



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

October 1, 2009

Ms. Amy Arnold
City Secretary
City of White Settlement
214 Meadow Park Drive
White Settlement, Texas 76108

OR2009-13846

Dear Ms. Arnold:

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# 356988.

The City of White Settlement (the "city") received two requests for information. The first request, received by the city on July 8, 2009, seeks the personnel file of a named city employee, expressly including nine categories of information. The second request, received by the city on July 10, 2009, seeks all information requests received by or processed by the named city employee, and all e-mails sent or received by any city e-mail address pertaining to the same city employee. You indicate the city does not have some of the requested information.¹ You state the city has released some of the requested information. You ask whether certain submitted information must be released in response to the first request. We understand you to raise section 552.117 of the Government Code for portions of these documents. We have considered your arguments and reviewed the submitted information.

Initially, we must address the city's obligations under the Act. Section 552.301(e) of the Government Code provides that a governmental body must submit to this office, no later than

¹The Act does not require a governmental body to release information that did not exist when a request for information was received, create responsive information, or obtain information that is not held by or on behalf of the city. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

the fifteenth business day after the date of its receipt of the request for information, the specific information the governmental body seeks to withhold or representative samples if the information is voluminous. *See id.* § 552.301(e)(1)(D). The city has not submitted any records as responsive to the July 10, 2009 request for information. *See Gov't Code* § 552.301(e).

You assert the city is unable to produce information in response to the July 10, 2009 request because it would be difficult to determine precisely which information requests were sent to or reviewed by the named city employee. However, a governmental body must make a good faith effort to relate a request to information that is within the governmental body's possession or control. *See Open Records Decision No. 561 at 8-9 (1990)*. Therefore, the city is required to make a good faith effort to find records responsive to this request. The administrative inconvenience of providing public records to a requestor in response to an open records request does not constitute sufficient grounds for denying such a request. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). We therefore find the city may not refuse to comply with any portion of this request on the basis that doing so would be difficult or burdensome.

You also claim the city is unable to produce information in response to the July 10, 2009 request because some of the requested e-mails may have been deleted. As noted above, the Act does not require a governmental body to release information that did not exist when a request for information was received. *See 562 S.W.2d at 267-68; ORD 452 at 3*. Accordingly, the city is not obligated to produce any information that has been deleted such that it cannot be recovered. However, to the extent any responsive e-mails existed at the time the city received the request, the city was prohibited from deleting them. *Open Records Decision No. 530 at 4 (1989)* (public records may not be destroyed when they are subject to pending open records request).

You next claim the city need not comply with the July 10, 2009 request because the requested e-mails would be excessively costly to produce. However, there are specific procedures in the Act that a governmental body must follow if it seeks to recoup the costs of complying with a request for information. *See Gov't Code §§ 552.261-.275* (subchapter F of the Act); *see e.g. id.* § 552.261 (in certain situations, governmental body may require bond for payment of costs or cash prepayment of anticipated costs for preparation of public record if such preparation would be unduly costly and its reproduction would cause undue hardship to governmental body if costs were not paid). Failure to comply with those procedures in a timely manner, however, bars a governmental body from recouping those costs. Moreover, a governmental body's failure to avail itself of these provisions does not excuse its duty to comply with the procedural requirements of the Act. Thus, having considered your arguments, we conclude the city failed to comply with the procedural requirements mandated by section 552.301 with respect to the July 10, 2009 request.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.—2007, pet. granted); *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 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). This statutory presumption can generally be overcome when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). However, you did not raise any exceptions or submit any information responsive to the July 10, 2009 request for our review. Accordingly, to the extent the city is able to identify information responsive to that request, such information must be released in accordance with section 552.302 of the Government Code. *See* Gov't Code §§ 552.301(e)(1)(D), .302. However, because you submitted information responsive to the July 8, 2009 request, we will consider the public availability of this information.

First, however, we address your question as to whether releasing the front page of the submitted cellular telephone bills would satisfy the portion of the July 8, 2009 request specifically seeking a “[c]opy of cell phone service provider’s detailed billing statements related to this employee’s city issued cell phone, including all incoming/outgoing telephone calls made from this employee’s city cell phone, from April 2009 through June 2009.” Because this request seeks detailed billing statements specifically including the incoming and outgoing telephone calls, we find that, with the exception of the information you marked that does not pertain to calls made or received in April, May, or June of 2009, the submitted billing statements are responsive to this request. Accordingly, we address the availability of all responsive portions of this billing statement with the other submitted information.

Section 552.117(a)(1) excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). You inform this office the submitted billing statements contain the telephone numbers of the named employee's family members. You also inform this office the named employee elected to keep his personal information in the submitted billing statements confidential. Thus, to the extent the submitted telephone numbers pertain to the named employee's family, they must be withheld under section 552.117(a)(1). You also state some of the remaining telephone numbers are the home telephone numbers of city employees. To the extent the employees whose home telephone numbers are in the billing statements properly elected to keep this information confidential, these numbers must be withheld under section 552.117(a)(1). If any employees did not so elect, their home telephone numbers must be released. You inform this office two telephone numbers in the billing statements are the work numbers of city employees. Section 552.117 does not apply

to work telephone numbers of government employees. Gov't Code § 552.117; *c.f.* ORD 506 at 5-6. Accordingly, these numbers, which we marked, must be released. You state the remaining telephone numbers pertain to applicants for employment with the city. However, by its terms, the provisions of section 552.117 apply only to the current or former employees or officials of the governmental body; this section does not apply to telephone numbers of applicants. Gov't Code § 552.117; Open Records Decision No. 455 at 2 (1987). Thus, the telephone numbers of applicants for employment with the city must be released.

Some remaining information in the billing statements is subject to section 552.136 of the Government Code, which states that "[n]otwithstanding 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."² *Id.* § 552.136(b). Section 552.136(a) defines "access device" as "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 ... obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument." *Id.* § 552.136(a). Upon review, we conclude the cellular telephone account number in the submitted billing statements is an access device number for purposes of section 552.136. Thus, the city must withhold the account number we marked under section 552.136.

You also submitted certain personnel records of the named employee. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the doctrine of common-law privacy, which protects information that (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. 540 S.W.2d at 685. This office has found a public employee's allocation of his salary to a voluntary investment program or to optional insurance coverage that is offered by his employer is a personal financial decision, and information about such decision is generally intimate or embarrassing and of no legitimate public concern. *See* Open Records Decision Nos. 600 (1992) (finding personal financial information to include designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care). The information we marked under section 552.101 reveals personal financial decisions of the named city employee for which there is no legitimate public interest. This information must be withheld under section 552.101 in conjunction with common-law privacy.

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

The personnel records also contain family member information of the named city employee. As you have represented this employee properly elected to keep his family member information confidential under section 552.024, the city must withhold this information under section 552.117(a)(1).

In summary, the city must withhold the telephone numbers pertaining to the named employee's family under section 552.117 of the Government Code. To the extent the other employees whose home telephone numbers are in the billing statements elected to keep these numbers confidential, their home telephone numbers must also be withheld under section 552.117. The city must also withhold the cellular telephone account number we marked under section 552.136, the information we marked under section 552.101 in conjunction with common-law privacy, and the family member information we marked under section 552.117. The remaining responsive information must be released.

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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/cc

Ref: ID# 356988

Enc. Submitted documents

cc: Requestor
(w/o enclosures)