



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.
The ruling and judgment can be viewed in PDF
format below.



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 17, 2015

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

Ms. Sonya Palmer
Staff Attorney
Texas Windstorm Insurance Association
P.O. Box 99090
Austin, Texas 78709-9090

OR2015-16923

Dear Ms. Palmer:

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# 575581 (TWIA ID# 000419).

The Texas Windstorm Insurance Association ("TWIA") received a request for information related to attorney fees related to specified litigation involving TWIA. You state TWIA has produced some information to the requestor. You claim some of the submitted information is excepted from disclosure under sections 552.103 and 552.136 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure 192.5. We have considered the submitted arguments and reviewed the submitted representative sample of information.¹

Initially, we must address TWIA's procedural obligations under section 552.301 of the Government Code when requesting a decision from this office under the Act. Pursuant to section 552.301(b), within ten business days after receiving a written request the governmental body must request a ruling from this office and state the exceptions to disclosure that apply. Gov't Code § 552.301(b). You state TWIA received the request for

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.

information on May 26, 2015. You do not inform us TWIA was closed for business on any of the days at issue. Accordingly, TWIA's ten-business-day deadline was June 9, 2015. However, you submitted the information required under section 552.301(b) in an envelope bearing a post-office cancellation mark of June 10, 2015. *See id.* § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Consequently, we find TWIA failed to comply with section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *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, 381-82 (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); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third-party interests are at stake. Open Records Decision No. 150 at 2 (1977). You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure. However, section 552.103 and the claimed privileges are discretionary in nature. They serve to protect a governmental body's interests and may be waived; as such, they do not constitute compelling reasons to withhold information. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 677 at 8-10 (2002) (attorney work product privilege under section 552.111 and rule 192.5 may be waived), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) and rule 503 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Accordingly, TWIA may not withhold any portion of the submitted information under section 552.103 of the Government Code or under rule 503 or rule 192.5. However, you also claim section 552.136 of the Government Code for the submitted information. Additionally, we note portions of the submitted information may be subject to section 552.137 of the Government Code.² Because these sections can provide a compelling reason to overcome the presumption of openness, we will address the applicability of sections 552.136 and 552.137 to the submitted information.

Section 552.136 of the Government Code provides, "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected,

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Upon review, we find TWIA must withhold the information we have marked under section 552.136 of the Government Code.

Section 552.137 of the Government Code 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). Gov’t Code § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, an e-mail address that a governmental entity maintains for one of its officials or employees, or an e-mail address provided to a governmental body by a person who has or seeks a contractual relationship with the governmental body or by the contractor’s agent. *See id.* § 552.137(c). We note the requestor has a right of access to his own e-mail address under section 552.137(h). *See id.* § 552.137(b). Because we are unable to discern whether the remaining e-mail addresses within the submitted documents fall within the scope of section 552.137(c), we must rule conditionally. To the extent the e-mail addresses at issue belong to members of the public, TWIA must withhold such e-mail addresses under section 552.137, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. However, to the extent the e-mail addresses at issue are excluded by section 552.137(c), TWIA may not withhold these e-mail addresses under section 552.137 of the Government Code.

We note some of the submitted information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, TWIA must withhold the information we have marked under section 552.136 of the Government Code. To the extent the e-mail addresses at issue belong to members of the public, TWIA must withhold such e-mail addresses under section 552.137, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. TWIA must release the remaining information; however, any information subject to copyright may be released only in accordance with copyright law.

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, 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,



Kristi L. Godden
Assistant Attorney General
Open Records Division

KLK/cz

Ref: ID# 575581

Enc. Submitted documents

c: Requestor
(w/o enclosures)

APR 06 2017

At 8:47 AM.
Velva L. Price, District Clerk

Cause No. D-1-GN-15-004059

TEXAS WINDSTORM INSURANCE
ASSOCIATION,
Plaintiff,

v.

KEN PAXTON, ATTORNEY
GENERAL OF TEXAS,
Defendant.

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IN THE DISTRICT COURT OF

98th JUDICIAL DISTRICT

TRAVIS COUNTY, TEXAS

AGREED FINAL JUDGMENT

This cause is an action under the Public Information Act (PIA), Texas Government Code ch. 552, in which Plaintiff Texas Windstorm Insurance Association (TWIA), sought to withhold certain information from public disclosure. All matters in controversy between Plaintiff TWIA and Defendant Ken Paxton, Attorney General of Texas, arising out of this lawsuit have been resolved, and the parties agree to the entry and filing of an agreed final judgment.

Texas Government Code section 552.325(d) requires the Court to allow a requestor a reasonable period of time to intervene after notice is attempted by the Attorney General. The Attorney General represents to the Court that in compliance with section 552.325(c), the Attorney General sent a certified letter to the requestor, Christopher J. Leavitt, on February 24, 2017, providing reasonable notice of this setting. The requestor was informed of the parties' agreement that TWIA may withhold the information at issue. The requestor was also informed of his right to intervene in the suit to contest the TWIA's right to withhold the information. The requestor has not filed a motion to intervene.

After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED THAT:

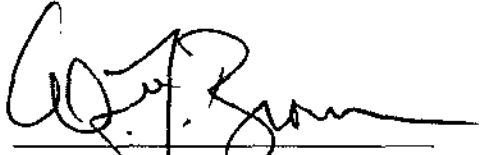
1. TWIA may redact the information at issue in accordance with the markings agreed upon by the parties reflected in TWIA's August 18, 2016 letter to the Attorney General pursuant Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5;
2. All court cost and attorney fees are taxed against the parties incurring the same;
3. All relief not expressly granted is denied; and
4. This Agreed Final Judgment finally disposes of all claims and all parties and is a final judgment.

SIGNED the 6 day of April, 2017.



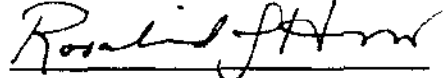
PRESIDING JUDGE

AGREED:



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