



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 11, 2010

Mr. Ricardo J. Navarro
Denton, Navarro, Rocha & Bernal
701 East Harrison, Suite 100
Harlingen, Texas 78550-9151

OR2010-02154

Dear Mr. Navarro:

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# 369958.

The City of Harlingen (the "city"), which you represent, received a request for text messages sent on any cellular telephones of the mayor and five commissioners relating to city business for the past six months. You state that one of the commissioners has no text messages responsive to the request.¹ You explain the city has submitted text messages which were transcribed from the named officials' personal cellular telephones. You claim the submitted information is not subject to the Act. In the alternative, you claim the submitted information is excepted from disclosure under section 552.109 of the Government Code. We have considered your arguments and reviewed the submitted information.

You claim that text messages from the mayor's and commissioners' personal cellular telephones are not public information subject to the Act because the city does not own or have any right of access to this information. The Act is applicable to "public information," as defined by section 552.002 of the Government Code. Section 552.002(a) provides that "public information" consists of

¹We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

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, virtually all of the information in a governmental body's physical possession constitutes public information and, thus, is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987). Moreover, section 552.001 of the Act provides that 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 note that information is not beyond the scope of the Act simply because the information is in the possession of a particular official or employee of a governmental body, rather than the governmental body as a whole. *See* Open Records Decision No. 635 at 3 (1995). On the contrary, information that clearly relates to a governmental body's official business is subject to the Act, regardless of whether the information is held by a particular official or employee, the governmental body's administrative offices, or the custodian of records. *See* ORD 635 at 3-4; *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 individual officials of the city possess the information at issue does not take the information outside the scope of the Act. *See id.*

You also assert the mayor's and commissioners' text messages are not subject to the Act because the city does not provide their cellular telephones. You inform us that the city has no contract or agreement to provide their cellular telephones, the city expends no funds for their cellular telephone expenses, no city personnel are used to maintain the cellular telephones, and the cellular telephone numbers are not held out to the public for the conducting of city business. However, information in a public official's personal cellular telephone records may be subject to the Act where the public official uses the personal cellular telephone to conduct public business. *See* ORD 635 at 6-7 (appointment calendar owned by a public official or employee is subject to the Act when it is maintained by another

public employee and used for public business). We also reiterate that information is within the scope of the Act if it relates to the official business of a governmental body and is maintained by a public official or employee of the governmental body. *See* Gov't Code § 552.002(a).

However, you also claim that none of the submitted information relates to the transaction of official business of the city. You state that “[a]lthough the enclosed text messages may reference the [c]ity or persons connected with the [c]ity, they were not made in connection with the transaction of official [c]ity business. Individual commissioners cannot, as a matter of law, transact official business of the [c]ity except as a body at a duly posted meeting.” By enacting the Act, the legislature has clearly stated that citizens are entitled, with few exceptions, to *complete* information about the affairs of their government. *See generally id.* § 552.001. To conclude the city could withhold information which clearly relates to official business on the grounds that the information is not from a posted meeting, would allow the city to easily and with impunity circumvent the Act’s disclosure requirements. The legislature could not have possibly intended such an outcome. Thus, we decline to limit the Act’s applicability to records created at a posted meeting of the commissioners. Accordingly, we find that text messages from the officials’ personal cellular telephones relating to the city constitute the official business of the city, and are subject to the Act. Finally, you note, and we agree, that a small portion of the submitted text messages, which we have marked, are purely personal in nature, and, therefore, are not subject to the Act. *See id.* § 552.021. The city need not release the marked texts in response to this request.

We now turn to your argument under section 552.109 of the Government Code for the text messages that are subject to the Act. Section 552.109 excepts from public disclosure “[p]rivate correspondence or communications of an elected office holder relating to matters the disclosure of which would constitute an invasion of privacy[.]” *Id.* § 552.109. This office has held the test to be applied to information under section 552.109 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code.

In *Industrial Foundation*, the Texas Supreme Court held that information is protected by common-law 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. *Id.* at 685. The type of information considered intimate or 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. *Id.* at 683. Having reviewed your arguments and the information at issue, we find you have failed to demonstrate that release of this information would constitute an invasion

of privacy. Therefore, none of the information at issue may be withheld under section 552.109 of the Government Code.

We note that the city may be required to withhold some of the information that is subject to the Act under section 552.117 of the Government Code.² Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code.³ Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential. We have marked information relating to a current or former city employee. The city must withhold that information under section 552.117(a)(1) to the extent the employee concerned timely requested confidentiality for the marked information under section 552.024.

In summary, the personal text messages we have marked are not subject to the Act and need not be released. To the extent a timely election under section 552.024 of the Government Code was made, the city must withhold the information we have marked under section 552.117 of the Government Code. The remaining information in the text messages that are subject to the Act must be released to the requestor.

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.

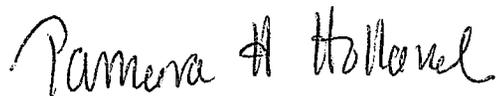
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public

²Unlike other exceptions to disclosure under the Act, this office will raise section 552.117 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

³We note that section 552.024(c)(2) of the Government Code now allows a governmental body to redact certain personal information pertaining to employees who properly elected to keep their information confidential without the necessity of requesting a ruling from this office. *See* Gov't Code § 552.024(c)(2).

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,

A handwritten signature in cursive script that reads "Tamara H. Holland".

Tamara H. Holland
Assistant Attorney General
Open Records Division

THH/jb

Ref: ID# 369958

Enc. Submitted documents

c: Requestor
(w/o enclosures)