



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

March 19, 2003

Ms. Courtney Alvarez
City Attorney
City of Kingsville
P. O. Box 1458
Kingsville, Texas 78364

OR2003-1890

Dear Ms. Alvarez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 178130.

The City of Kingsville (the "city") received a request for four categories of information, two of which pertain to: (1) telephone and cellular telephone records for the city's mayor (the "mayor"), four city commissioners (the "commissioners"), the city manager, and the assistant city manager for a specified period of time; and (2) e-mail correspondence regarding business-related affairs pertaining to the same individuals for the same period of time. You state that you have provided the requestor with some responsive information. You indicate that some responsive information does not exist.¹ You claim, however, that portions of the remaining requested information do not constitute "public information" for purposes of the Act. In the alternative, you claim that these portions are excepted from disclosure pursuant to sections 552.101 and 552.109 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

You claim that the personal cellular, personal office, and home telephone records, as well as the e-mail correspondence from personal e-mail accounts, of the mayor and the commissioners are not public information subject to the Act because the city does not have custody of or access to most of this information. Section 552.002 of the Government Code defines "public information" as:

¹ We note that it is implicit in several provisions of the Public Information Act (the "Act") that the Act applies only to information already in existence. *See* Gov't Code §§ 552.002, .021, .227, .351. The Act does not require a governmental body to prepare new information in response to a request. *See* Attorney General Opinion H-90 (1973); *see also* Open Records Decision Nos. 87 (1975), 342 at 3 (1982), 416 at 5 (1984), 452 at 2-3 (1986), 555 at 1-2 (1990), 572 at 1 (1990). A governmental body must only make a good faith effort to relate a request to information which it holds. *See* Open Records Decision No. 561 at 8 (1990).

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.

Gov't Code § 552.002(a). Thus, under this provision, information is generally "public information" within the scope of the Act when it relates to the official business of a governmental body or is maintained by a public official or employee in the performance of official duties, even though it may be in the possession of one person. Further, information that is collected, assembled, or maintained by a third party may be subject to disclosure under the Act, if a governmental body owns or has a right of access to the information. *See* Open Records Decision Nos. 462 (1987), 445 (1986); *cf.* Open Records Decision No. 499 (1988). In addition, section 552.001 of the Government Code states it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. *See* Gov't Code § 552.001(a).

We further note that the characterization of information as "public information" under the Act is not dependent on whether the requested records are in the possession of an individual or whether a governmental body has a particular policy or procedure that establishes a governmental body's access to the information. *See* Open Records Decision No. 635 at 3-4 (1995) (finding that information does not fall outside definition of "public information" in Act merely because individual member of governmental body possesses information rather than governmental body as whole); *see also* Open Records Decision No. 425 (1985) (concluding, among other things, that information sent to individual school trustees' homes was public information because it related to official business of governmental body) (overruled on other grounds by Open Records Decision No. 439 (1986)). Thus, the mere fact that the city does not possess the information at issue does not take the information outside the scope of the Act. *See id.* Furthermore, the Act's definition of "public information" does not require that an employee or official of a governmental body create the information at the direction of the governmental body. Therefore, to the extent that the personal cellular, personal office, and home telephone records, as well as the e-mail correspondence from personal e-mail accounts, of the mayor and the commissioners relate to the transaction of official city business, we conclude that such information is subject to disclosure under the Act. *See* Gov't Code § 552.002(a); *see also* Open Records Decision No. 635 at 7 (1995). To the extent that such information does not relate to the transaction of official city business, we conclude that such information is not subject to disclosure under the Act and need not be released to the requestor.

Next, we address the procedural requirements of section 552.301 of the Government Code. Section 552.301(e) requires in pertinent part that a governmental body that requests an attorney general decision under section 552.301(a) must submit to the attorney general, within a reasonable time, but not later than the fifteenth business day after the date of receiving the request, copies of the written request for information and the specific information requested, or representative samples of it if a voluminous amount of the

information was requested, labeled to indicate which exceptions apply to which parts of the copy. *See* Gov't Code § 552.301(e). To date, the city has not submitted to us: 1) a copy of the written request for information or 2) any information relating to the transaction of official city business that is responsive to the requests for: a) personal office and home telephone records of the mayor and the commissioners; b) e-mail correspondence from personal e-mail accounts of the mayor and the commissioners; c) personal cellular telephone records of the commissioners; or d) personal cellular telephone records of the mayor, other than those which were submitted to us for our review. Therefore, we find that the city failed to request a decision from our office in accordance with section 552.301 of the Government Code with respect to this particular information.

