present request (criterion "4"), and the decision explicitly authorizes an educational agency or institution to withhold the information without the necessity of again seeking a decision from this office (criterion "5"). However, if, for example, the governmental body from which the information is requested is a police department rather than an educational agency or institution as that term is defined in FERPA, then Open Records Decision No. 634 cannot be relied upon by the police department as a previous determination, because neither criterion "2" nor criterion "4" is met. Likewise, there are numerous prior decisions of this office that may meet all of the above-stated criteria except the fifth. These prior decisions provide guidance to a governmental body of whether particular information *may be* excepted

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previous determinations of the second type, a governmental body should request a decision from this office if it is unclear to the governmental body whether all of the elements on which the previous decision's conclusion was based have been met with respect to the requested records or information.

[9]*See* 20 U.S.C. § 1232g(a)(3) (defining "educational agency or institution" under FERPA).

from disclosure, but none of these decisions constitutes previous determinations under section 552.301(a) of the Act of the second type. These prior decisions, therefore, are previous determinations only to the extent they meet all four of the above-stated criteria for the first type of previous determination.

If a governmental body receives repeated requests for a specific, clearly delineated category of information, the governmental body is encouraged to ask this office for a previous determination of the second type, authorizing the governmental body to withhold the information in response to future requests without the necessity of seeking a ruling from this office.

SUMMARY

The term "previous determination" under section 552.301(a) of the Government Code means only one of two types of attorney general decisions. So long as the law, the facts, and the circumstances on which the ruling was based have not changed, the first type of previous determination exists where requested information is precisely the same information as was addressed in a prior attorney general ruling, the ruling is addressed to the same governmental body, and the ruling concludes that the information is or is not excepted from disclosure. The second type is an attorney general decision which may be relied upon so long as the elements of law, fact, and circumstances are met to support the previous decision's conclusion, the decision concludes that a specific, clearly delineated category of information is or is not excepted from disclosure, and the decision explicitly provides that the governmental body or type of governmental body from which the information is requested, in response to future requests, is not required to seek a decision from the attorney general in order to withhold the information.

Yours very truly,

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