



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 24, 2008

Mr. Andrew D. Clark
Powell & Leon, L.L.P.
1706 West Sixth Street
Austin, Texas 78703

OR2008-10073

Dear Mr. Clark:

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# 316980.

The Copperas Cove Independent School District (the "district"), which you represent, received two requests for all e-mails of a district employee "that include as sender, cc, bcc, and recipient" sixteen named individuals during specified time periods. You assert the requested information is not subject to the Act. Alternatively, you claim that some of the submitted information is excepted from disclosure under section 552.137 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also received and considered comments from one of the requestors. *See Gov't Code § 552.304* (interested party may submit written comments concerning disclosure of requested information).

Initially, we note that one of the submitted-emails is not responsive to the first request for information because it was created after the date of the request. This ruling does not address the public availability of any information that is not responsive to the request and the district is not required to release that information in response to the request. We have marked the non-responsive e-mail message.

Next, we must address your comments regarding the e-mails that are no longer in the district's possession. The Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983). You indicate that the responsive e-mail messages no longer exist on the district's employee's hard drive and have been deleted by

that employee. You state the responsive messages are only recoverable from the remote archive system.

In general, 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 state the district currently uses Kerio e-mail software and this system automatically archives the e-mail messages on the system offline on the first of each month. If the messages are deleted from the system before the first of each month, they are not archived. As noted above, you inform us that all e-mail messages responsive to these requests have been deleted from the employee's hard drive and no location references for the messages remain on the computer's FAT system. Based on your representation that the locations of the files have been deleted from the FAT system, we find that the deleted e-mail messages at issue were no longer being "maintained" by the district at the time of the request, and are not public information subject to disclosure under the Act. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); see also Gov't Code §§ 552.002, 552.021 (public information consists of information collected, assembled, or maintained by or for governmental body in connection with transaction of official business). Accordingly, we conclude the Act does not require the district to release the requested e-mail messages that have not been recovered. However, as you have identified and submitted recovered e-mails that contain information the first requestor seeks, we will address whether you must release this information to this requestor.¹

The district asserts the submitted e-mails are not subject to the Act. The Act is applicable to "public information." See Gov't Code § 552.021. Section 552.002 of the Act provides that "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 district contends the submitted e-mails do not concern the official business of the district, but instead relate to the district employee in her capacity as a member of the city council. Based on your representations and our review, we agree

¹We note the submitted e-mails are only responsive to the O'Dwyer request for information.

that most of the submitted e-mails are not public information for the purpose of section 552.002 of the Government Code. We therefore, conclude that those e-mails are not subject to the Act and need not be released to the requestor. *See* Open Records Decision No. 635 at 4 (1995) (Gov't Code § 552.002 not applicable to personal information unrelated to official business and created or maintained by state employees involving de minimus use of state resources). However, the remaining e-mails, which we have marked, are subject to the Act because they relate to the transaction of district business. Therefore, we will address your claim against disclosure for this information.

However, we first must address the district's 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 exempted from public disclosure. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information that it wishes to withhold. Pursuant to section 552.301(b), the governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(a), (b). Under 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. *Id.* § 552.301(e)(1)(A)-(D).

You state that district received the O'Dwyer request for information on April 22, 2008. You inform us that the district sought clarification of the request on April 30, 2008. *See id.* § 552.222 (providing that a governmental body may ask the requestor to clarify the request if what information is requested is unclear to the governmental body). Thus, the ten business day time period to request a decision from us under section 552.301(b) was tolled on the date that the district sought clarification of the request from the requestor. *See* Gov't Code § 552.301(b); *see also* Open Records Decision No. 663 at 5 (1999) (clarification does not trigger a new ten business day time interval, but merely tolls the ten business day deadline during the clarification or narrowing process, which resumes upon receipt of the clarification or narrowing response). The district received clarification from the requestor on May 8, 2008. Thus, we conclude the district's deadline to submit its request for a ruling was May 14, 2008. The district did not, however, request a ruling from this office until May 20, 2008. Additionally, the fifteen day deadline was May 21, 2008, and you did not submit the information requested or written comments explaining why the stated exception applies until May 29, 2008. Consequently, we conclude the district failed to comply with the procedural requirements of section 552.301 of the Government Code in requesting a decision from our office pertaining to the O'Dwyer request.

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 requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *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 section 552.302); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Section 552.137 of the Government Code can provide a compelling reason to overcome this presumption; therefore, we will consider whether this section requires the district to withhold the submitted information.

Section 552.137 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). *See Gov't Code* § 552.137(a)-(c). 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. The private e-mail addresses do not appear to be of a type specifically excluded by section 552.137(c). Therefore, unless the individuals whose private e-mail addresses are at issue consented to release of their e-mail addresses, the district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code. We note however that one of the e-mail addresses at issue belongs to the first requestor. The district must release this requestor's e-mail address to him pursuant to section 552.023 of the Government Code. *See id.* § 552.023 (person has special right of access to information held by a governmental body that relates to person and that is protected from public disclosure by laws intended to protect person's privacy interest). The remaining information in the marked e-mails 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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).

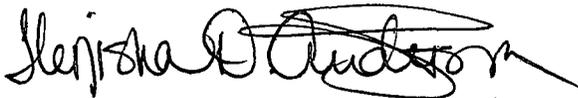
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 challenge 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,



Henisha D. Anderson
Assistant Attorney General
Open Records Division

HDA/mcf

Ref: ID# 316980

Enc. Submitted documents

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