



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 9, 2010

Ms. Myrna S. Reingold
Galveston County Legal Department
722 Moody, 5th Floor
Galveston, Texas 77550-2317

OR2010-12019

Dear Ms. Reingold:

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# 389664.

Galveston County (the "county") received a request for specified e-mails and electronic communications sent or received by a named individual for a specified period of time.¹ You indicate some of the requested information does not exist.² You state you have released

¹You inform our office the county received the initial request for information on May 7, 2010. You state that on May 10, 2010, the county provided the requestor with an estimate of charges and required a deposit. *See* Gov't Code §§ 552.2615 (providing governmental body shall provide requestor with estimate of charges if charges exceed \$40), .263(a)(providing governmental body may require a deposit or bond for payment of anticipated costs if the governmental body has provided the requestor with the required written itemized statement detailing the estimated charge for providing the copy and if the charge is estimated to exceed \$100). You also inform us the requestor modified the request on May 18, 2010, and the county sent a revised estimate of charges, which also required a deposit, on May 19, 2010. Finally, you state the county received payment from the requestor on May 21, 2010. Accordingly, the request is considered received on May 21, 2010. *See id.* § 552.263(e) (providing that for purposes of subchapters F and G of Act, request for copy of public information is considered to have been received by governmental body on date governmental body receives deposit or bond for payment of anticipated costs).

²The 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 dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

some of the requested information. You claim some of the remaining information is not subject to the Act. You also claim the remaining information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.117, 552.1175, 552.136, and 552.137 of the Government Code.³ We have considered your arguments and reviewed the submitted information.⁴

Initially, we note a portion of the submitted information is not responsive to the instant request because it does not consist of e-mails or electronic communications. The county need not release nonresponsive information in response to this request, and this ruling will not address that information.

You assert some of the submitted e-mails are not subject to the Act. The Act applies to "public information," which is defined in section 552.002 of the Government Code as:

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. 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). You inform us a portion of the submitted information consists of personal e-mails that do not relate to the transaction of official county business. You state these e-mails represent the employee's personal use of his county e-mail account under the county's electronic communications policy. Based on your representations and our review, we agree the e-mails you have marked do not constitute "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the county. *See* Gov't Code § 552.021; *see also* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources).

³We note that although you raise section 552.102 of the Government Code, you make no arguments to support this exception. Therefore, we assume you have withdrawn your claim that this section applies to the submitted information. *See* Gov't Code §§ 552.301 (b), (e), .302.

⁴We 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.

Therefore, this information is not subject to the Act and need not be released in response to this request.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. You claim a portion of the submitted information is confidential under section 58.007 of the Family Code, which is encompassed by section 552.101 of the Government Code. Section 58.007 provides, in relevant part:

(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 Subchapters B, D, and E.

Fam. Code § 58.007(c). Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007(c). *See id.* § 51.03(a), (b) (defining "delinquent conduct" and "conduct indicating a need for supervision"). For purposes of section 58.007(c), "child" means a person who is ten years of age or older and under seventeen years of age at the time of the reported conduct. *See id.* § 51.02. You assert that the information at issue consists of juvenile law enforcement records subject to section 58.007 of the Family Code. However, upon review, we find that none of the submitted information pertains to a juvenile engaged in delinquent conduct or conduct indicating a need for supervision for purposes of section 58.007(c). Therefore, we conclude you have failed to establish section 58.007(c) of the Family Code is applicable to any of the submitted information, and it may not be withheld under section 552.101 of the Government Code on that basis.

You also assert some of the information at issue is confidential under section 552.101 in conjunction with section 58.005 of the Family Code. Section 58.005 of the Family Code states in pertinent part:

(a) Records and files concerning a child, including personally identifiable information, and information obtained for the purpose of diagnosis, examination, evaluation, or treatment or for making a referral for treatment of a child by a public or private agency or institution providing supervision of a child by arrangement of the juvenile court or having custody of the child under order of the juvenile court may be disclosed only to:

- (1) the professional staff or consultants of the agency or institution;
- (2) the judge, probation officers, and professional staff or consultants of the juvenile court;
- (3) an attorney for the child;
- (4) a governmental agency if the disclosure is required or authorized by law;
- (5) a person or entity to whom the child is referred for treatment or services if the agency or institution disclosing the information has entered into a written confidentiality agreement with the person or entity regarding the protection of the disclosed information;
- (6) the Texas Department of Criminal Justice and the Texas Juvenile Probation Commission for the purpose of maintaining statistical records of recidivism and for diagnosis and classification; or
- (7) with leave of the juvenile court, any other person, agency, or institution having a legitimate interest in the proceeding or in the work of the court.

Id. § 58.005(a). Under section 58.005 of the Family Code, a “child” means a person who is ten years of age or older and under seventeen years of age at the time of the reported conduct. *See id.* § 51.02(2) (defining “child” for purposes of title 3 of Family Code). After review of the information at issue and consideration of your arguments, we conclude the information you have marked is generally subject to section 58.005(a). We note, however, the information at issue does not reflect the ages of the juveniles involved. Because we are unable to determine the ages of the juveniles involved in these documents, we must rule conditionally. To the extent the information at issue pertains to children who are ten years of age or older and under seventeen years of age, it is confidential pursuant to section 58.005(a) of the Family Code and must be withheld in its entirety under

section 552.101 of the Government Code.⁵ However, to the extent the information at issue pertains to children who are not ten years of age or older and under seventeen years of age, the county may not withhold the information at issue under section 58.005. In that case, we will address your remaining argument against the disclosure of this submitted information.

