



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 18, 2011

Ms. Sheri Bryce Dye  
Assistant Criminal District Attorney  
Bexar County  
300 Dolorosa, 4<sup>th</sup> Floor  
San Antonio, Texas 78205

OR2011-07014

Dear Ms. Dye:

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# 417992.

Bexar County (the "county") received a request for (1) any investigation, report, or inquiry during a specified time period regarding a named county employee's use of any county cell phones or communications to other county cell phones and (2) the names of individuals involved in any complaint, inquiry, report, or investigation of the named county employee's use of county cell phones and the names of any county commissioner or county judges briefed or advised of the outcome of any such investigation.<sup>1</sup> You argue the submitted information is not subject to the Act. In the alternative, you claim the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered your arguments and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, you assert the submitted information because it consists of an investigation that remains incomplete and solely in draft form. Section 552.002(a) provides that "public information" consists of

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<sup>1</sup>You state the county sought and received clarification from the requestor. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

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). Information is generally subject to the Act when it is held by a governmental body and it relates to the official business of a governmental body or is used by a public official or employee in the performance of official duties. *See* Open Records Decision No. 635 (1995). Virtually all of the information in a governmental body's physical possession constitutes public information and thus is subject to the Act. Gov't Code § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). Drafts constitute public information subject to the Act provided this information is maintained by the governmental body and relates to the transaction of official business. We note the submitted information concerns an investigation of the work performance of certain county employees and contains documents produced by county employees in their employment capacity. Therefore, we conclude the submitted information was collected or assembled or is maintained in connection with the transaction of official business and, thus, constitutes "public information" as defined by section 552.002(a). Accordingly, we will consider whether any of the submitted information is excepted under the Act.

Next, we note some of the submitted information is not responsive to the request at issue because it was created after the date the present request was received. This ruling does not address the public availability of any non-responsive information, and the county need not release any non-responsive information in response to this request.

Next, you assert the second portion of the request is composed of a series of questions rather than a request for information which exists in documents or other records. We note the Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). We also note the Act does not require a governmental body to disclose information that did not exist when the request for information was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978; writ *dism'd*); Open Records Decision No. 452 at 3 (1986). However, a governmental body must make a good faith effort to relate a request to information held by the governmental body. *See* Open Records Decision No. 561 at 8 (1990). Therefore, while the county is not required to create a document in response to the portion of the request at issue, to the extent documents from which this information may be derived existed on the date the county received the request, we assume such documents have been released. If such documents have not been released, then they must be released at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we must address the county's procedural obligations under section 552.301 of the Government Code when requesting a decision from this office under the Act. Pursuant to section 552.301(b), within ten business days after receiving the request the governmental body must request a ruling from this office and state the exceptions to disclosure that apply. *See* Gov't Code § 552.301(b). This office does not count any holidays observed by a governmental body that receives a request for information as business days for the purpose of calculating that governmental body's deadlines under the Act. You state the county received the request on February 18, 2011 and February 21, 2011 was a county holiday. You further state the county sought clarification of the request on March 2, 2011 and received clarification of the request on that date. *See id.* § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). As we have no indication the county acted in bad faith in seeking clarification in this instance, we consider the county's ten-business-day period for requesting a decision under section 552.301(b) to have begun on March 2, 2011, the date the county received the requestor's response to the request for clarification. *See City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010) (holding when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). Thus, the county's ten-business-day deadline was March 16, 2011. While you raised section 552.101 within the ten-business-day time period as required by subsection 552.301(b), you did not raise section 552.103 until March 31, 2011, after that deadline had passed. Thus, we find the county failed to comply with section 552.301(b) with respect to its claim under section 552.103.

Further, the requestor asserts the county failed to comply with the procedural requirements of section 552.301(e-1) of the Government Code by not providing the requestor with a copy of the county's brief within fifteen business-days of the county's receipt of the request. Section 552.301(e-1) requires a governmental body that submits written comments to the attorney general under section 552.301(e)(1)(A) to send a copy of those comments to the person who requested the information from the governmental body within fifteen business-days of receiving the request for information. Gov't Code 552.301(e-1). Consequently, the fifteen business-day deadline to provide a copy of the county's written comments to this office to the requestor was March 23, 2011.

