



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 25, 2015

Mr. Sterling Harmon
Appellate Chief
Criminal District Attorney's Office
McLennan County
219 North 6th Street, Suite 200
Waco, Texas 76701

OR2015-17737

Dear Mr. Harmon:

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# 577476.

The McLennan County District Attorney's Office (the "district attorney's office") received two requests from the same requestor for a specified video recording and for information pertaining to a specified incident, including text communications between a named district attorney's office employee and another named individual. You state the district attorney's office released some information. We understand the district attorney's office does not have information responsive to the request for the specified video recording.¹ The district attorney's office claims some of the requested information is not subject to the Act. The district attorney's office also claims some of the submitted information is excepted from disclosure under section 552.108 of the Government Code. We have considered your arguments and reviewed the submitted information, portions of which consist of

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *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 Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

representative samples.² We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released).

Initially, the district attorney's office asserts some of the requested information is not subject to the Act because it does not constitute public information. The Act applies to "public information," which is defined in section 552.002 of the Government Code as:

information that is written, produced, 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:

(A) owns the information;

(B) has a right of access to the information; or

(C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or

(3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Id. § 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. Information that is written, produced, collected, assembled, or maintained by a third party may be subject to disclosure under the Act if a governmental body owns, has a right of access, or spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information. Gov't Code § 552.002(a); *see* Open Records Decision No. 462 at 4 (1987). Further, information that is written, produced, collected, assembled, or maintained by an individual officer or employee of a governmental body in the officer's or employee's official capacity may be subject to disclosure under the

²We assume the representative samples 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.

Act if the information pertains to official business of the governmental body. Gov't Code § 552.002(a)(3). Information is "in connection with the transaction of official business" if the information is created by, transmitted to, received by, or maintained by a person or entity performing official business or a government function on behalf of a governmental body and the information pertains to official business of the governmental body. *See id.* § 552.002(a-1). 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 id.* § 552.001(a).

We further note that 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 that 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, 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 is related to the district attorney's office's business, the mere fact it is not in the district attorney's office's possession does not remove the information from the scope of the Act. *See* ORD 635 at 6-8 (stating that 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 state a portion of the request asks for text communications between a named district attorney's office employee and another named individual. You inform us these communications were made on cellular telephones owned by the employee. You state you are unable to determine the nature of these communications. To the extent the text communications at issue are maintained by an employee of the district attorney's office and pertain to the official business of the district attorney's office, the text communications are subject to the Act and must be released unless an exception to disclosure applies to the information. However, to the extent the requested text communications do not relate to the official business of the district attorney's office, they are not subject to the Act and need not be released. We will consider your arguments against the disclosure of the requested information that is subject to the Act.

To the extent the text communications at issue are subject to section 552.002 of the Government Code, we address your argument this information is not subject to the provisions of the Act because it may consist of records of the judiciary. The Act generally requires the public disclosure of information maintained by a "governmental body." *See* Gov't Code § 552.002(a)(1). While the Act's definition of a "governmental body" is broad, it specifically excludes the judiciary. *See id.* § 552.003(1)(B). Information "collected,

assembled, or maintained by or for the judiciary” is not subject to the Act but instead is “governed by rules adopted by the Supreme Court of Texas or by other applicable laws and rules.” *Id.* § 552.0035(a); *cf.* Open Records Decision No. 131 (1976) (applying statutory predecessor to judiciary exclusion under Gov’t Code § 552.003(1)(B) prior to enactment of Gov’t Code § 552.0035). In determining whether a governmental entity falls within the judiciary exception of the Act, this office looks to whether governmental entity maintains the relevant records as an agent of the judiciary in regard to judicial, as opposed to administrative functions. *See* Open Records Decision No. 646 at 2-3 (1996) (citing *Benavides v. Lee*, 665 S.W.2d 151 (Tex. App.—San Antonio 1983, no writ)). You state the text communications at issue were referenced in an in camera meeting with two district court judges. To the extent the text communications at issue are subject to the Act under section 552.002 of the Government Code, the communications are maintained by a district attorney’s office employee in the transaction of official business for the district attorney’s office. Because this information is maintained by the district attorney’s office for the transaction official business, it does not constitute a record of the judiciary. Therefore, this information is subject to the Act and may only be withheld if it is excepted from disclosure under an exception in the Act. Therefore, we will consider your remaining arguments for this information.

