



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 4, 1998

Mr. Terrence S. Welch, P.C.  
Vial, Hamilton, Koch & Knox  
1717 Main Street  
Suite 4400  
Dallas, Texas 75201-7388

OR98-2955

Dear Mr. Welch:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 119971.

The City of Highland Village (the "city") received a request for the following information:

1. One (1) copy of any and all letters or memos authored by Councilman Dixon relating to the Highland Village Municipal Complex issue including but not limited to those directed to individuals or included in select mailing lists.
2. One (1) copy of the select mailing list that he referenced, including names, addresses, phone numbers and any other information contained on the mailing list(s). Including but not limited to any separate citizen lists maintained by Councilman Dixon.
3. Any e-mails, faxes, memos, or margin notes related to the bond election for the Highland Village Municipal Complex election.
4. One (1) copy of any tapes, computers disks, databases, printed materials or other devices/documents utilized by councilman [sic] Dixon related to the Highland Village Municipal Complex election.

You indicate that there is no information responsive to request number four. You have submitted a sample of the documents that you contend are responsive to requests one, two,

and three.<sup>1</sup> You argue that the responsive information is not public information and is not subject to required public disclosure under the Open Records Act. In the alternative, you contend that the information is excepted from disclosure by section 552.109 of the Government Code.

You contend that the information requested in items one through three need not be released because it is not "public information" subject to the Open Records Act. Section 552.002 of the Government Code defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." The Open Records Act does not ordinarily require a governmental body to obtain information not in its possession. Open Records Decision Nos. 558 (1990), 499 (1988). If, however, information is collected, assembled, or maintained by a third party, it will be subject to disclosure under chapter 552 of the Government Code if a governmental body owns or has a right of access to the information. *See* Open Records Decision No. 462 (1987); *cf.* Open Records Decision No. 499 (1988) (relevant facts in determining whether information held by consultant is subject to the Open Records Act are: 1) information collected by consultant must relate to the governmental body's official business; 2) consultant must have acted as agent of the governmental body in collecting information; and 3) governmental body must have or be entitled to access to the information). We have additionally observed that certain factors are relevant, although not exhaustive, in deciding whether a document is essentially a governmental or personal document: who prepared the document; the nature of its contents; its purpose or use; who possessed it; who had access to it; whether the governmental body required its preparation; and whether its existence was necessary to or in furtherance of official business. Open Records Decision No. 635 at 4-5 (1995).

You represent to this office the following facts about the requested information:

[i]t is undisputed that (1) these documents were not generated within or by the City; (2) these documents are not and never have been in the possession of the City; (3) these documents have never been placed in City files; (4) these documents were not created by City employees for or on behalf of City Councilmember Dixon; (5) no City equipment was utilized in generating these documents; (6) these documents have not been used in the conduct of City business; (7) these documents were created by Councilmember Dixon at his own expense on his personal computer equipment; (8) these documents

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<sup>1</sup> In reaching our conclusion here, we 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.

were sent to or given to individuals at Councilmember Dixon's discretion; (10) no City ordinance or other applicable authority mandated or otherwise required the creation of these documents; and (11) these documents are not necessary or in the furtherance of City business.

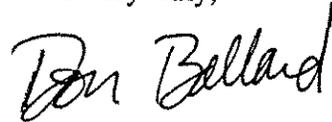
Although you do not explain how or why the city obtained a copy of the requested information here, we presume from your arguments that the city does not have a right of access to the information. Open Records Decision Nos. 558 (1990) (The Open Records Act does not ordinarily require a governmental body to obtain information not in its possession.), 499 (1988). As you indicate that the information was not collected or maintained by the city, did not involve the transaction of official business, nor were city resources used in the creation or maintenance of the documents, we find that most of the submitted documents are not public information as contemplated by the Open Records Act. The information submitted as Exhibits 1, 3, and 4 need not be released. Exhibit 2, however, is public information. It appears that the submitted memorandum was sent by a council member to a member of a city committee concerning city matters and in the furtherance of city business. The subject matter concerns the city's municipal complex. Because we find that Exhibit 2 is public information, we will consider your claimed exception to disclosure.

You assert that section 552.109 protects the memorandum in Exhibit 2 from disclosure. Section 552.109 protects private correspondence and communications of elected office-holders when release of the information "would constitute an invasion of privacy." Decisions under section 552.109 rely on the same tests applicable under section 552.101 of the Government Code. *See* Open Records Decision Nos. 506 (1988), 241 (1980), 212 (1978); *see also* Open Records Decision No. 40 (1974) (providing that section 552.109 protects content of information, not fact of communication). Section 552.101 encompasses common-law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). There is legitimate public interest in the expenditure of public funds. *See* Gov't Code § 522.022(3); Open Records Decision Nos. 541 at 1-2 (1990), 520 at 5 (1989), 518 at 7 (1989), 233 at 2 (1980). Similarly, there is a legitimate public interest in how public officials conduct official business. Open Records Decision Nos. 518 at 4 (1989), 506 at 4 (1988). We do not believe that the memorandum here is protected by a right of privacy; thus, we conclude that the record is not protected from disclosure by section 552.109. *See* Open Records Decision No. 241 (1980). Exhibit 2 must be released.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous

determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink that reads "Don Ballard". The signature is written in a cursive, slightly slanted style.

Don Ballard  
Assistant Attorney General  
Open Records Division

JDB/nc

Ref.: ID# 119971

Enclosures: Submitted documents

cc: Mr. Rusty Vaughn  
2855 Woodhollow  
Highland Village, Texas 75077  
(w/o enclosures)