



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 28, 2010

Mr. René Guerra
Criminal District Attorney
City of Hidalgo
100 North Closner, Room 303
Edinburg, Texas 78539

OR2010-07823

Dear Mr. Guerra:

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# 379434.

Hidalgo County (the "county") received a request for text messages and voice-mail messages between and among the county commissioners and county judge for a specified period of time. You claim the requested information is not subject to the Act. In the alternative, you claim the requested information is subject to section 552.109 of the Government Code. We have considered your arguments.

You claim that the requested text messages and voice-mail messages are not public information subject to the Act because the county does not collect, assemble, or maintain this information. The Act is applicable to "public information," as defined by section 552.002 of the Government Code. Section 552.002(a) 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.

Gov't Code § 552.002(a). 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). Moreover, section 552.001 of the Act provides that 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).

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)). This office has found that information in a public official's personal records may be subject to the Act where the public official uses the records to conduct public business. *See* ORD 635 at 6-12 (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).

As noted above, you state the county does not collect, assemble, or maintain the requested messages and the county has no specific "policy or ordinance requiring the commissioner[s] or county judge to either save or transcribe their text messages or voicemails." Thus, you assert the messages at issue are not subject to the Act. We disagree. 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). A governmental body may not circumvent the applicability of the Act by conducting official public business in a private medium. *See* ORDs 635 at 12, 425 at 2. Although the county does not specifically collect, assemble, or maintain the messages at issue, this information is maintained by the elected county commissioners and an elected county judge. *See* Gov't Code § 552.201(b) (each elected county officer is the officer for public information of the information created or received by that county officer's office). Accordingly, we find that, to the extent the county commissioners or county judge maintain text or voice-mail messages that relate to the official business of the county, these messages are subject to the Act. To the extent the messages maintained by the county commissioners

and county judge do not relate to the official business of the county, they are not subject to the Act.

Next, we must address the county's procedural obligations under the Act. Pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving the 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. *See* Gov't Code § 552.301(e). You inform us that the county received this request on February 25, 2010. However, as of the date of this letter, you have not submitted to this office a copy or representative sample of the information requested. Consequently, we find that the county failed to comply with the procedural requirements of section 552.301.

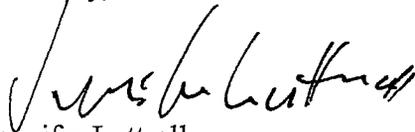
Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *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); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Although you argue the requested messages are excepted from disclosure under section 552.109 of the Government Code, which is a mandatory exception to disclosure, by failing to submit any information for our review, we have no basis for finding it confidential under section 552.109. Thus, to the extent the county commissioners or county judge maintain text or voice-mail messages that relate to the official business of the county, we have no choice but to order these messages released pursuant to section 552.302. If you believe the information is confidential and may not lawfully be released, you must challenge this ruling in court pursuant to section 552.324 of the Government Code.

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, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Jennifer Luttrall". The signature is fluid and cursive, with the first name being the most prominent.

Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/dls

Ref: ID# 379434

No submitted documents

c: Requestor