



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 8, 2007

Mr. Robert T. Bass
Allison, Bass & Associates, L.L.P.
A.O. Watson House
402 West 12th Street
Austin, Texas 78701

OR2007-10169

Dear Mr. Bass:

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# 286093.

The Jack County Judge's Office (the "county"), which you represent, received a request for any and all documents related to the personal digital assistant ("PDA") of a named judge. You assert that a portion of the information is not subject to the Act. Additionally, you raise sections 552.101, 552.102, 552.108, 552.109, and 552.117 of the Government Code.¹ We have considered your arguments and reviewed the submitted information.

Initially, you note that the Act does not apply to records of the judiciary. Gov't Code § 552.003(B). The purposes and limits of the judiciary exception were construed in *Benavides v. Lee*, 665 S.W.2d 151 (Tex. App.—San Antonio 1983, no writ). The court explained the purpose of the judiciary exception:

The judiciary exception . . . is important to safeguard judicial proceedings and maintain the independence of the judicial branch of government,

¹Although you also raise sections 552.103, 552.107, and 552.111 of the Government Code, you have provided no arguments explaining how these exceptions are applicable to the submitted information. Therefore, the county has waived its claims under these exceptions. Gov't Code §§ 552.301(e) (governmental body must provide comments explaining why exceptions raised should apply to information requested); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general).

preserving statutory and case law already governing access to judicial records. But it must not be extended to every governmental entity having any connection with the judiciary.

Id. at 152. Thus, to fall within the judiciary exception, the document must contain information that pertains to judicial proceedings. *See* Open Records Decision Nos. 527 (1989) (Court Reporters Certification Board not part of judiciary because its records do not pertain to judicial proceedings), 204 (1978) (information held by county judge that does not pertain to proceedings before county court subject to Act). Upon review of your arguments and the submitted information, we find that you have failed to demonstrate that any of the submitted information was collected, assembled, or maintained by or for the judiciary. Accordingly, none of the submitted information constitutes judicial records as contemplated by section 552.003 of the Government Code.

You also argue that a portion of the information at issue does not constitute public information under section 552.002 of the Government Code. Section 552.021 of the Government Code provides for public access to “public information.” *See* Gov’t Code § 552.021. Section 552.002(a) defines “public information” as:

[I]nformation 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). Under this provision, information is generally “public information” within the scope of the Act when it relates to the official business of a governmental body or is maintained by a public official or employee in the performance of official duties, even though it may be in the possession of one person. *See* Open Records Decision No. 635 at 4 (1995). In addition, section 552.001 states 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). In this instance, however, you contend that the judge made personal entries on his PDA, which were created and maintained by him primarily for his personal use, and were not collected, assembled, or maintained in connection with the transaction of official business by or for the county. Based on your representations and our review of the information at issue, we conclude that the judge’s personal calendar entries, e-mail contacts, and notes that were created and maintained primarily for his personal use are not subject to disclosure under the Act and need not be released to the requestor. *See id.* § 552.002(a), Open Records Decision No. 635 at 3-8 (appointment calendar purchased by state employee, who also maintained calendar herself and apparently had sole access to it, not subject to Act).

Next, we address your comment that the language in the written request for information is unclear. Specifically, you state that the request is vague and ambiguous.² A governmental body is required to make a good-faith effort to relate a request to information that it holds. *See* Open Records Decision No. 561 at 8 (1990) (construing statutory predecessor). Based on our review, we find that the county has made a good-faith effort to relate the request to information that the county maintains. Accordingly, we will address your arguments against disclosure of this information.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes such as section 58.007(c) of the Family Code. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007. Section 58.007(c) reads as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

Fam. Code § 58.007(c). Upon review of the submitted information, we find that you have failed to demonstrate that any of the submitted information constitutes a law enforcement record or file concerning a juvenile suspect or offender. Therefore, no portion of the submitted information may be withheld under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code.

Section 552.101 also encompasses information that is considered to be confidential under other constitutional, statutory, or decisional law. *See* Open Records Decision Nos. 600 at 4

²We note that the Act permits a governmental body to seek clarification from a requestor. *See* Gov’t Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *see also* Open Records Decision No. 663 at 5 (1999) (providing that time periods proscribed by section 552.301 are tolled during the clarification process).

(1994) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). Section 552.109 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[.]” Gov’t Code § 552.109. This office has held that 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. We will therefore consider your claims regarding common-law privacy under section 552.101 together with your claim under section 552.109.

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. *Id.* at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). Some of the submitted information contains information that is considered highly intimate or embarrassing and of no legitimate concern to the public. Therefore, we agree that the county must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, you have failed to demonstrate how any of the remaining information constitutes highly intimate or embarrassing information for the purposes of common-law privacy. Furthermore, you have not directed our attention to any other law under which the remaining submitted information would be held confidential for the purposes of section 552.101. Thus, we conclude that the county may not withhold any of the remaining submitted information under either section 552.101 or under section 552.109.

Section 552.102 excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). This office has found that section 552.102 only applies to information

in the personnel file of an employee of a governmental body. You have failed to explain how any portion of the information consists of information in the personnel file of a county employee. Therefore, we determine that section 552.102 does not apply to the remaining information.

Section 552.108 of the Government Code excepts from public 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 that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). Although you have marked some information as information related to “security[.]” you have failed to explain how this information constitutes information held by a law enforcement agency or how its release would interfere with the detection, investigation, or prosecution of crime for the purposes of section 552.108 of the Government Code. Accordingly, we find that you have failed to demonstrate how or why section 552.108 is applicable to the information at issue. Therefore, the county may not withhold any of the information at issue under section 552.108 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses, 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 of the Government Code. Gov’t Code § 552.117(a)(1). Whether a particular piece of information is protected under section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Accordingly, if the judge made a timely election to keep his personal information confidential, the county must withhold the judge’s home address and telephone number, social security number, and any information that reveals whether the judge has family members pursuant to section 552.117(a)(1) of the Government Code. The county may not withhold this information under section 552.117(a)(1) if the judge did not make a timely election to keep the information confidential.

We note that the information at issue also contains e-mail addresses of members of the public.³ Section 552.137 makes certain e-mail addresses confidential, providing in pertinent part:

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Under section 552.137, a governmental body must withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See id.* § 552.137(b). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. We have marked the e-mail addresses that are subject to section 552.137. These e-mail addresses do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that the individuals to whom these e-mail addresses pertain have affirmatively consented to their release. Accordingly, we conclude that the county must withhold the e-mail addresses we have marked under section 552.137.

In summary, the judge's personal calendar entries, e-mail contacts, and notes are not subject to disclosure under the Act and need not be released to the requestor. The county must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. If the judge made a timely election to keep his personal information confidential, the county must withhold that information under section 552.117(a)(1) of the Government Code. The county must withhold the marked email addresses that are subject to section 552.137 of the Government Code. The remaining information must be released.

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).

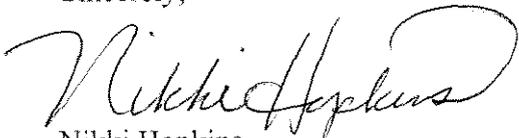
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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,

A handwritten signature in cursive script that reads "Nikki Hopkins".

Nikki Hopkins
Assistant Attorney General
Open Records Division

NRH/mcf

Ref: ID# 286093

Enc. Submitted documents

c: Mr. Dan Stephenson
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(w/o enclosures)