ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 9, 2010

Mr. Michael J. Sandlin
Assistant District Attorney
Dallas County
Frank Crowley Courts Building
133 North Industrial Boulevard, LB-19
Dallas, Texas 75207-4399

OR2010-10168

Dear Mr. Sandlin:

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# 386007.

The Dallas County District Attorney's Office (the "district attorney") received a request for (1) all communications to and from a named individual relating to requests from groups, organizations, or individuals for the district attorney to appear or speak at their event; and (2) any calendars for the district attorney over a specified time period. You state you do not maintain some information responsive to the request.[1] You claim the submitted information is not subject to the Act. Alternatively, you claim the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[2] We have also received and considered comments from the requestor. *See*

[1]We note that the 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).

[2]We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we address your contention that the submitted information is not public information subject to the Act. The Act is applicable only to "public information." *See id.* §§ 552.002, .021. 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.

Id. § 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).

You assert the submitted communications and calendar entries are not subject to the Act because the district attorney is not required to collect, assemble, or maintain such information in connection with the transaction of official business. In Open Records Decision No. 635 (1995), this office found that information in a public official's personal appointment calendar may be subject to the Act in certain instances. *See* ORD 635 at 6-8 (stating information maintained on a privately-owned medium and actually used in connection with the transaction of official business would be subject to the Act). We note that the Act's definition of "public information" does not require that an employee or official create the information at the direction of the governmental body. *See* Gov't Code § 552.002. Based on our review of the submitted information, we find one of the calendar entries in Exhibit C was not collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business. *See* ORD 635 at 4 (section 552.002 not applicable to personal information unrelated to official business and created or maintained by state employee involving de minimis use of state resources). Thus, the calendar entry we have marked in Exhibit C is not subject to the Act and need not be released. However, upon review, we find you have failed to demonstrate the remaining calendar entries and the submitted communications were not collected, assembled, or maintained in connection with the transaction of official district attorney business. Thus, we find the remaining information

constitutes "public information" as defined by section 552.002(a). Because this information is subject to the Act, it must be released unless it falls within the scope of an exception to disclosure. *See* Gov't Code §§ 552.301, .302.

Next, we note the request seeks in part all communications to and from a named individual relating to requests for the district attorney to appear or speak at events. We note some of the information you submitted as responsive to this part of the request does not consist of communications to or from the named individual. Thus, this information, which we have marked, is not responsive to the present request. Additionally, we note a portion of the remaining information, which we have marked, is not responsive to the present request for information because it was created after the date the district attorney received the present request. This ruling does not address the public availability of any information that is not responsive to the request, and the district attorney is not required to release that information in response to the request.

You argue that the remaining information is excepted from disclosure under section 552.101 of the Government Code in conjunction with common-law privacy. You claim the information at issue is confidential pursuant to common-law privacy and "special circumstances." You state the information at issue shows a pattern of the district attorney's locations of certain regularly kept appointments and that, if released, this information could potentially place the district attorney in danger of physical harm. However, the Third Court of Appeals recently ruled that the "special circumstances" exception found in past Attorney General Open Records Decisions directly conflicts with Texas Supreme Court precedent regarding common-law privacy. *Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P. and Hearst Newspapers, L.L.C.*, 287 S.W.3d 390 (Tex. App.—Austin 2009, pet. filed). The court of appeals ruled that the two-part test set out in *Industrial Foundation* is the "sole criteria" for determining whether information can be withheld under common-law privacy. *Id.*; *see also Indus. Found.*, 540 S.W.2d at 686. Upon review, we find no portion of the information at issue is highly intimate or embarrassing and not of legitimate public interest. Thus, no portion of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.108(b)(1) of the Government Code excepts from required public disclosure an internal record of a law enforcement agency maintained for internal use in matters relating to law enforcement or prosecution if "release of the internal record or notation would interfere with law enforcement or prosecution." Gov't Code § 552.108(b)(1). A governmental body that seeks to withhold information under section 552.108(b)(1) must sufficiently explain how and why the release of the information would interfere with law enforcement and crime prevention. *See id.* § 552.301(e)(1)(A); *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.) (section 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws); Open Records Decision Nos. 562 at 10 (1990), 531 at 2 (1989).

You seek to withhold the remaining calendar entries and the submitted communications under section 552.108(b)(1). You state this information shows scheduled events or requests for the district attorney to appear at scheduled events, and you argue that this information could establish a pattern for future appearances. You state release of this information could compromise the district attorney's safety and make him more vulnerable to being attacked. We note the information at issue only pertains to the district attorney's past schedule and appearances at events of various organizations. You have failed to demonstrate how this information establishes a pattern for any future appearances. Further, you have failed to demonstrate how release of this information will interfere with law enforcement. Accordingly, the district attorney may not withhold the remaining calendar entries or the submitted communications under section 552.108(b)(1) of the Government Code.

We note the communications in Exhibit D contain e-mail addresses. Section 552.137 of the Government Code 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).[3] Gov't Code § 552.137(a)-(c). The e-mail addresses we have marked are not specifically excluded by section 552.137(c). Therefore, the district attorney must withhold the e-mail addresses we have marked in Exhibit D under section 552.137 of the Government Code, unless the owners consent to their release.[4]

In summary, the calendar entry we have marked in Exhibit C is not subject to the Act and need not be released. The district attorney must withhold the e-mail addresses we have marked in Exhibit D under section 552.137 of the Government Code, unless the owners consent to their release. The remaining information must be released to the requestor.

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

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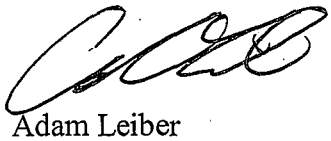
[3]The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

[4]We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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,



Adam Leiber
Assistant Attorney General
Open Records Division

ACL/tp

Ref: ID# 386007

Enc. Submitted documents

c: Requestor
(w/o enclosures)