We note the county's written comments to this office, which are copied to the requestor, are postmarked March 14, 2011. This office is unable to resolve disputes of fact in the open records ruling process. Accordingly, we must rely upon the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernable from the documents submitted for our inspection. *See* Open Record Decision No. 522 at 4 (1990). Based on the submitted information, we find the county complied with the procedural requirements of section 552.301(e-1) with respect to providing a copy of its written comments to the requestor.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the information is public

and must be released unless the governmental body demonstrates a compelling reason to withhold the information. See Gov't Code § 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); Open Records Decision No. 630 (1994). A compelling reason generally exists when information is confidential by law or third-party interests are at stake. See Open Records Decision Nos. 630 at 3, 325 at 2 (1982). As noted above, the county failed to comply with section 552.301 of the Government Code in relation to its claim under section 552.103. Section 552.103 is discretionary in nature. It serves only to protect a governmental body's interests and may be waived. As such, section 552.103 does not constitute a compelling reason to withhold information for purposes of section 552.302. See Gov't Code § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 439, 475-76 (Tex. App.—Dallas, 1999, no pet.) (governmental body may waive section 552.103), Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general). Thus, in failing to timely raise section 552.103, the county has waived its arguments under section 552.103 and may not withhold any of the information at issue under that section. However, we will consider your timely-raised claim under section 552.101 of the Government Code for the submitted information.

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. This section encompasses the doctrine of common-law privacy, which protects information that (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 and embarrassing by the Texas Supreme Court in *Industrial Foundation* included 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. You cite to *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), in support of your argument under common-law privacy for the submitted information. In *Ellen*, the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment in the workplace. Here, however, the information at issue pertains to the work performance of county employees concerning issues unrelated to sexual harassment. Because this information does not concern sexual harassment, we find that *Ellen* is not applicable. Therefore, none of the responsive information may be withheld under section 552.101 in conjunction with common-law privacy and the court's holding in *Ellen*.

As noted above, common-law privacy encompasses the types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation*. See *id.* at 683. In addition, this office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. See Open Records Decision Nos. 470 (1987) (illness from severe

emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Additionally, this office has found a compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U. S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). However, active warrant information or other information relating to an individual's current involvement in the criminal justice system does not constitute criminal history information for the purposes of section 552.101. *See Gov't Code § 411.081(b)* (police department allowed to disclose information pertaining to person's current involvement in the criminal justice system). Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public interest. Thus, this information must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

We note a portion of the submitted information, which we have marked, may be subject to section 552.117 of the Government Code.<sup>2</sup> Section 552.117 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 pursuant to section 552.024. *See id.* §§ 552.117(a)(1), .024(b). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time the governmental body receives 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. If the employees to whom the marked information pertains timely requested confidentiality under section 552.024, then the county must withhold the marked information under section 552.117(a)(1). If the employees did not timely elect to withhold their personal information, then the county may not withhold the information marked under section 552.117(a)(1) of the Government Code.

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). *See Gov't Code § 552.137(a)-(c)*. The e-mail addresses we have marked are not excluded by subsection (c). Therefore, the county must withhold the personal e-mail addresses we have marked under

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<sup>2</sup>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)*.

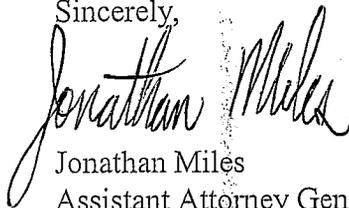
section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.<sup>3</sup>

In summary, the county must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The county must withhold the information we have marked under section 552.117(a)(1) of the Government Code to the extent the employees to whom the marked information pertains timely requested confidentiality under section 552.024. The county must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. 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](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,



Jonathan Miles  
Assistant Attorney General  
Open Records Division

JM/em

Ref: ID# 417992

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>3</sup>In Open Records Decision No. 684 (2009), this office issued 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.