



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 6, 2013

Mr. Gary B. Lawson
Strasburger & Price, L.L.P.
901 Main Street, Suite 4400
Dallas, Texas 75202-3794

OR2013-09446

Dear Mr. Lawson:

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# 488100.

The Dallas Police & Fire Pension System (the "system"), which you represent, received a request for (1) all text messages sent or received by cellular telephones assigned to seven named system trustees, including the telephone number and name of each person that each message was sent to or from, and times and dates of each message; and (2) any log or list identifying all system cellular telephones, their telephone numbers, who they are assigned to, and their minute, data, and texting plans. You state the system has released some of the requested information. You indicate some of the requested information is not subject to the Act. You also claim the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.111, and 552.152 of the Government Code.¹ We have considered your arguments and reviewed the submitted representative sample of information.²

¹Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence and rule 192 of the Texas Rules of Civil Procedure, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 677 (2002), 676 (2002). Nevertheless, the proper exceptions to raise when asserting the attorney client and work product privileges for information not subject to section 552.022 of the Government Code are sections 552.107 and 552.111 of the Government Code, respectively. *See id.*

²We assume the "representative 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 those records contain substantially different types of information than that submitted to this office.

Initially, we note some of the information you have submitted to us for review is not responsive to the request for information because it was created after the system received the request. This ruling does not address the public availability of any information that is not responsive to the request, and the system is not required to release this information, which we have marked, in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dism'd).

We next address your assertions concerning the requested text messages. We note the Act is applicable to “public information.” *See* Gov’t Code § 552.021. Section 552.002 of the Act provides “public information” consists of “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.” *Id.* § 552.002(a). Thus, virtually all information that is in a governmental body’s physical possession constitutes public information that is subject to the Act. *Id.* § 552.002(a)(1); *see also* 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 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). However, the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Bustamante*, 562 S.W.2d 266; Open Records Decision No. 452 at 3 (1986).

We further note 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 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, 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)). Furthermore, this office has found information in a public official’s personal e-mail account and home telephone records may be subject to the Act where the public official uses the personal e-mail account and home telephone records to conduct public business. *See* ORD 635 at 6-12 (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).

In this instance, you inform us that the system provides cell phones to the individuals named in the request, but assert the system is unable to provide the requested text messages because

the system has been informed by its cell phone service provider that the provider does not retain text messages.³ You inform us that “it was only when the system requested copies of text messages from its phone provider that [it] learned for the first time that no such records were in fact kept or available.” You additionally assert the system did not submit the requested text messages to this office for review because “[r]ight now the only means to respond to [this portion of the request] would be to take these identified cell phones out of the hands of their users and to make them available for inspection by the requestor.” You also argue that providing the information in that manner “is such a substantial interference with the job duties of the users as to be more than is required by [the Act.]” You inform us the system’s own information technology department “is exploring what means if any are reasonably available for it to retrieve and store only [s]ystem related text messages.” In addition, we note you state the information technology department of the law firm representing the system has “identified . . . one service that would charge some \$300 per phone per data retrieval and that would entail a back-up of all data on the phones hard-drives[.]” We understand from these assertions, however, that you acknowledge that certain responsive text messages may in fact exist on the phones of the named individuals.

As we discussed above, information is within the scope of the Act if it was made in connection with the transaction of 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). Thus, if the requested text messages exist and were made in connection with the transaction of the official business of the system, they are subject to the Act and must be released unless they are excepted from disclosure under the Act.⁴ In this regard, we note that the administrative inconvenience of providing public records is not a ground for refusal to comply with the Act. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976). However, if the requested text messages do not exist or were not made in connection with the transaction of the official business of the system, then they are not subject to the Act, and the system is not required to release them in response to the request for information.⁵

We must next address the system’s procedural obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public

³We note in support, you have provided a copy of correspondence the system received from its service provider in which the provider representative states: “[a]fter checking with our account team, I was in error about being able to retrieve text messages from phones. [The provider] does not have the capability to access the actual content of the text messages unless you have access to at least one of the two phones involved.”

⁴We note chapter 70 of Title 1 of the Texas Administrative Code provides for the costs a governmental may charge a requestor to provide copies of public information under the Act. *See* 1 T.A.C. §§ 70.3 (discussing charges for providing copies of public information), .10 (listing summary of charge for copies of public information).

⁵As our ruling is dispositive, we do not address your arguments to withhold this information from release under the Act.

disclosure. Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request a copy or representative sample of the specific information requested. *Id.* § 552.301(e)(1)(D). The system received the request for information on March 6, 2013. Thus, the system's fifteen-business-day deadline under section 552.301(e) was March 27, 2013. However, as of the date of this letter, the system has not submitted a copy or representative sample of the requested text messages that were made in connection with the transaction of official system business and that, thus, are subject to the Act. Therefore, to the extent they exist, we conclude the system failed to comply with the procedural requirements mandated by section 552.301(e) regarding the requested text messages that are subject to the Act.⁶

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 information at issue is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *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). Although you assert the requested text messages subject to the Act are excepted from release under sections 552.103, 552.107, and 552.111 of the Government Code, these sections are discretionary in nature and serve only to protect a governmental body's interests. As such, the system's claims under these sections are not compelling reasons to overcome the presumption of openness. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); ORDs 677 at 10 (attorney work-product privilege under section 552.111 is not compelling reason to withhold information under section 552.302), 676 at 12 (attorney-client privilege under section 552.107 constitutes compelling reason to withhold information under section 552.302 only if information's release would harm third party); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Therefore, the requested text messages subject to the Act are not excepted from release on these bases. Accordingly, to the extent they exist, the system must release the requested text messages that are subject to the Act.

