



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

May 23, 2003

Mr. Jack W. Dieken
Taylor County Sheriff's Department
450 Pecan Street
Abilene, Texas 79602-1692

OR2003-3512

Dear Mr. Dieken:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 181548.

The Taylor County Sheriff's Department (the "department") received a request for 1) the policy manual used by the department, 2) work e-mail addresses of all employees who work at the Law Enforcement Center (the "LEC"), and 3) "[a]ll e-mails sent to or by Jack Dieken, Ed Carter, Carol Taylor, and Bill Stovall at their work e-mail addresses." You inform us that you will release the requested policy manual but claim that other requested information is excepted from disclosure under sections 552.102, 552.108, 552.111, and 552.137 of the Government Code. We have considered the exception you claim and reviewed the submitted information.¹

Initially, we address your statements that some information is no longer maintained by the department or is not maintained in the format requested. You inform us that some of the requested e-mail messages were erased in the regular course of business. The Public Information Act (the "Act") does not require a governmental body to disclose information that does not exist at the time a request is received or to create new information in response to a request. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).²

¹We assume that the 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.

²We note, however, that to the extent the requested e-mails remain in a computer program's "trash can" or "recycle bin," the information has not truly been deleted and is still being "maintained" by the department for purposes of the Act and is still considered "public information." *See* Gov't Code § 552.002(a).

You also state that the department does not maintain the requested work e-mail addresses in a single list. The Act does not generally require a governmental body to produce information in the format requested. See *AT&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 676 (Tex. 1995); *Fish v. Dallas Indep. Sch. Dist.*, 31 S.W.3d 678, 681 (Tex. App.—Eastland, pet. denied); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3, 342 at 3 (1982), 87 (1975). However, a governmental body has a duty to make a good faith effort to relate a request to information that it holds. See Open Records Decision No. 561 at 8 (1990). Thus, the department must make a good faith effort to relate this request to records that it maintains that contain the requested e-mail addresses.

We next address your argument that complying with this request would place an unreasonable burden on the department. It has long been established that the difficulty of complying with a public information request is not a relevant factor in determining whether the responsive information is excepted from required public disclosure. See, e.g., *Industrial Found. v. Texas Industrial Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976); see also Attorney General Opinion JM-672 (1987) (difficulty or cost of complying with public information request does not determine whether information is available to public). We note, however, that “[i]f a large amount of information has been requested, the governmental body may discuss with the requestor how the scope of a request might be narrowed, but the governmental body may not inquire into the purpose for which information will be used.” Gov’t Code § 552.222(b).

We turn now to the exceptions you claim. You assert that the requested e-mail addresses are excepted from disclosure under section 552.102. This section excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common law privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found.*, 540 S.W.2d at 685. We note, however, that employee privacy under section 552.102 is significantly narrower than common law privacy under section 552.101, because of the greater public interest in the disclosure of information relating to public employees. See Attorney General Opinion JM-229 at 2 (1984); Open Records Decision Nos. 470 (1987), 444 (1986), 423 (1984). Generally, section 552.102 protects only that information that reveals “intimate details of a highly personal nature.” See Open Records Decision No. 315 (1982). We find that the requested e-mail addresses do not constitute intimate details of a highly personal nature. Thus, they may not be withheld pursuant to this exception. See Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow); cf Open Records

Decisions Nos. 478 (1987), 455 (1987) (absent special circumstances, names, addresses, and telephone numbers are not “intimate” information).

You also seek to withhold the e-mail addresses as well as the requested e-mail messages under section 552.108(b)(1) of the Government Code. This section excepts from public disclosure an internal record of a law-enforcement agency that is maintained for internal use in matters relating to law enforcement or prosecution if “release of the internal record or notation would interfere with law enforcement or prosecution.” Section 552.108(b)(1) is intended to protect “information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State.” *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a law-enforcement agency must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. Instead, the governmental body must meet its burden of explaining, if the requested information does not supply the explanation on its face, how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. Open Records Decision No. 409 at 2 (1984).

You state that “[s]ince the primary function of the [department] and its employees at the LEC is to investigate crimes and enforce criminal laws, releasing the e-mail addresses which are used for that purpose would interfere with law enforcement and the enforcement of criminal laws” and that the department “believes that the release of these e-mails would in fact interfere with law enforcement.” Having considered your arguments and reviewed the submitted information, we agree that release of some of the e-mails would interfere with law enforcement or the investigation of crime. We have marked these types of e-mail messages, which may be withheld pursuant to section 552.108(b)(1). We find, however, that you have not explained, nor is it apparent to this office, how release of the e-mail addresses or the remaining e-mail messages would interfere with the detection, investigation, or prosecution of crime. Accordingly, we determine that the department may not withhold the remaining requested information under section 552.108 of the Government Code.

You also claim that the remaining e-mail messages implicate the department’s policymaking functions. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” This section encompasses the deliberative process privilege. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000). The deliberative process privilege incorporated by section 552.111 protects from disclosure interagency and intra-agency communications consisting of advice, opinion, or recommendations on policymaking matters of a governmental body. *See id.*; Open Records Decision No. 615 at 5 (1993). An agency’s policymaking functions do not encompass internal administrative or personnel matters;

disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, the deliberative process privilege does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5. Having considered your arguments and reviewed the remaining e-mail messages, we conclude that they do not constitute discussions concerning the department's policymaking functions and thus may not be withheld pursuant to section 552.111.

Finally, you argue that the requested e-mail addresses are excepted under section 552.137 of the Government Code. This section provides that “[a]n e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act].” However, this section does not apply to a government employee's work e-mail address because such address is not that of the employee as a “member of the public” but is instead the address of the individual as a government employee. We have marked the types of e-mail addresses that must be withheld pursuant to section 552.137 unless their owners have consented to their release. *See* Gov't Code § 552.137(b).

In summary, we have marked the types of e-mail messages that may be withheld under section 552.108. E-mail addresses of members of the public must be withheld pursuant to section 552.137. All other requested information must be released.

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,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/seg

Ref: ID# 181548

Enc. Submitted documents

c: Mr. Alfredo Solis
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(w/o enclosures)