



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 22, 2010

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

OR2010-02576

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# 370826.

The City of Harlingen (the "city"), which you represent, received a request for the following four categories of information: (1) campaign finance reports filed by candidates in the city's May 2009 election; (2) all text message conversations between and among city commission members from September 1, 2009 to November 23, 2009; (3) all telephone conversation logs between and among city commission members from September 1, 2009 to November 23, 2009; and (4) a copy of the minutes from a November 18, 2009 city commission meeting. You state the city does not have text messages for the mayor or for one of the city commission members.¹ You claim the submitted text messages are not public information subject to the Act. In the alternative, you assert the messages are excepted from disclosure under section 552.109 of the Government Code. You also state the city notified the individuals whose information is at issue of the request and of their right to submit arguments to this office as to why the requested information should not be released. Gov't Code § 552.304 (interested party may submit comments stating why the information should

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 governmental body. *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).

or should not be released). We have considered your arguments and reviewed the submitted information.

Initially, we note you have not submitted any information responsive to the first, third, and fourth categories of the request. We assume to the extent information responsive to these portions of the request existed when the city received the request for information, you have released it to the requestor. If not, then you must do so at this time. *See id.* §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we address your contention that the submitted text messages are not subject to the Act. The Act applies to "public information," which is defined in section 552.002 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.

Gov't Code § 552.002. 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).

You state the city has no right of access to the cellular telephones and telephone accounts related to these text messages, and does not collect, assemble, maintain, or have a right of access to these messages. However, the characterization of information as "public information" under the Act is not dependent on whether the requested records are in the possession of an official or employee of a governmental body 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 official or employee 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, if the information at issue relates to city business, the mere fact that the city does not possess the information does not take the information outside the scope of the Act. *See* ORD 635 at 6-8 (stating information maintained on a privately-owned medium and actually used in connection with the transaction of official business would be subject to the Act).

You also claim the messages could not have been made in connection with city business because city commissioners, as a matter of law, can only transact legally effective official city business at a duly posted meeting. Additionally, you allege the text messages discussing commission appointees "merely recount official business that ha[s] already taken place[.]" and thus do not pertain to official city business. However, 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* Gov't Code § 552.001. To conclude the city could withhold information which clearly relates to official business on the grounds that the information is either not from a posted meeting or pertains to past official business, 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 commission or to discussion related to future commission business.

Upon review of the submitted text message transcripts, we agree the messages in Exhibits B and C as well as some information in Exhibit D are unrelated to the individuals' responsibilities as city commissioners and their transaction of official city business. Thus, we agree some of the submitted text messages are not "public information" under the Act, and need not be released in response to the request. However, most of the messages submitted in Exhibit D pertain to the transaction of official city business. Because the marked messages relate to the official business of a governmental body and are maintained by a public official of the governmental body, we conclude these messages are subject to the Act. *See id.* § 552.002(a). Consequently, we will consider your claimed exception to disclosure of the marked information.

Section 552.109 of the Government Code 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. *See id.* 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. As noted above, the information in question relates to the work conduct of elected city officials. As this office has often stated, the public has a legitimate interest in information that relates to the official conduct of public officials and employees. *See, e. g.*, Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees), 423 at 2 (1984) (scope of public employee privacy is narrow), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest). Thus, because this information is of legitimate public interest, it may not be withheld under section 552.109 of the Government Code.

Some of the remaining information may be subject to section 552.117(a)(1) of the Government Code.² This section excepts from public disclosure the present 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 timely request that such information be kept confidential under section 552.024. Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The city may only withhold information under section 552.117(a)(1) on behalf of employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the official whose information we marked timely elected to keep her family member information confidential pursuant to section 552.024, the city must withhold the information we marked under section 552.117(a)(1). However, if the official at issue did not timely elect under section 552.024, her information must be released along with the remaining information that is subject to the Act.

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,

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

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,

A handwritten signature in black ink, appearing to read "Bob Davis", written in a cursive style.

Bob Davis
Assistant Attorney General
Open Records Division

RSD/cc

Ref: ID# 370826

Enc. Submitted documents

cc: Requestor
(w/o enclosures)