



June 5, 2001

Mr. Thomas F. Keever  
Assistant District Attorney  
County of Denton  
P.O. Box 2850  
Denton, Texas 76202

OR2001-2329

Dear Mr. Keever:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 148011.

Denton County (the “county”) received a request for fourteen categories of information, including contracts and correspondence with certain law firms and other companies, certain documents concerning county development districts, all phone numbers, fax numbers, and e-mail addresses of certain county officials and employees, county computer information, calendars of certain county officials and employees, and all e-mails sent or received on county equipment using certain personal e-mail accounts. You state that you have made “substantial amounts” of information available to the requestor. However, you claim that, due to the breadth of the current request, you have been unable to determine whether all of the information is public. Indeed, you claim that some of the requested information is excepted from disclosure under 552.117 of the Government Code.<sup>1</sup> You further claim that some of the requested information may consist of deleted e-mails that, for the purposes of the Public Information Act (the “Act”), do not exist and therefore are not subject to disclosure under the Act. We have considered your arguments.

First, we address your contention that potentially responsive e-mails that have been deleted are not subject to the Act and the county is not required to search its computers for such deleted e-mails. The Act applies only to “public information” in existence at the time of the

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<sup>1</sup>You also raised sections 552.101 through 552.113, 552.128, and 552.131 of the Government Code as possible exceptions. However, you have not submitted to this office any written comments explaining why these exceptions apply to any of the requested information. Therefore, we do not address whether these exceptions apply. See Gov’t Code §§ 552.301(e), .302.

request for information. See Gov't Code § 552.021; *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). "Public information" is defined under section 552.002 of the Act 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(a). Public information may be recorded on various media, including "a magnetic, optical, or solid state device that can store an electronic signal." *Id.* § 552.002(b). Furthermore, "[t]he general forms in which media containing public information exist include ... a voice, data, or video representation held in computer memory." *Id.* § 552.002(c).

Computer software programs keep track of the location of files by storing the location of data in the "file allocation table" (FAT) of a computer's hard disk. The software then displays the file as being in a specific storage location. Usually, but not always, when a file is "deleted," it is not actually deleted, but the display of the location is merely shown to be moved to a "trash bin" or "recycle bin." Later, when files are "deleted" or "emptied" from these "trash bins," the data is usually not deleted, but the location of the data is deleted from the FAT. Some software programs immediately delete the location information from the FAT when a file is deleted. Once the location reference is deleted from the FAT, the data may be overwritten and permanently removed. You do not indicate whether the potentially responsive deleted e-mails have been simply placed into the trash bin of a computer program or have been deleted from the trash bin. To the extent an e-mail has only been placed in the "trash bin" or "recycle bin" of a program, the e-mail is still being "maintained" by the county for purposes of the Act and is still considered "public information." However, to the extent an e-mail has been deleted from the trash bin, and thus the location of the file on the hard drive has been deleted from the FAT, we believe the e-mail is no longer being "maintained" by the county and therefore the e-mail is no longer public information. *Id.* § 552.002(a).

The county's officer for public information carries the duty of promptly producing such public information when it is requested, unless the county wishes to withhold the information. *Id.* §§ 552.203, .221. If the county wishes to withhold the information, it must request a decision from the attorney general and submit to the attorney general, among other things, a copy or representative sample of the public information being requested. *Id.* § 552.301. Therefore, to the extent the deleted e-mails responsive to the instant request

are still contained in a trash bin of a county computer program, the county is obliged to retrieve those e-mails and promptly make them available to the requestor or submit them to the Attorney General for a decision.<sup>2</sup> Because you did not submit any such e-mails to this office for our decision, the county must release the e-mails as discussed below.

Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You have not submitted a copy or a representative sample of any of the requested information.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). You argue that the requested personal telephone numbers, fax numbers, and e-mail addresses of county employees and officials are excepted under section 552.117 of the Government Code. Section 552.117 can provide a compelling reason for withholding information that is otherwise presumed public under section 552.302. Section 552.117 excepts from disclosure the home addresses and telephone numbers, 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. This office has read section 552.117 to except personal e-mail addresses and personal fax numbers of government officials and employees. 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)*. Therefore, the county may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those officials and employees who timely elected to keep their personal information confidential, the county must withhold the officials' and employees' personal telephone numbers, personal fax numbers, and personal e-mail addresses. The county may not withhold this information under section 552.117 for those officials and employees who did not make a timely election to keep the information confidential.

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<sup>2</sup>You indicate that if the county were able to retrieve deleted e-mails, it would require the use of technology. We note that section 552.231 of the Government Code establishes the procedure for responding to a request for information that requires programming or manipulation of data.

With regard to the responsive information that is not protected by section 552.117, we have no basis for finding it is confidential because you have not submitted the information to this office. Thus, we have no choice but to order all of the information that is not otherwise protected by section 552.117 released pursuant to section 552.302 of the Government Code. We caution that the distribution of confidential information constitutes a criminal offense. Gov't Code § 552.352. If you believe the information is confidential and may not lawfully be released, you must challenge the ruling in court as outlined below.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

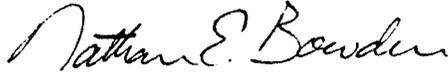
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Nathan E. Bowden  
Assistant Attorney General  
Open Records Division

NEB/sdk

Ref: ID# 148011.

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