Because the city failed to comply with the procedural requirements of section 552.301, all of the information at issue is now presumed public. *See* Gov't Code § 552.302; *see also* *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The city must demonstrate a compelling interest in order to overcome the presumption that the information is now public. *See id.* Normally, a compelling interest is demonstrated when some other source of law makes the requested information confidential or when third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Although the city claims that this information is excepted from disclosure pursuant to section 552.109 of the Government Code, we note that this particular exception is a discretionary exception to disclosure under the Act that does not constitute a compelling interest sufficient to overcome the presumption that the information at issue is now public.² Accordingly, we conclude that the city may not withhold any portion of the information at issue under section 552.109 of the Government Code. Furthermore, because the city did not submit for our review complete copies of all information that is responsive to the request for the personal cellular, personal office, and home telephone records, as well as the e-mail correspondence from personal e-mail accounts, of the mayor and the commissioners that relate to the transaction of official city business, we have no basis for concluding that any information, other than that which was submitted to us, is excepted from disclosure under section 552.101 of the Government Code or is otherwise confidential by law. Accordingly, we conclude that the city must release to the requestor the personal cellular, personal office, and home telephone records, as well as the e-mail correspondence from personal e-mail accounts, of the mayor and the commissioners that relate to the transaction of official city business which were not submitted to us for our review.

² Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

We caution the city, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. *See* Gov't Code § 552.352. Prior to releasing this particular information, the city should ensure that it does not contain any such confidential information. If the city believes that any portion of such information is indeed confidential and may not lawfully be released, the city must challenge this ruling in court as outlined below. We now address your claim regarding section 552.101 of the Government Code with respect to the personal cellular telephone records of the mayor that you have submitted to us for our review.

You claim that the submitted personal cellular telephone records of the mayor contain information which is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.³ Information is protected from disclosure under the common-law right to privacy if it (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* at 683.

You state that the city maintains these records because the mayor was seeking reimbursement from the city for "city-business calls" made on his personal cellular telephone. Thus, you acknowledge that these records contain some information relating to the transaction of official city business. We note that such information does not concern the intimate aspects of an individual's private affairs, but instead directly pertains to the work behavior and job performance of a city employee, namely the mayor. As we have frequently stated, information pertaining to the job performance of public employees and officials cannot be deemed outside the realm of public interest. *See generally* Open Records Decision Nos. 473 (1987) (even highly subjective evaluations of public employees may not ordinarily be withheld as private information), 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Accordingly, we conclude that the city may not withhold any portion of the submitted personal cellular telephone records that relates to the transaction of official city business by the mayor under section 552.101 of the Government Code in conjunction with the common-law right to privacy.

³ Section 552.101 excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure under the common-law right to privacy.

We note that portions of the submitted information are subject to section 552.117(1) of the Government Code. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code § 552.117(1)*. However, information that is responsive to a request may not be withheld from disclosure under section 552.117(1) if the official or employee with whom the information is associated did not request confidentiality for the information in accordance with section 552.024, or if the request for confidentiality regarding the information under section 552.024 was not made until after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*.

In addition, a current or former official's or employee's personal cellular telephone number may be protected from disclosure under section 552.117(1), since protecting such numbers from disclosure fulfills one of the purposes of section 552.117, which is to protect public officials and employees from being harassed at home. *See Open Records Decision Nos. 670 at 6 (2001), 506 at 5-6 (1988)* (statutory predecessor to section 552.108 protects from disclosure cellular telephone numbers assigned to public and private vehicles used by county officials and employees with specific law enforcement responsibilities; predecessor to section 552.117 not applicable to cellular telephone numbers paid for by county and intended for use at work for county business). Accordingly, we conclude that the city must withhold the mayor's personal cellular telephone number that is contained within the submitted information pursuant to section 552.117(1), if he requested confidentiality in accordance with section 552.024 prior to the city's receipt of this request. Otherwise, the city must release this number to the requestor. We have marked a representative sample of this number for your review.

We also note that portions of the submitted information are subject to section 552.136 of the Government Code. Section 552.136 makes certain access device numbers confidential and provides:

- (a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:
- (1) obtain money, goods, services, or another thing of value; or
 - (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. Accordingly, we conclude that the city must withhold the cellular telephone account numbers that are contained within the submitted information pursuant to section 552.136 of the Government Code. We have marked a representative sample of such numbers for your review.

In summary, to the extent that the personal cellular, personal office, and home telephone records, as well as the e-mail correspondence from personal e-mail accounts, of the mayor and the commissioners do not relate to the transaction of official city business, such information is not subject to disclosure under the Act and need not be released to the requestor. To the extent that such records exist, the city must release to the requestor the personal cellular, personal office, and home telephone records, as well as the e-mail correspondence from personal e-mail accounts, of the mayor and the commissioners that relate to the transaction of official city business which were not submitted to us for our review. With the exception of the mayor's personal cellular telephone number which must be withheld pursuant to section 552.117(1) of the Government Code, if he made a timely request for confidentiality in accordance with section 552.024 of the Government Code, and the mayor's cellular telephone account number which must be withheld pursuant to section 552.136 of the Government Code, the city must release the submitted information to the requestor to the extent that such information relates to the transaction of official city business.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be

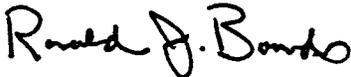
provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 178130

Enc. Marked documents

c: Mr. Tony Gonzales, President
C/O Courtney Alvarez
City of Kingsville
P. O. Box 1458
Kingsville, Texas 78364
(w/o enclosures)