You assert some of the submitted information is excepted from release under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the common-law physical safety exception that the Texas Supreme Court recognized in *Texas Department of Public Safety v. Cox Texas Newspapers, L.P. & Hearst Newspapers, L.L.C.*, 343 S.W.3d 112, 117 (Tex. 2011) ("freedom from physical harm is an independent interest protected under law, untethered to the right of privacy"). In the *Cox* decision, the Supreme Court recognized, for the first time, a common-law physical safety exception to required disclosure. *Cox*, 343 S.W.3d at 118.

⁶We note the system complied with the procedural obligations under the Act regarding the remaining requested information.

Pursuant to this common-law physical safety exception, the court determined “information may be withheld [from public release] if disclosure would create a substantial threat of physical harm.” *Id.* In applying this new standard, the court noted “deference must be afforded” law enforcement experts regarding the probability of harm, but further cautioned “vague assertions of risk will not carry the day.” *Id.* at 119.

You assert the telephone numbers of cellular telephones assigned to trustees and the telephone numbers of calls made to or from those cellular telephones are confidential under the common-law physical safety exception because “if the requestor were in fact to publish [the numbers] we believe such persons’ and their families’ personal safety might well be compromised” and “the public’s access to such devices’ phone numbers lend[s] themselves to becoming an easy tool for persons to invade the private time and space of the user.” However, upon review, we find you have failed to demonstrate how release of the telephone numbers of a trustee you have marked would create a substantial threat of physical harm to the trustee at issue. Accordingly, you have not established any of the submitted information is confidential under the common-law physical safety exception, and the system may not withhold it from release under section 552.101 on that ground.

You also seek to withhold the telephone numbers at issue under section 552.152 of the Government Code, which provides the following:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Gov’t Code § 552.152. Upon review, we find the system has not demonstrated release of any the information at issue would subject the trustee at issue to a substantial threat of physical harm. Therefore, the system may not withhold any of the submitted information under section 552.152.

Section 552.117 of the Government Code may be applicable to some of the submitted responsive information.⁷ Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, 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. *Id.* § 552.117(a)(1). Section 552.117(a)(2) excepts from disclosure

⁷The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. See Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987); see, e.g., Open Records Decision No. 470 at 2 (1987) (because release of confidential information could impair rights of third parties and because improper release constitutes a misdemeanor, attorney general will raise predecessor statute of section 552.101 on behalf of governmental bodies).

this same information regarding a peace officer, as defined by article 2.12 of the Texas Code of Criminal Procedure, regardless of whether the officer elected under section 552.024 or 552.1175 of the Government Code to keep such information confidential. *Id.* 552.117(a)(2). Section 552.117 also encompasses a personal cellular telephone number, provided a governmental body does not pay for the cellular telephone service. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). You have submitted the telephone records of a trustee. You inform us some of the trustees at issue are active police officers. Therefore, the system must withhold the telephone numbers we have marked under section 552.117(a)(2) of the Government Code if (1) the information consists of home telephone numbers or family member information of the trustee at issue and (2) the trustee at issue is a currently licensed peace officer as defined by article 2.12 of the Texas Code of Criminal Procedure. If the trustee at issue is not a currently licensed peace officer as defined by article 2.12 of the Texas Code of Criminal Procedure, then the system must withhold this information under section 552.117(a)(1) of the Government Code if (1) the information consists of home telephone numbers or family member information of the trustee at issue and (2) the trustee at issue made a timely election to keep the information confidential. However, the system may not withhold this information under section 552.117(a)(1) if either the information does not consist of home telephone numbers or family member information of the trustee at issue or the trustee at issue did not make a timely election to keep the information confidential. In addition, if the marked information pertains to a cellular telephone number, then the system may only withhold such information under section 552.117 if a governmental body did not pay for the cellular telephone service.

Some of the submitted information is excepted from disclosure under section 552.136(b) of the Government Code, which states “[n]otwithstanding any other provision of [the Act], 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(b). The system must withhold the account numbers we have marked under section 552.136 of the Government Code.

To conclude, the system is not required to release any requested text message that was not made in connection with the transaction of official business of the system, but must release any requested text message that is subject to the Act because it was made in connection with the transaction of official system business. The system must withhold the telephone numbers we have marked under section 552.117(a)(2) of the Government Code if (1) the information consists of home telephone numbers or family member information of the trustee at issue and (2) the trustee at issue is a currently licensed peace officer as defined by article 2.12 of the Texas Code of Criminal Procedure. If the trustee at issue is not a currently licensed peace officer as defined by article 2.12 of the Texas Code of Criminal Procedure, then the system must withhold this information under section 552.117(a)(1) of the Government Code if (1) the information consists of home telephone numbers or family member information of the trustee at issue and (2) the trustee at issue made a timely election to keep the information confidential. However, if the marked information pertains to a cellular telephone number,

then the system may only withhold such information under section 552.117 if a governmental body did not pay for the cellular telephone service. The system must withhold information we have marked under section 552.136 of the Government Code. The system must release the remaining responsive information.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/tch

Ref: ID# 488100

Enc. Submitted documents

c: Requestor
(w/o enclosures)