



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

August 4, 2009

Ms. Amy L. Sims
Assistant City Attorney
City of Lubbock
P.O. Box 2000
Lubbock, Texas 79457

OR2009-10781

Dear Ms. Sims:

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# 351370.

The City of Lubbock (the "city") received a request for several categories of information pertaining to a named city council member. You state you have released some of the requested information. You inform us the councilman does not maintain a personal e-mail account, and therefore, there is no information responsive to the request for his personal e-mail records.¹ You claim that portions of the requested information are not subject to the Act.² You also claim that portions of the submitted information are excepted from disclosure

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 dism'd); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²Although you raise section 552.101 of the Government Code in support of your argument that the Act does not apply to the requested information, we note section 552.101 is an exception to disclosure of information that is subject to the Act. *See Gov't Code §§ 552.101, .021; see also id. § 552.002.*

under sections 552.117 and 552.137 of the Government Code.³ We have considered the exceptions you claim and reviewed the submitted information.

The Act applies to “public information,” which is defined under section 552.002 as:

(a) . . . 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); *see also id.* § 552.021. Thus, 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. Further, information that is collected, assembled, or maintained by a third party may be subject to disclosure under the Act, if a governmental body owns or has a right of access to the information. *See* Open Records Decision Nos: 462 (1987), 445 (1986); *cf.* Open Records Decision No. 499 (1988). 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, the mere fact that the city does not possess the information at issue does not take the information outside the scope of the Act. *See id.* Furthermore, this office has found information in a public official’s personal e-mail account and home telephone records may be subject to the Act where the public official uses the personal e-mail account and home telephone to conduct public business. *See* ORD 635 at 6-7 (appointment calendar owned by a public official or employee is subject to the Act when it is maintained by another public employee and used for public business).

³Although you initially raised sections 552.101, 552.103, 552.107, 552.108, 552.109, and 552.111 of the Government Code, you have not submitted arguments explaining how these exceptions apply to the submitted information. Therefore, we presume that you have withdrawn these exceptions. *See* Gov’t Code §§ 552.301, 552.302. Also, although you raise section 552.136 of the Government Code, based on your arguments, we understand you to raise section 552.137 of the Government Code.

You inform us the councilman was not an elected official from May 18, 2006 to May 16, 2008. In regards to the time period when the councilman was an elected official, you state the councilman's personal cellular telephone records are not subject to the Act because the city does not provide or pay for the councilman's cellular telephone. You also state that the city does not provide the councilman with an allowance to use his personal cellular telephone. Additionally, you state the councilman does not hold his cellular telephone out to the public as a means to contact him for city business. Based on your representations, we find the city does not own or have access to the councilman's personal cellular telephone records. Therefore, the councilman's personal cellular telephone records are not subject to the Act.

In regards to the requested text messages, you state that even if they contain information related to the official business of the city, they are not subject to the Act because they are maintained by the councilman as a private individual. We reiterate that information is within the scope of the Act if it relates to the official business of a governmental body and is maintained by the a public official or employee of the governmental body. Thus, to the extent the text messages maintained by the councilman relate to the official business of the city, they are subject to the Act, and as you have claimed no exceptions to disclosure for these messages, they must be released. To the extent the councilman's text messages do not relate to the official business of the city, they are not subject to the Act and need not be released.

Section 552.117(a)(1) of the Government Code excepts from public disclosure the present and former 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. *See Gov't Code § 552.117(a)(1)*. Whether a particular piece of information is protected by 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)*. You inform us, and provide documentation showing, that the employee whose information is at issue made a timely election for confidentiality of his personal information under section 552.024. Therefore, the city must withhold the information you have marked, and the additional information we have marked, in Exhibit C under section 552.117(a)(1) of the Government Code.

You argue that Exhibit E contains personal e-mail addresses. Section 552.137 of the Government Code states in part that "[e]xcept 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 [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure. *Gov't Code § 552.137(a)*. We note that this section does not apply to the general e-mail address of an organization or company. It also 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. You state you have not received consent for the release of any e-mail address

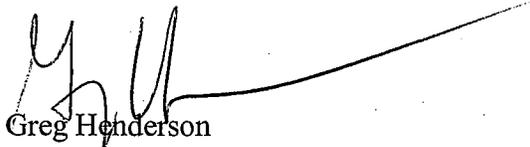
from a member of the public. Upon review, except for the e-mail address we have marked for release, we agree the e-mail addresses you have marked, as well as the e-mail addresses we have marked, are subject to section 552.137 of the Government Code and therefore must be withheld.

In summary, the councilman's personal cellular telephone records are not subject to the Act and need not be released. To the extent the councilman's text messages do not relate to the official business of the city, they are not subject to the Act and need not be released. To the extent the councilman's text messages relate to the official business of the city, they are subject to the Act and, as you raise no exceptions against the disclosure of this information, must be released. The city must withhold the information marked under section 552.117(a)(1) of the Government Code. Except for the information we have marked for release, the city must withhold the information marked under section 552.137 of the Government Code. The remaining information must be released.

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.oag.state.tx.us/open/index_orl.php; 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Greg Henderson
Assistant Attorney General
Open Records Division

GH/rl

Ref: ID# 351370

Enc. Submitted documents

c: Requestor
(w/o enclosures)