



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 5, 2010

Ms. Helen Valkavich
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283

OR2010-15157

Dear Ms. Valkavich:

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# 395817 (COSA File No. 10-1163).

The City of San Antonio (the "city") received a request for all correspondence, including e-mails, phone records, text messages, and memoranda, from all computers and phones, including cell phones issued, paid for, or partially funded by the city assigned to a named city employee from April 1, 2010 to the date of the request. You claim a portion of the submitted information is not subject to the Act. You state you will redact personal e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ You also claim the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.116 of the Government Code.² You indicate you have notified an interested third party of the request. *See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for Attorney General

¹Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including 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.

²You inform us the city withdraws its initial claims under sections 552.102, 552.103, 552.106, 552.107, 552.110, 552.111, and 552.136 of the Government Code.

ruling should or should not be released). We have considered the exception you claim and reviewed the submitted information, portions of which are representative samples.³

The Act is applicable to “public information.” *See id.* § 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). You inform us that portions of the submitted information consist of personal e-mails that have no connection with city business and represent incidental use of city e-mail by city employees. After reviewing the information at issue, we agree that the information we have marked in Attachments 2F and 2G does 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 city. *See id.* § 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). Therefore, the information we have marked is not subject to the Act, and the city need not release it in response to this request.⁴ However, we determine the remaining information pertains to the work functions of city employees and, thus, is subject to the Act. Therefore, we will consider your arguments for the remaining information.

Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that Attachments 2A, 2D, 2E, and the remaining information in 2F relate to a pending criminal investigation conducted by the city police department’s sex crimes unit. Based on your representation and our review, we conclude that the release of Attachments 2A, 2D, and 2E would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Accordingly, the city may

³We 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.

⁴As we are able to make this determination, we need not address your remaining arguments against the disclosure of this information.

withhold Attachments 2A, 2D, and 2E under section 552.108(a)(1).⁵ However, the remaining information in Attachment 2F pertains to the city auditor's functions as a city auditor and not to the criminal investigation. Upon review, we find you have failed to adequately explain how the release of the information in Attachment 2F would interfere with the detection, investigation, or prosecution of crime. Therefore, that information may not be withheld under section 552.108(a)(1).

You also raise section 552.101 of the Government Code for the remaining information in Attachment 2F. 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. Section 552.101 encompasses the common-law right of privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* include information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Upon review, we find no portion of the remaining information in Attachment 2F is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city may not withhold this information under section 552.101 in conjunction with common-law privacy.

Section 552.116 of the Government Code provides:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from [required public disclosure under the Act]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [required public disclosure] by this section.

(b) In this section:

(1) 'Audit' means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, a

⁵As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) 'Audit working paper' includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You state that article V.A. of Chapter 2 of the city's charter creates the Office of the City Auditor (the "city auditor") and authorizes the city auditor to conduct financial, fiscal compliance, and financial procedure audits of all city departments, offices, agencies, and programs. You further inform us that the city auditor "serves at the will and pleasure of the City Council, and reports directly to the Mayor and Council." You state that the information you have marked consists of audit working papers from audits conducted by the city auditor of the city's fire department and public works department that were authorized and monitored by the city council pursuant to article V.A. of Chapter 2 of the city's charter. You further state that the final audits will be released to the public. Based on your representations and our review of the information at issue, we conclude that the information you have marked consists of audit working papers that the city may withhold under section 552.116 of the Government Code.

We note a portion of the remaining information in Attachment 2F may be subject to section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024. *See id.* § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See Open Records Decision No. 530 at 5 (1989)*. Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the employee at issue timely requested confidentiality under section 552.024, the city must withhold the information we have marked under section 552.117(a)(1). Conversely, to the extent the employee at issue

did not make a timely election under section 552.024, the city may not withhold the marked information under section 552.117(a)(1).

In summary, the information we have marked is not subject to the Act, and the city need not release it in response to this request. The city may withhold Attachments 2A, 2D, and 2E under section 552.108(a)(1) of the Government Code. The city may withhold the audit working papers you have marked under section 552.116 of the Government Code. To the extent the employee at issue timely made a request for confidentiality under section 552.024 of the Government Code, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code. As no further exceptions to disclosure are raised, 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, toll free at (888) 672-6787.

Sincerely,



Andrea L. Caldwell
Assistant Attorney General
Open Records Division

ALC/eeg

Ref: ID# 395817

Enc. Submitted documents

c: Requestor
(w/o enclosures)