Section 552.101 also encompasses common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses the types of information that are held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined that other types of information are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private). We have marked private information that must be withheld under section 552.101 in conjunction with common-law privacy.

Common-law privacy also encompasses certain types of personal financial information. Financial information that relates only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 at 9-12 (1992) (identifying public and private portions of certain state personnel records), 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis). Thus, a public employee's allocation of part of the employee's salary to a voluntary investment program offered by the employer is a personal investment decision, and information about that decision is protected by common-law privacy. *See, e.g.*, ORD 600 at 9-12 (participation in TexFlex), 545 at 3-5 (deferred compensation plan). Likewise, the details of an employee's enrollment in a group insurance program, the designation of the beneficiary of an employee's

⁵As our ruling is dispositive under this scenario, if the submitted information is confidential under section 58.005 of the Government Code, we need not address your remaining arguments against the disclosure of the information. Furthermore, we note that the requestor is a representative from the Brazoria County Criminal District Attorney's Office. However, the requestor does not indicate that he has a right of access to this information under state or federal law. *See* Open Records Decision Nos. 598 (1991), 583 (1990), 451 (1986).

retirement benefits, and an employee's authorization of direct deposit of the employee's salary are protected by common-law privacy. *See* ORD 600 at 9-12. We have marked financial information that the county also must withhold on this basis to the extent that the marked information concerns an employee benefit or other salary deduction that is financed exclusively by the employee. To the extent that the marked information concerns an employee benefit or other salary deduction to which the county makes a financial contribution, the marked information may not be withheld under section 552.101 in conjunction with common-law privacy. However, we find the remaining information at issue is either not highly intimate or embarrassing or is of legitimate public interest. Therefore, none of the remaining portion of you have marked may be withheld under section 552.101 on that basis.

Section 552.103 of the Government Code provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The county must meet both prongs of this test for information to be excepted under section 552.103(a). Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code (the "APA"), are considered litigation under section 552.103. Open Records Decision No. 588 at 7 (1991).

You state a portion of the remaining information, which you have marked, pertains to worker's compensation claims currently pending before the Texas Department of Insurance Division of Workers' Compensation (the "department") alleging work-related injuries

sustained in the course and scope of employment with the county. You also state the information at issue is related to the worker's compensation claims and that contested cases before the department are generally governed by the APA. Labor Code § 410.153. Based on our review of your representations and the information at issue, we find that the county has established that litigation was pending on the date that it received the present request for information. Further, we also find that the submitted information relates to the pending litigation. Accordingly, we conclude that the county may withhold the information you have marked under section 552.103 of the Government Code.⁶

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any information that has either been obtained from or provided to the opposing parties in the litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Section 552.117(a)(1) of the Government Code excepts from disclosure the 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 of the Government Code. *See* Gov't Code §§ 552.117(a)(1), .024. Although you raise section 552.117(a)(1) for portions of the remaining information, we find it does not contain home addresses or telephone numbers, social security numbers, or family member information of current or former county employees. Thus, section 552.117(a)(1) is not applicable to the remaining information.

You also claim some of the remaining information is protected under section 552.1175 of the Government Code. This section excepts from public disclosure the home addresses and telephone numbers, social security numbers, and family member information of specified categories of governmental body employees or officials. *See id.* § 552.1175(a)-(b). Upon review of the remaining information, we find the information does not contain the home addresses and telephone numbers, social security numbers, or family member information of any persons falling within the specified categories of governmental body employees listed in section 552.1175. Thus, none of the remaining information may be withheld under section 552.1175 of the Government Code.

You have marked portions of the remaining information under section 552.136(b) of the Government Code, which states "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or

⁶As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

maintained by or for a governmental body is confidential.” *Id.* § 552.136(b). An access device number is one that may be used to (1) obtain money, goods, services, or another thing of value, or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument, and includes an account number. *Id.* § 552.136(a). Upon review, we agree the county must withhold the information you have marked under section 552.136 of the Government Code.

Lastly, you raise section 552.137 of the Government Code for the e-mail addresses you have highlighted in yellow. 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). *Id.* § 552.137(a)–(c). Subsection 552.137(c)(1) states that subsection 552.137(a) does not apply to an e-mail address “provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor’s agent[.]” *Id.* § 552.137(c)(1). We also note that this exception is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. In this instance, some of the marked e-mail addresses are government e-mail addresses or were provided to the county by a person who has a contractual relationship with the county. Thus, these e-mail addresses, which we have marked for release, may not be withheld under section 552.137 of the Government Code. The county must withhold the remaining e-mail addresses you have highlighted in yellow, under section 552.137 of the Government Code, unless the owners consent to their release.

In summary, a portion of the submitted information consists of e-mails that are not subject to the Act, and the county need not release this information. To the extent the information we have marked pertains to children who are ten years of age or older and under seventeen years of age, it is confidential pursuant to section 58.005(a) of the Family Code and must be withheld in their entirety under section 552.101 of the Government Code. The county must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy along with the financial information that we have marked to the extent that the financial information concerns an employee benefit or other salary deduction that is financed exclusively by the employee. The county may withhold the information marked under section 552.103 of the Government Code. The county must withhold the information you have marked under section 552.136 of the Government Code. Except where we have marked for release, the county must withhold the e-mail addresses you have highlighted in yellow, under section 552.137 of the Government Code, unless the owners consent to their release.⁷ The remaining responsive information must be released.

⁷We note, and you acknowledge, 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 insurance policy numbers under section 552.136 of the Government Code and e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/eeg

Ref: ID# 389664

Enc. Submitted documents

cc: Requestor
(w/o enclosures)