Next, we address the requestor’s claim the district attorney’s office failed to comply with the procedural requirements of the Act in requesting a ruling from this office. Section 552.301 of the Government Code prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See id.* § 552.301(b). In this instance, the district attorney’s office received the first request for information on June 1, 2015. You inform us, and provide documentation showing, the district attorney’s office sought clarification of the first request for information on June 2, 2015. *See id.* § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). You state, and provide documentation showing, the district attorney’s office received the requestor’s first and second clarifications on June 5, 2015. You state, and provide documentation showing, the district attorney’s office requested further clarification of the first request for information on June 12, 2015, and received the requestor’s third clarification on June 16, 2015. Accordingly, as we have no indication the district attorney’s office acted in bad faith in seeking clarification in this case, we consider the district attorney’s office ten-day period for requesting a decision for the first request under section 552.301(b) to have commenced on June 16, 2015, the date of the district attorney’s office receipt of the requestor’s final response to the requests for clarification. *See City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). Thus, the district attorney’s office ten-business-day deadline for the first request was June 30, 2015. Additionally, we note the district attorney’s office received a second request for information from the same requestor on June 11, 2015. Thus, the

district attorney's office ten-business-day deadline for the second request was June 25, 2015. The envelope in which the district attorney's office submitted information under section 552.301 bears a post meter mark of June 18, 2015. *See* Gov't Code § 552.308(a) (prescribing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Consequently, we find the district attorney's office complied with the procedural requirements mandated by section 552.301 of the Government Code. Accordingly, we will address the district attorney's office's arguments against disclosure of the requested information.

The requestor also asserts the district attorney's office failed to comply with section 552.221 of the Government Code. *See id.* § 552.221(a) (requiring governmental body's officer for public information to promptly produce public information). We note that while section 552.302 provides failure to comply with section 552.301 results in the presumption that the requested information is subject to required public disclosure and must be released, the Act contains no comparable provision for a violation of section 552.221(a). *See id.* § 552.302. Thus, even if the district attorney's office failed to comply with section 552.221, as the requestor alleges, the district attorney's office has not waived its discretionary or mandatory exceptions. Accordingly, we will consider the district attorney's office's arguments against disclosure of the requested information.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(17). The submitted information contains court-filed documents that are subject to subsection 552.022(a)(17) and must be released unless they are made confidential under the Act or other law. *See id.* You seek to withhold the information subject to subsection 552.022(a)(17) under section 552.108 of the Government Code. However, section 552.108 is a discretionary exception and does not make information confidential under the Act. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). Therefore, the marked court-filed documents may not be withheld under section 552.108 of the Government Code. As you claim no other exception against disclosure of the marked court-filed documents, they must be released.

Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state Exhibits I and J pertain to pending criminal investigations. You state there are approximately 177 people facing criminal prosecution in these investigations. You further state 62 individuals were arrested as a result of the specified incident but were released without charges. However, we understand the information relating to the 62 individuals not charged is too intertwined with the pending investigations to separate the records. Based on your representation and our review, we conclude the release of the remaining information in Exhibits I and J would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, section 552.108(a)(1) is applicable to the remaining information in Exhibits I and J.

However, section 552.108 does not except from disclosure “basic information about an arrested person, an arrest, or a crime.” Gov’t Code § 552.108(c). Section 552.108(c) refers to the basic information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-88; *see also* Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Accordingly, with the exception of basic information, the district attorney’s office may withhold the remaining information in Exhibits I and J under section 552.108(a)(1) of the Government Code.³

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c).⁴ *See* Gov’t Code § 552.137(a)-(c). Section 552.137 does not apply to an institutional e-mail address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). Upon review, we find the district attorney’s office must

³As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

withhold the e-mail addresses in the remaining information under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure or subsection (c) applies.

In summary, the portions of the requested text messages that relate to the official business of the district's attorney's office are subject to the Act. With the exception of basic information, the district attorney's office may withhold the information not subject to section 552.022(a)(17) of the Government Code within Exhibits I and J under section 552.108(a)(1) of the Government Code. The district attorney's office must withhold the e-mail addresses in the remaining information under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure or subsection (c) applies. The district attorney's office must release the remaining 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,

A handwritten signature in cursive script, appearing to read "Paige Thompson". The signature is written in black ink and is positioned above the typed name and title.

Paige Thompson
Assistant Attorney General
Open Records Division

PT/dls

Ref: ID# 577476

Enc. Submitted documents

c: Requestor
(w/o enclosures)