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April 29, 2016

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OR2016-09729

Dear Mr. Brown:

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# 608750.

The City of Fulshear (the "city"), which you represent, received two requests from different requestors for specified information pertaining to phone records and communications made by city council members.<sup>1</sup> The city states it is providing some of the requested information to the requestors, but claims the submitted information is either not subject to the Act or excepted from disclosure under section 552.101 of the Government Code. We have considered the submitted arguments and reviewed the submitted information. We have also considered comments submitted by one of the requestors. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

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<sup>1</sup>The city sought and received clarification of the information requested. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified).

The Act is applicable only to “public information.” *See id.* §§ 552.002, .021. Section 552.002(a) reads as follows:

(a) In this chapter, “public information” means 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;

(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). Section 552.002(a-1) also provides the following:

Information is in connection with the transaction of official business if the information is created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer’s or employee’s official capacity, or a person or entity performing official business or a governmental function on behalf of a governmental body, and pertains to official business of the governmental body.

*Id.* § 552.002(a-1). 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). 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 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 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 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) (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) (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 city’s business, the mere fact it is not in the city’s possession does not remove the information from the scope of the Act. *See* ORD 635 at 6-8 (information maintained on a privately-owned medium and actually used in connection with the transaction of official business would be subject to the Act).

The city informs us Exhibit A consists of personal cellular telephone records of a city council member and Exhibit B consists of text messages of a city council member from his personal cellular telephone. The city states the submitted information “is not written, produced, collected, assembled, or maintained under a law or ordinance of in connection with the transaction of official business, and no public money is spent or contributed for the purpose of writing, producing, collecting, assembling, or maintaining the information.” The city also asserts, with the exception of the highlighted information, the submitted information does not pertain to official business of the city but, rather, pertains strictly to personal affairs. Thus, the city asserts the submitted information does not consist of public information that is subject to disclosure under the Act. We reiterate 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). Thus, to the extent the submitted information does not relate to the official business of the city, it is not subject to the Act and the city is not required to release it. However, to the extent the information relates to the official business of the city, it is subject to the Act and the city must release it, unless an exception to disclosure applies. *See id.* §§ 552.301 (a), .302. The city acknowledges the information it has highlighted “relates to telephone calls to or from the City Administrator, and is the only enclosed information which pertains to official business of the [c]ity.” Nevertheless, the city asserts this information is not subject to the Act because it is not made in connection with the transaction of official business. Based on

the city's representations, we find the highlighted information was collected, assembled, or maintained in connection with the transaction of official city business. Thus, this information constitutes "public information" as defined by section 552.002(a). Accordingly, the highlighted information is subject to the Act and we will consider the city's arguments against its release under the Act. However, we agree the remaining records at issue are not "public information" under the Act because they are personal and do not relate to the transaction of official business. *See id.* § 552.002; Open Records Decision No. 635 (1995) (statutory predecessor to Act not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Therefore, the city is not required to release this information under the Act.

The city asserts some of the highlighted information is excepted 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. This section encompasses information protected by other statutes. Although the city raises section 552.101 in conjunction with Texas Rule of Evidence 504, this office has concluded section 552.101 does not encompass discovery privileges. Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990) (predecessor statute). Therefore, the city may not withhold the information at issue under section 552.101 on that ground.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy, which consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). Upon review, we find the city has failed to demonstrate any of the highlighted information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, this information is not confidential under constitutional privacy, and the city may not withhold it under section 552.101 on that ground. Accordingly, the city must release the highlighted information to the requestors.

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](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/bhf

Ref: ID# 608750

Enc. Submitted documents

c: 2 Requestors  
(w/o enclosures)